

THE TROUBLE WITH AMICUS FACTS

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ABSTRACT

The number of amicus curiae briefs filed at the Supreme Court is at an all-time high. Most observers, and even some of the Justices, believe that the best of these briefs are filed to supplement the Court's understanding of facts. Supreme Court decisions quite often turn on generalized facts about the way the world works (Do violent video games harm children? Is a partial birth abortion ever medically necessary?). To answer these questions, the Justices are hungry for more information than the parties and the record can provide. The consensus is that amicus briefs helpfully add factual expertise to the Court's decision making.

The goal of this Article is to chip away at that conventional wisdom. The trouble with amicus facts, I argue, is that today anyone can claim to be a factual expert. With the Internet, factual information is easily found and cheaply manufactured. Moreover, the amicus curiae has evolved significantly from its origin as an impartial "friend of the court." Facts submitted by amici are now funneled through the screen of advocacy. The result is that the Court is inundated with eleventh-hour, untested, advocacy-motivated claims of factual expertise. And the Justices are listening. This Article looks at the instances in recent years when a Supreme Court Justice cites an amicus for a statement of fact. It describes the way the brief, rather than the underlying factual source, is cited as authority and addresses the failure of the parties to act as an adequate check. I challenge this process as potentially infecting the Supreme Court's decisions with unreliable evidence, and I make suggestions for ways to reform it. It is time to rethink the expertise-providing role of the Supreme Court amicus and to refashion this old tool for its new purpose.

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INTRODUCTION

Amicus curiae briefs filed at the U.S. Supreme Court are on the rise—up 800% over 50 years.¹ These “friend of the court” briefs are filed for any number of reasons: to make or reiterate a legal argument, to flag implications of a law for an industry, to weigh in and show consensus on a policy debate, or to ask the Court to steer clear of an issue altogether. Perhaps the most influential type of amicus brief, however, is one that adds new facts to the record.

¹ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 752 (2000); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 34 (2004); see also Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955, 956 (2007) (“In recent years, amici curiae have participated in over 80 percent of cases heard on the merits in the U.S. Supreme Court.”).

Supreme Court decisions today frequently turn on questions of so-called “legislative fact”—generalized facts about the world that are not limited to any specific case.² These types of factual questions should be familiar: Do violent video games harm child brain development?³ Does racial diversity have educational benefits?⁴ Is a partial birth abortion ever medically necessary?⁵ The evidence the Justices use to answer these questions is not limited in any respect. Claims of legislative fact come to the Court’s attention in a procedural hodge-podge: sometimes on the record, sometimes presented by the parties, sometimes found by the Justices on their own, and—of interest here—increasingly presented through briefs of *amicus curiae*.

The majority view is that this expertise-providing role for the *amicus curiae* is a good thing.⁶ Political scientists and legal scholars have la-

² The term “legislative fact” was coined by the legendary Kenneth Culp Davis over sixty years ago to distinguish different types of fact finding in administrative agencies. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 *Harv. L. Rev.* 364, 402–03 (1942). Many others, including myself, have elaborated on the concept since then, and the discussions have generated new names for this type of generalized fact. See, e.g., David L. Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* 46–48 (2008) (further breaking down the category of legislative facts into “constitutional doctrinal facts” that substantiate a particular interpretation of the Constitution to help form a test, and “constitutional reviewable facts” that help apply a constitutional test to similar cases); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *Duke L.J.* 1, 9–10 (2011) (describing legislative facts as “general facts about the state of the world that are not particularly within the knowledge of the parties with standing to appear before the Court”); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 *U. Ill. L. Rev.* 145 (introducing the term “foundational facts”). But it is Davis’s original terminology on which I rely, as I have done in the past. For my prior work on the subject, see Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 *Va. L. Rev.* 1255 (2012) [hereinafter Larsen, *Fact Finding*]; Allison Orr Larsen, *Factual Precedents*, 162 *U. Pa. L. Rev.* 59 (2013) [hereinafter Larsen, *Factual Precedents*].

³ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738–39 (2011).

⁴ *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013).

⁵ *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007).

⁶ Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 *U. Chi. L. Rev.* 965, 987 (2009) (“There has been no shortage of praise in the legal literature for the ability of *amicus* briefs to ‘inform the court of implications of a decision’ . . . [and] provide relevant factual information not offered by the parties.”); James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 *Pol. Res. Q.* 365, 365–66 (1997) (“Nearly all past research on *amici curiae* implicitly, if not explicitly, argues that *amicus* briefs convey critical and reliable information to the Court Indeed, conventional wisdom suggests that courts often rely on factual information or analytical approaches offered by *amici*, but not otherwise advanced by the parties to the case.”).

beled this “educating” role of the amicus to be particularly valuable:⁷ a way to “alleviate costly information gathering”⁸ by judges, and a critical “tool to surpass the limitations placed on the court by an adversary system.”⁹ While there are robust debates among academics about the influence amicus briefs have on case outcomes,¹⁰ most seem to agree that

The chorus of praise has not been completely unanimous. There are those who have warned that amicus briefs are just “advocacy documents.” Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 *Harv. L. Rev.* 31, 48 (2005). And some have questioned the reliability of amici on technical matters. See, e.g., Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 *Calif. L. Rev.* 1185, 1216 (2013) (“Amicus briefs, in particular, are often submitted by advocates and may be replete with dubious factual assertions that would never be admitted at trial.”); Gorod, *supra* note 2, at 60–61 (“[A]micus practice presents, at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take presented by the party-centered adversarial system.”); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 *N.C. L. Rev.* 91, 94–95 (1993) (noting that while evidence introduced at trial will be subject to expert testimony and cross-examination, such safeguards do not apply to amicus briefs); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 *Rev. Litig.* 669, 705–06 (2008) (expressing concern that scrutiny from the litigating parties is complicated by issues of unequal resources and untimely access to the briefs).

⁷ Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *Law & Soc’y Rev.* 807, 815 (2004); see also Kearney & Merrill, *supra* note 1, at 750 (reporting the claim that amicus briefs provide “valuable new information” to the Court); David Orozco & James G. Conley, *Friends of the Court: Using Amicus Briefs to Identify Corporate Advocacy Positions in Supreme Court Patent Litigation*, 2011 *U. Ill. J.L. Tech. & Pol’y* 107, 112 (“Under an information theory, the briefs are useful if they expose novel facts.”); Simard, *supra* note 6, at 682 (describing the information theory of amicus briefs, which suggests that “amicus briefs are effective not because they provide a barometer of public sentiment, but rather because they supplement the arguments of the parties by providing information not found in the parties’ briefs,” and finding that “[t]his theory is more in line with the common thought that amicus briefs facilitate judicial decisionmaking by educating the decisionmaker”).

⁸ Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 *Conn. L. Rev.* 185, 207 (2009).

⁹ Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 *Am. U. L. Rev.* 1243, 1247 (1992).

¹⁰ See, e.g., Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* 45 (2008) [hereinafter Collins, *Interest Groups*] (reasoning that the Supreme Court’s allowance of substantial amicus participation suggests that the Justices view amici as a valuable aid in the decision-making process); Collins, *supra* note 7, at 827 (identifying the positive influence of amicus briefs as “marginal,” while still recognizing that the Court may be deferential to the interests of the executive branch and other prestigious amicus participants); Spriggs & Wahlbeck, *supra* note 6, at 381–82 (proposing that amici that reiterate the arguments of the party are better off than those that exclusively add new arguments).

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when providing specialized knowledge—filling in factual gaps for the Court—the amicus is really at its best.¹¹

The Justices similarly applaud amicus expertise.¹² Justice Breyer has said that these briefs “play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.”¹³ Justice Alito concurs, observing that “[e]ven when a party is very well represented, an amicus may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice.”¹⁴ And former Supreme Court law clerks have remarked that it is the “non-legal” information provided by amici that is the most useful. As one clerk publicly explained: “As a rule, the farthest thing from a party argument is what is most helpful. For example, hard facts or social science data Often you wish you knew more facts than you get from a party brief.”¹⁵

The Supreme Court may be hungry for more factual information than the parties can provide, but this Article argues the amicus brief (at least under current rules) is not the best place to find it. In a digital world where factual information is exceedingly easy to access, more amici than ever before can call themselves experts and seek to “educate” the

¹¹ See, e.g., Jonathan Alger & Marvin Krislov, *You’ve Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 504 (2004) (“Amici may be particularly helpful to the courts if they provide specialized medical, technical, or scientific data or evidence otherwise not presented by the parties.”); Lucius J. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 J. Pol. 41, 56 (1967) (highlighting amicus briefs’ usefulness in providing social science data); Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici Before the Supreme Court*, 78 Wash. U. L.Q. 789, 794–95 (2000) (recognizing that amici, especially scientific and technical amici, may serve to inform the Court of the broader legal and policy implications of its decisions); cf. Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U. L. Rev. 315, 317, 334, 337 (2008) (arguing for a First Amendment right to file an amicus brief).

¹² A notable exception to this trend is Judge Richard Posner, who complains that amicus briefs “increase litigation costs, evade page limitations, and promote ‘interest group’ politics in the judicial process.” Alger & Krislov, *supra* note 11, at 503 (quoting Posner). But even Judge Posner asserts that the only amicus briefs he would allow are ones that can “present[] ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

¹³ Justice Breyer Calls for Experts to Aid Courts in Complex Cases, *N.Y. Times*, Feb. 17, 1998, at A17.

¹⁴ *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002).

¹⁵ Lynch, *supra* note 1, at 66.

Court on factual matters.¹⁶ In the 79 cases from last Term, for example, 61 of them involved an amicus brief filed to supplement the Court's factual understanding of the case.¹⁷

It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them. The American College of Pediatricians, for example, is a socially conservative group founded to protest the adoption of children by gay couples, in opposition to the contrary position taken by the similarly named American Academy of Pediatrics.¹⁸ With so much data out there and so many "experts" competing for the Court's attention, it becomes increasingly difficult to sort the reliable amici information from the unreliable.

And the Court is attempting to do so. My research shows that 1 in every 5 citations to amicus briefs by the Justices in the last 5 years was used to support a factual claim—something I define as a theoretically falsifiable observation about the world. Of those citations, several surprising patterns emerge. Less than a third of the factual claims credited by the Court were contested by the party briefs. And more than two-thirds of the time, the Justice citing the amicus brief for a fact cites only the amicus brief as authority—not any accompanying study or journal citation from within the brief. This indicates that the Justices are using

¹⁶ See Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 Minn. L. Rev. 2016, 2052 (2012) ("More than any other type of brief filed at an appellate court, those drafted by amici contain a significant portion of new evidence.").

¹⁷ I am referring to the cases heard during the 2012–2013 Term. These 61 cases were counted because they had at least one amicus brief present factual studies or data in its table of authorities.

¹⁸ Position Statements of the College, Am. Coll. of Pediatricians, <http://www.acpeds.org/the-college-speaks/position-statements> (last visited Sept. 16, 2014) (stating that the mission of the American College of Pediatricians is "to enable *all* children to reach their optimal physical and emotional health and well-being"); For Policy Makers, Am. Coll. of Pediatricians, <http://www.acpeds.org/the-college-speaks/for-policy-makers> (last visited Sept. 16, 2014) (listing studies such as "Marriage Rights for Homosexual Couples: Not the Best for Children"); Press Release, Am. Acad. of Pediatrics, American Academy of Pediatrics Supports Same Gender Civil Marriage (Mar. 21, 2013), available at <http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/American-Academy-of-Pediatrics-Supports-Same-Gender-Civil-Marriage.aspx> ("The American Academy of Pediatrics (AAP) supports civil marriage for same-gender couples—as well as full adoption and foster care rights for all parents, regardless of sexual orientation—as the best way to guarantee benefits and security for their children.").

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these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.

Political scientists and legal academics have done valuable work tracking the number and type of amici,¹⁹ the rate of success of these amici (measured by how often the side they favor wins),²⁰ and most recently (using plagiarism detection software) the frequency with which Supreme Court opinions track language in amicus briefs.²¹ Surprisingly little attention has been paid, however, to the role that almost everyone agrees is the most valuable one for an amicus to play: that of factual expert. This Article fills that void by documenting the number of times the Supreme Court cites to an amicus brief for a factual claim; it then raises concerns about this use of “amicus expertise.”

I make two central objections to the use of amicus briefs as factual authorities: one substance-based and one process-based.

First, as to substance, I contest the notion that amicus-presented factual claims are reliable. Historically, the “friend of the Court” was a lawyer who happened to actually be in the courtroom during oral argument. There was no preparation and no agenda in his participation. The amicus today, however, has evolved significantly since its original incarnation. Now the norm is targeted amicus briefs authored by motivated interest groups, often coordinated by the parties, and submitted by well-organized and well-funded players. As Judge Posner has observed, these briefs are “advocacy documents” plain and simple.²²

This change matters because the studies, statistics, and articles marshaled by these groups to support factual assertions are selected by those with a “dog in the fight.” The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. And with the vast amount of information and studies available

¹⁹ See Collins, *Interest Groups*, supra note 10, at 45–50; Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 *Judicature* 127 (2005); Simmons, supra note 8, at 193, 209–14.

²⁰ Kearney & Merrill, supra note 1, at 787–93.

²¹ Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content* (Aug. 8, 2013) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=2300505>.

²² Posner, supra note 6.

online now, it is not hard to assemble evidence to support a pre-existing point of view.²³

Indeed, I did some digging into the fact-based amicus briefs cited by the Court and found several examples where the reliability of the information presented is shaky at best. Sometimes, for example, the amicus will cite a study that it funded itself. Sometimes the numbers supplied by an amicus to support an assertion of fact are not even publicly available but instead remain “on file with” the amicus. And it is not uncommon for an amicus to present factual evidence that, in reality, rests on methods which have been seriously questioned by others working in the field. This Article provides a handful of case studies of the Court’s reliance on amicus briefs for factual claims that—when one actually looks at the data in the brief—turn out to be resting on unsteady authority.

To date, the standard response to questions about “junk science” ending up in Supreme Court opinions is to resort to the adversary process.²⁴ While that may have been enough in a pre-Internet universe, it is insufficient today. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims.

My second objection to amicus expertise is more fundamental. Nowhere outside the Supreme Court do we see this widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability. The fact that the U.S. Supreme Court is unique in educating itself about the world in this way should give us pause. Unlike other legal decision makers (that is, administrative agencies and trial courts), the U.S. Supreme Court is not set up to sort through what is now a sea of factual claims coming from a variety of actors who all claim to be experts.

This Article suggests that if the Court is going to continue to use amicus briefs to answer factual questions, it needs to impose some quality control safeguards—much like procedures that currently exist in admin-

²³ For others who warn about reliability of Internet sources, see Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 *Nw. U. L. Rev.* (forthcoming 2014), available at <http://ssrn.com/abstract=2331578>.

²⁴ See, e.g., John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 *Const. Comment.* 69, 104–05 (2008) (arguing that the adversary process helps to make judicial fact finding superior to congressional fact finding). The “junk science” quote comes from Rustad & Koenig, *supra* note 6, at 97–99.

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istrative law and for expert witnesses at trial. What has happened, I submit, is that the Supreme Court's desire for factual information has outgrown what the amicus process can effectively and reliably provide. We are using an old court-educating tool to address a new data-rich and data-hungry world. The fit is off, the consequences are great, and it is time to confront the tension.

I. HISTORY OF THE AMICUS CURIAE

A. *Origins*

The amicus curiae—or “friend of the court”—is in no way a new-fangled idea. Dating back to Roman law, the original amicus was a “bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge.”²⁵ In pre-eighteenth-century England, the amicus was a neutral lawyer physically present in the courtroom who would engage in an impromptu “oral ‘shepardizing,’ the bringing up of cases not known to the judge.”²⁶ Early courts welcomed this form of the amicus curiae, on the theory that such neutral aids helped to avoid error and “served to maintain judicial honor and integrity.”²⁷

Interestingly, the original amicus was the lawyer, not the client—the amicus curiae stood in “an essentially professional relation to the Court.”²⁸ “Organizations could not serve as amici curiae.”²⁹ The word amicus really described a professional relationship between a judge and

²⁵ Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *Yale L.J.* 694, 694 (1963) (quoting Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases* 62–63 (Boston, Little, Brown & Co. 1879)); see also Collins, *Interest Groups*, *supra* note 10, at 38 (describing the origin of the amicus brief in Roman law); Ruth Colker, *Justice Sandra Day O'Connor's Friends*, 68 *Ohio St. L.J.* 517, 521 (2007) (“The practice of an outside lawyer assisting the court existed in Roman law, throughout medieval England, and, in a limited manner, within the French legal system.”). For a dissenting historical account, at least of the American amicus, see Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790–1890*, 20 *Const. Comment.* 111, 112 (2003) (rebutting the “conventional story of a transformation from neutral to partisan amici,” and claiming that amici were never neutral in America and the contrary view is just “a common but unrealistically nostalgic version of the history of American legal practice”).

²⁶ Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 *Fordham Urb. L.J.* 1605, 1607 (1999); see also Collins, *Interest Groups*, *supra* note 10, at 38 (discussing pre-eighteenth-century amici).

²⁷ Lowman, *supra* note 9, at 1248.

²⁸ Krislov, *supra* note 25, at 703.

²⁹ Simard, *supra* note 6, at 677.

a lawyer. It was not until the early 1900s that courts began to attribute amicus briefs to the organization that sponsored it rather than to the lawyer who submitted it.³⁰

Once the amicus arrived in America, the adversary system took hold of it and it became common for an amicus to represent the interests of another. The first American amicus to make a formal appearance at the U.S. Supreme Court was the famed orator Henry Clay in an 1821 case involving a Kentucky land dispute.³¹ Clay's role in the case was unique at the time because he served both as an arm of the Court (the traditional role of the amicus) and as an advocate for the non-party landowners.³²

Clay may have been the first American amicus, but he was by no means the last. Throughout the nineteenth century it became increasingly common for third-party interests to voice their concerns to the Court through an amicus brief. Indeed, many think that the amicus flourished in this country because of the limits on third-party representation in our common law system. The amicus was, in other words, "a catch-all device for dealing with some of the difficulties presented by the common law system of adversary proceeding."³³

The turn of the twentieth century, then, brought dramatic change in the amicus business—a total shift, as one scholar frames it, from "neutral friendship to positive advocacy and partisanship."³⁴ Historians have pointed to several potential causes for the shift: the growth of interest group politics generally,³⁵ the bureaucratization of government that made it easier to coordinate messages (the creation of the Department of Justice and the National Association of Attorneys General, for example),³⁶ and the emergence of administrative agencies.³⁷ Now amici are

³⁰ *Id.*

³¹ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 17–18 (1823). For discussion of the case in detail, see Krislov, *supra* note 25, at 700–01.

³² Clay argued that his appearance was justified because the Court's decision would affect the rights of numerous people who were not parties to the dispute but had claims to the land. He was allowed to participate—thus helping the Court *and* the landowners—although historians caution that this "debut of the amicus curiae in the Supreme Court must be recognized as a dramatic and unusual one." Krislov, *supra* note 25, at 700–01.

³³ *Id.* at 720.

³⁴ *Id.* at 697.

³⁵ See *id.* at 703.

³⁶ See *id.* at 704–06.

³⁷ See *id.* at 706.

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often compared to lobbyists.³⁸ Many interest groups are established at least in part for the purpose of participation as amici in appellate cases, even calling themselves “acknowledged adversaries” or “litigating amic[i].”³⁹ The evolution of the amicus from neutral bystander to “adversarial weapon”⁴⁰ has generated a fair amount of criticism—both past and present. In 1949, Justice Frankfurter complained that the amicus briefs were embarrassing the Court: “I do not like to have the Court exploited as a soap box or as advertising medium, or as the target, not of arguments but of mere assertion that this or that group has this or that interest in a question to be decided.”⁴¹

Justice Frankfurter’s desire to restrict amicus curiae did not ultimately carry the day (indeed even he changed his mind on the subject by 1953).⁴² Today “[t]he general practice of the U.S. Supreme Court . . . is to allow essentially unlimited amicus participation.”⁴³ Rule 37 of the Supreme Court Rules formally requires individuals and organizations wishing to file amicus briefs to obtain consent from the parties (with the exception of the federal government and individual states, who need not seek consent).⁴⁴ In practice, however, the overwhelming majority of par-

³⁸ See Kearney & Merrill, *supra* note 1, at 783 (“Political scientists have long perceived an analogy between interest groups lobbying legislatures and interest groups seeking to influence judicial decisions through the filing of amicus briefs.”); Rustad & Koenig, *supra* note 6, at 96 (“Today . . . many amici are lobbyists or representatives of special interests.”).

³⁹ Madeleine Schachter, *The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-national Courts as a Means of Advancing the Public Interest*, 28 *Fordham Int’l L.J.* 88, 90–91 (2004) (alteration in original).

⁴⁰ Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 *Suffolk J. Trial & App. Advoc.* 1, 6 (2000).

⁴¹ Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 *J. Pol.* 782, 784 (1990) (quoting Memorandum for the Conference from Felix Frankfurter (Oct. 28, 1949) (on file with the Earl Warren Papers, Manuscript Division, Library of Congress)) (internal quotation marks omitted). Justice Black expressed the opposite view: “Most of the cases that come before the Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae.” *Id.* at 784–85 (quoting Memorandum for the Conference from Hugo L. Black (Apr. 9, 1954) (on file with the Earl Warren Papers, Manuscript Division, Library of Congress)) (internal quotation marks omitted).

⁴² *Id.* at 785.

⁴³ *Id.* at 784.

⁴⁴ *Sup. Ct. R.* 37(3).

ties before the Supreme Court file blanket consent: “[L]eave to file an amicus brief is granted as a matter of course.”⁴⁵

As a consequence, the amicus practice at the U.S. Supreme Court has exploded. The past 50 years have seen a dramatic increase both in the number of amicus briefs filed and the number of times the Court cites an amicus brief in an opinion.⁴⁶ In fact, as others have observed, an amicus brief is “now filed in virtually every case” the U.S. Supreme Court hears, and, in big, marquee, end-of-June-type cases, amicus briefs will regularly “number in the double digits.”⁴⁷

B. The “*Brandeis Brief*” and the Birth of Amicus Factual Expertise

The Supreme Court amicus has radically changed since Henry Clay first represented the interests of Kentucky landowners. Not only are amicus briefs more prevalent now, but they are also varied in their function.⁴⁸

⁴⁵ Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 *Tex. L. Rev.* 1247, 1251 (2011); see also Collins, *Interest Groups*, *supra* note 10 (“[T]he Court’s modern rules and norms clearly allow for essentially unlimited amicus participation.”); Stephen M. Shapiro et al., *Supreme Court Practice* 516 n.171 (10th ed. 2013) (“It is becoming increasingly common for the parties to agree to provide ‘blanket consent to *amicus curiae* briefs’ by letter to the Clerk—a trend that explicit reference to the practice in the 2013 revision to Rule 37.2(a) may accelerate.”).

⁴⁶ See Kearney & Merrill, *supra* note 1 (noting the 800% increase in amicus briefs filed at the Court from 1946 to 1995); see also *id.* at 757 (“There is no question but that the total number of references to amici is substantial, and that the frequency of such references has been increasing over time.”); Collins, *Interest Groups*, *supra* note 10, at 46–47 (depicting graphically the increase in Supreme Court cases with at least one amicus brief filed); Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 *J.L. & Pol.* 639, 645 (1993) (“On average, 84.4 percent of all full opinion cases decided between 1986 and 1991 contained at least one amicus curiae brief, compared with 28.6 percent during the Warren Court era.”).

⁴⁷ Gorod, *supra* note 2, at 35–36 (citing Collins, *supra* note 7, at 807–08, 812); see also Collins, *Interest Groups*, *supra* note 10, at 46 (demonstrating that amicus briefs were filed in over 90% of the cases heard in the Supreme Court between 1990 and 2001); Lynch, *supra* note 1, at 33–34 (noting that there were a record 107 amicus briefs filed in *Grutter v. Bollinger* and 33 such briefs in *Lawrence v. Texas*); Owens & Epstein, *supra* note 19, at 127–28 (“The growth in amicus curiae participation – and perhaps the growing influence of amici as well – was a fundamental part of the Rehnquist era [I]t is now the rare case in which at least one amicus *does not* file.”).

⁴⁸ Political scientists have given us two essential theories on the modern role for amicus briefs: (1) affected groups theory and (2) information theory. Affected groups theory supposes that the Justices “look to amicus briefs as a barometer of opinion on both sides of the issues.” Simard, *supra* note 6, at 681 (quoting Kearney & Merrill, *supra* note 1, at 786). Information theory, by contrast, suggests that the contents of an amicus brief matter, and in

Most relevant, the twentieth century saw the birth of amicus briefs filed to educate the Court on non-legal matters.⁴⁹ It is this role of the amicus—as factual expert—that has flourished in modern times and is applauded by many scholars and jurists as the most valuable function an amicus can perform.⁵⁰ Indeed it is this role that is actually encouraged by the modern Supreme Court rules, which explicitly call for amici to supplement information the parties provide.⁵¹

So how did the amicus evolve from a lawyer who happened to be in the courtroom spontaneously shepardizing cases to the 28 (out of 30) amicus briefs filed in *Brown v. Entertainment Merchants Association* presenting studies on neuroscience? Most scholars agree that the change can be traced to the turn of the century and the rise of the “Brandeis brief.”⁵²

particular that they matter if they are supplementing the record with factual expertise. See *id.* at 682; see also Spriggs & Wahlbeck, *supra* note 6, at 372–73 (finding that amicus briefs routinely present new arguments and information, or reinforce existing arguments).

⁴⁹ See Simard, *supra* note 6, at 682 (explaining that amicus briefs fill the valuable role of “providing information not found in the parties’ briefs,” including, for example, “factual data such as social science information that is absent from the appellate record”).

⁵⁰ See Dobbins, *supra* note 16 (“More than any other type of brief filed at an appellate court, those drafted by amici contain a significant portion of new evidence. Amici are newcomers to the case, and because they were typically not involved at the trial court level, they may feel particularly unconstrained by the record review rule. In addition, because amici often have specialized knowledge and interests on the matters presented in a case, they are often a particularly rich source for new evidence on appeal.” (footnote omitted)); Gorod, *supra* note 2, at 36 (“[A]n amicus brief that will be of considerable help to the Court is one that brings to the attention of the Court relevant matter *not already brought to its attention by the parties.*” (internal quotation marks omitted)); Rustad & Koenig, *supra* note 6, at 94 (“The most common method of introducing social science evidence to the Court is through ‘non-record evidence’ in amicus curiae briefs.” (footnote omitted)); see also Abramowicz & Colby, *supra* note 6, at 968–69, 987 (arguing in favor of educating generalist courts on highly technical matters and claiming that “amicus briefs have proven to be quite helpful” in this matter); Tai, *supra* note 11, at 793 (calling for increased role of scientific and technical amici).

⁵¹ Rule 37 states that amicus briefs should not repeat party arguments and instead “may be of considerable help to the Court” if they call attention to a matter “not already brought to its attention by the parties.” Sup. Ct. R. 37(1). As Brianne Gorod has observed, the rules “expressly encourage nonparties to use [amicus briefs] to assist the Court in engaging in extra-record factfinding.” Gorod, *supra* note 2, at 36.

⁵² See Richard B. Cappalli, Bringing Internet Information to Court: Of “Legislative Facts,” 75 Temp. L. Rev. 99, 99–100 & n.3 (2002); Marion E. Doro, The Brandeis Brief, 11 Vand. L. Rev. 783, 789–90 (1958). But see Noga Morag-Levine, Facts, Formalism, and the Brandeis Brief: The Origins of a Myth, 2013 U. Ill. L. Rev. 59, 61–62 (arguing that the practice of presenting scientific and medical evidence to the Court predates the Brandeis brief).

A “Brandeis brief” is the colloquial name given to a brief filed at the Supreme Court that presents non-legal data to aid the Court in making a legal rule.⁵³ Its name comes from a pioneer brief filed by famed advocate (and later Justice) Louis Brandeis in a 1908 case called *Muller v. Oregon*.⁵⁴ The plaintiffs in the case challenged a state law restricting the number of hours women were allowed to work. Brandeis, filing a brief in support of the law, adopted a remarkably revolutionary strategy. His brief contained 2 pages of legal argument and 102 pages of evidence about how women needed special protection from the hazards of long work hours.⁵⁵

To understand why this brief was so remarkable and influential (even if the science it relied on has subsequently been debunked⁵⁶), one must remember the state of legal thought in 1908. In the late 1800s, law was “largely regarded as a matter of logic.”⁵⁷ The height of legal formalism saw legal decision making as a “technical-mechanistic process, as if it were a procedure.”⁵⁸ This understanding of law as a logical undertaking makes claims of generalized fact largely irrelevant.

In the early twentieth century, however, legal realists began to challenge this understanding of law by “frankly recogniz[ing] the courts’ lawmaking function.”⁵⁹ This shift naturally led to a significant change in the role of fact finding. As Professor Ann Woolhandler helpfully explains, “After all, it only makes sense to provide courts with data to assist in their lawmaking function if one sees courts as having such a func-

⁵³ See Frederick Schauer, *The Decline of “The Record”*: A Comment on Posner, 51 *Duq. L. Rev.* 51, 55 (2013) [hereinafter Schauer, *Decline of “The Record”*]. As Professor Schauer points out, the actual Brandeis brief was a party brief, not an amicus brief. Although it is a critical “part of the widespread understanding of the use by American appellate courts of non-legal social science data, it is important to remember that it was, after all, a *brief*, produced by a party and open to rebuttal by opposing parties.” *Id.*

⁵⁴ 208 U.S. 412, 419 (1908); see also Cappalli, *supra* note 52, at 99 (“While it seems unexceptional for today’s judges to consult and cite legislative facts, the Brandeis brief was a brilliant leap into the future.”).

⁵⁵ See Doro, *supra* note 52, at 792; Schachter, *supra* note 39, at 105.

⁵⁶ Rustad & Koenig, *supra* note 6, at 106 (“Brandeis’s brief would be assessed harshly as junk social science by today’s standards.”).

⁵⁷ Doro, *supra* note 52, at 789.

⁵⁸ Menachem Mautner, *Three Approaches to Law and Culture*, 96 *Cornell L. Rev.* 839, 851 (2011).

⁵⁹ Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 *Vand. L. Rev.* 111, 115 (1988); see also Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 *Calif. L. Rev.* 1441, 1463–64 (1990) (discussing the Court’s switch to a post-formalist era).

tion, as distinguished from a function of discovering law that is dictated by text, precedent, and principle.”⁶⁰

The Brandeis brief had a “significant impact on legal thought”⁶¹ and “marked a creative shift for the Court, introducing the use of vivid, factual detail as a way to break out of the formalist categories dominating the analysis.”⁶² It was just the tip of the iceberg of briefs that presented factual data to guide the Supreme Court’s legal analysis. Prominent twentieth-century examples should quickly come to mind: the psychological studies on the impact of segregation in *Brown v. Board of Education*,⁶³ the medical evidence about abortion in *Roe v. Wade*,⁶⁴ and the social science data about affirmative action in *Grutter v. Bollinger*,⁶⁵ to name a few.

With facts more relevant to their decisions, it becomes important to think about how the Justices access information that informs those facts. How are they educated on, for example, abortion procedures or social science studies on race? The Federal Rules of Evidence contemplate expert testimony if “scientific, technical, or other specialized knowledge will help the trier of fact.”⁶⁶ At trial, such evidence comes through the adversarial process and expert witnesses, where a party can challenge the methodology or conclusions of the study in question.⁶⁷ Such evidence then becomes part of the record which, traditionally, “rigidly cir-

⁶⁰ Woolhandler, *supra* note 59; see also Rustad & Koenig, *supra* note 6, at 101 (“The incorporation of sociological data into judicial decision-making is the result of the legal realist movement.”).

⁶¹ Rustad & Koenig, *supra* note 6, at 106.

⁶² Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *Harv. L. Rev.* 10, 88–89 (1987).

⁶³ 347 U.S. 483, 494 & n.11 (1954); see also Paul L. Rosen, *The Supreme Court and Social Science* 157 (1972) (explaining how the Court’s use of social science data in *Brown* endorsed the use of extra-legal data in constitutional interpretation); Schauer, *Decline of “The Record,”* *supra* note 53, at 55 & nn.23–24 (noting that the factual data relied on by the *Brown* Court was discussed extensively in the NAACP brief in the case).

⁶⁴ 410 U.S. 113, 149 & n.44 (1973); see also Schachter, *supra* note 39, at 105–06 (“In *Roe v. Wade*, the Court relied on numerous submissions by legal, medical, and religious organizations to discuss the physical risks of abortion at various stages of pregnancy.” (footnote omitted)).

⁶⁵ 539 U.S. 306, 330–32 (2003); see also McGinnis & Mulaney, *supra* note 24, at 82 (“In *Grutter v. Bollinger*, for instance, which upheld the University of Michigan Law School’s race-based admissions policy, the Court relied on factual assertions in the amicus briefs of educational associations, businesses and some retired generals in finding that diversity in education is a compelling state interest.”).

⁶⁶ Fed. R. Evid. 702(a).

⁶⁷ Schachter, *supra* note 39, at 106.

cumscribed the limits of acceptable sources in arguments before and decisions by appellate courts.”⁶⁸

Even after the influence of realism became apparent in the 1930s, the extra-legal facts the Justices relied upon tended to come from the record and within the bounds of the adversary system. As Professor Fred Schauer observed recently, the psychological studies on the impact of racial segregation used by the *Brown* Court were part of the proceedings below.⁶⁹ Similarly, the Brandeis brief in *Muller v. Oregon*—while an integral part of the lore on the use of non-record facts—was “after all, a brief, produced by a party and open to rebuttal by opposing parties.”⁷⁰

This helps us to appreciate, in Schauer’s words, “what is new and what is not.”⁷¹ “Once we see both *Brown* and the Brandeis Brief in contexts more limited than what they are commonly taken to represent,” Schauer explains, “we can appreciate that judicial factual inquiry into matters not argued below, not found in the appellate record or briefs, and not discussed at oral argument is indeed a relatively new phenomenon, fostered substantially by the ease of electronic research.”⁷²

Somewhere along the way in this journey toward “judicial factual inquiry,” the amicus brief became the Court’s principal tool. “As the Court became more willing to entertain extra-legal facts, political groups began to file amicus curiae briefs in significant numbers.”⁷³ Political scientists and legal scholars now tell us that “[m]ore than any other type of brief filed at an appellate court, those drafted by amici contain a significant portion of new evidence.”⁷⁴ These briefs are filed after the record is closed, and the information they present is not subject to cross-examination below.

And these briefs seem to be making their mark.⁷⁵ It is well known, for example, that factual assertions by amici played an important role in the

⁶⁸ Schauer, Decline of “The Record,” supra note 53, at 52.

⁶⁹ Id. at 55 & nn.23–24.

⁷⁰ Id. at 55.

⁷¹ Id.

⁷² Id. at 56.

⁷³ Rustad & Koenig, supra note 6, at 109.

⁷⁴ Dobbins, supra note 16; see also Rustad & Koenig, supra note 6, at 94 (“The most common method of introducing social science evidence to the Court is through ‘non-record evidence’ in amicus curiae briefs.” (footnote omitted)).

⁷⁵ For empirical support that Brandeis briefs make a difference on the Court’s decisions, see Kearney & Merrill, supra note 1, at 749–50. Professors Kearney and Merrill found support for the hypothesis that the Justices are “receptive to ‘Brandeis Brief’-type information that sheds light on the wider social implications of the decision.” Id. at 778.

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Court's 2003 decision upholding the University of Michigan Law School's race-based affirmative action decision.⁷⁶ Justice O'Connor cited one of the briefs by name in both her opinion and her oral summary of the case from the bench.⁷⁷ And, in the 2007 *Gonzales v. Carhart* decision about partial birth abortion, Justice Kennedy relied on the assertion by an amicus that women suffer psychological harm after abortion—even though this was not one of the reasons Congress gave (in extensive factual findings) for banning the procedure.⁷⁸

Today it is exceedingly common, and quite often praised, for an amicus to present the Court with extra-record factual information. The next part of this Article will document the rate of Supreme Court citations to amici as factual experts in recent years. It will then speculate as to reasons for the trend, and explain why we should care.

II. SUPREME COURT AMICI AS FACTUAL EXPERTS TODAY

A. *What Facts Are Amici Supplying and Why?*

Before exploring how Supreme Court amici are cited as factual experts, a few words are necessary on my working definition of a fact. As I have elaborated elsewhere, a factual statement (as opposed to a legal one) is a claim that can be theoretically falsified and is typically supported by non-legal evidence.⁷⁹ I certainly acknowledge that the line between law and fact is not easy to draw, but, like it or not, the distinction is one that is entrenched in our legal system and one that most lawyers use every day.

For the purposes of this paper, an assertion of fact is one that in theory can be true or false and that is followed by evidence (“Go ahead, Google it”). Examples of facts supported by amici authority include: claims on the general unreliability of eyewitness testimony,⁸⁰ statistics on the costs that libraries will face to determine copyright status of in-

⁷⁶ See supra note 65 and accompanying text.

⁷⁷ See Lynch, supra note 1.

⁷⁸ 550 U.S. 124, 159 (2007); see also Reva B. Siegel, Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*, 117 Yale L.J. 1694, 1697–98 & n.15 (2008) [hereinafter Siegel, Politics of Protection] (noting the absence of congressional findings on this point).

⁷⁹ See my prior work for elaboration on my definition of a fact. Larsen, Factual Precedents, supra note 2, at 69–70; Larsen, Fact Finding, supra note 2, at 1264, 1268.

⁸⁰ *Perry v. New Hampshire*, 132 S. Ct. 716, 727 (2012) (citing brief for the American Psychological Association).

ternational works,⁸¹ and observations on common practices leading to election fraud.⁸²

The examples in this paper are not just facts, however: They are so-called “legislative facts.” Kenneth Culp Davis first defined a “legislative fact” in 1945 as a fact that “inform[s] a court’s legislative judgment on questions of law and policy.”⁸³ Despite the name, a legislative fact need not be found by a legislature (although it can be). It is best understood in comparison to an “adjudicative fact” (also Davis’s phrase), which is a fact about any particular controversy—the who, what, where, when facts of a dispute, or “the stuff of ordinary litigation.”⁸⁴ A legislative fact is not case-specific, but is rather a generalized claim about the state of the world used “in the law-interpreting and law-making functions of appellate courts.”⁸⁵ Examples of legislative fact questions are plentiful: Does corporate money corrupt politics?⁸⁶ Is it inherently violent to flee from police in a car?⁸⁷ When does an adolescent’s brain fully mature?⁸⁸

Legislative facts are not new of course. When Chief Justice Marshall wrote the opinion in *Gibbons v. Ogden*, he explained that “[a]ll America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation.”⁸⁹ This is technically, as Professor David Faigman has commented, a statement of legislative fact: an observation

⁸¹ *Golan v. Holder*, 132 S. Ct. 873, 904–05 (2012) (citing briefs for the Conductor’s Guild and American Library Association).

⁸² *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (citing brief for the Massachusetts Gay and Lesbian Political Caucus “detailing ‘bait and switch’ fraud in a petition drive in Massachusetts”).

⁸³ Davis, *supra* note 2, at 404.

⁸⁴ Woolhandler, *supra* note 59, at 113. Note that Professor Woolhandler emphasizes a different aspect of the definition of legislative fact: “The key difference between adjudicative and legislative facts is not the characteristics of particular versus general facts, but rather, evidence whose proof has a more established place and more predictable effect.” *Id.* at 114.

⁸⁵ Schauer, *Decline of “The Record,” supra* note 53, at 57; see also Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 *Tex. L. Rev.* 269, 273 (1999) (“Judicial opinions are filled with assertions about the state of the world.”); Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 *Gonz. L. Rev.* 157, 191 (2005) (stating that legislative facts are relevant when “the court is in essence ‘making law’ either by filling a gap in the common law by formulating a rule, construing a statute, or framing a constitutional rule”).

⁸⁶ *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

⁸⁷ *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011).

⁸⁸ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

⁸⁹ 22 U.S. (9 Wheat.) 1, 190 (1824).

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about the way most Americans understand language.⁹⁰ And even if that statement does not seem “fact-y” enough, it is hard to argue that Justice Blackmun’s medical research about abortion procedures in 1973’s *Roe v. Wade* decision was pure legal analysis.⁹¹

Several things, however, *are* new and worth noting. I specify three: the rise of the amicus brief, the impact of the Internet, and a general increase of empiricism in the Court’s decision making.

First, as mentioned above, the number of amicus briefs filed at the Court has skyrocketed. Professors Joseph Kearney and Thomas Merrill documented a dramatic increase in the number of amicus briefs filed from the late 1940s to the late 1990s—an increase of over 800%.⁹² Alexandra Dunworth, Joshua Fischman, and Daniel Ho then documented a continual increase in recent years. In their study of Supreme Court amicus briefs from 1978 to 2006, they noticed that “[d]espite a decrease in [the Court’s] caseload around 1990, the number of amicus briefs (per case and overall) steadily increase[d].”⁹³ More specifically, the last 50 years has also seen an increase in the number of briefs filed presenting the Court with social science data.⁹⁴ And, by my count, 78% of the cases decided in the 2012–2013 Term had an amicus participate who brought a factual authority to the Court’s attention, be it medical, historical, or social science.

Why are there so many factual amici today? Perhaps the answer is that the Court seems more responsive to amici generally—citing amicus

⁹⁰ David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. Pa. L. Rev. 541, 545–46 (1991).

⁹¹ See supra note 64 and accompanying text.

⁹² Kearney & Merrill, supra note 1; see also Owens & Epstein, supra note 19, at 127 (noting an increased reception to amici during the Rehnquist Court era); Spriggs & Wahlbeck, supra note 6, at 373 (demonstrating that approximately 67% of amicus briefs they studied tendered arguments not contained in the party brief, but noting that amici often repeat party arguments as well).

⁹³ Alexandra Dunworth, Joshua Fischman & Daniel E. Ho, Policy Voting: What Amici Tell Us About Law 7 (Oct. 30, 2009) (unpublished manuscript), available at <http://dho.stanford.edu/research/amici.pdf>.

⁹⁴ Alger & Krislov, supra note 11, at 504–05 (“Since the seminal *Brown v. Board of Education* decision, social science has expanded its reach in Supreme Court filings and frequently social scientists have submitted amicus briefs.” (citation omitted)); Ronald Roesch, Stephen L. Golding, Valerie P. Hans & N. Dickon Reppucci, Social Science and the Courts: The Role of Amicus Curiae Briefs, 15 Law & Hum. Behav. 1, 1–2 (1991) (“Social scientists have become increasingly involved in the submission of amicus curiae or ‘friend of the court’ briefs to the courts.”).

briefs at a higher rate than ever before.⁹⁵ Linda Greenhouse has speculated that the Rehnquist Court, at least, was particularly attentive to novel arguments from amici (particularly those represented by skilled lawyers) due to concerns about “its own institutional legitimacy in the wake of *Bush v. Gore*.”⁹⁶ Others have suggested that referencing amici is a “strategic move, designed to draw the attention of the (relatively) centrist Anthony Kennedy” who seems more inclined than others to look to third-party briefs.⁹⁷

I think, however, the rise of amici who present factual data to the Court has more to do with a global change in the way we all process and expect information. It is hard to overstate the degree of change that technology has brought to the law in the past 15 years. As Barbara Bintliff puts it, “[T]he computer’s impact on law is conceivably greater and more fundamental than almost any other development of the last hundred years.”⁹⁸

With the dawn of the digital age and the tremendous amount of information available to access instantly, arguments are changing—and the arguments in judicial opinions and legal briefs are no exception. Consider a casual debate with a friend over access to violent video games. Before the Internet, one might make general references to a risk of brain damage in children or increased violence in our society—but without empirical support. Now, however, such support can be accessed with a click of the mouse (or even a swipe on a phone). With that ease of access comes a new expectation—a hunger for empirical support in factual claims about the world.

American culture has always equated science with legitimacy,⁹⁹ but the Internet makes that intuition more pronounced and the effects become more visible. Modern audiences, in other words, demand authorities supporting factual observations. These authorities—be they studies

⁹⁵ Kearney & Merrill, *supra* note 1, at 757 (looking at all of the references to amicus briefs from 1946 to 1995 and concluding that “[t]here is no question but that the total number of references to amici is substantial, and that the frequency of such references has been increasing over time”); see also Owens & Epstein, *supra* note 19, at 130 (noting that the rise in citation to amicus briefs in the Rehnquist Court years was “astonishingly high”).

⁹⁶ Owens & Epstein, *supra* note 19, at 128 (footnote omitted) (internal quotation marks omitted) (quoting Linda Greenhouse, *What Got into the Court? What Happens Next?*, 57 *Me. L. Rev.* 1, 10 (2005)).

⁹⁷ *Id.* at 131.

⁹⁸ Barbara Bintliff, *From Creativity to Computerese: Thinking like a Lawyer in the Computer Age*, 88 *Law Libr. J.* 338, 339 (1996).

⁹⁹ Tai, *supra* note 11, at 796–97.

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or statistics or just amicus briefs—essentially communicate: “I am not making this up.”¹⁰⁰ Perhaps living in a world where information is so freely available means people insist on those authorities for statements of fact to a new degree.

This may partially explain why others have observed an increase in empiricism on the Court and an increase in citation to non-legal authorities.¹⁰¹ In *Roe v. Wade*, for example, the Court asserted without citation that “[m]aternity, or additional offspring, may force upon the woman a distressful life and future Mental and physical health may be taxed by child care.”¹⁰² The Court just left it at that. By contrast, in the 2007 *Gonzales v. Carhart* decision, Justice Ginsburg in dissent made a similar observation and followed it with 10 citations to fact-based authorities—from medical journals to *New York Times* articles to briefs from the American Psychological Association.¹⁰³ Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void.

B. Recent Trends in the Court’s Citation to Amicus Briefs

Not only has amicus participation increased, but the past several decades have also brought a dramatic upswing in citation to amicus briefs in

¹⁰⁰ Frederick Schauer, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1950 (2008) [hereinafter Schauer, *Authority and Authorities*] (internal quotation marks omitted) (attributing the line to humorist Dave Barry and making the connection to legal authorities).

¹⁰¹ Timothy Zick, *Constitutional Empiricism: Quasi-neutral Principles and Constitutional Truths*, 82 N.C. L. Rev. 115 (2003); see also Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. Ill. L. Rev. 851, 851 (explaining that “over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity”); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 477 (1986) (“Once heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists.”); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 658–68 (1988) (providing a historical account of the use of facts in judicial opinions); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. Legal Stud. 495, 497–98 (2000) (documenting the rise of non-legal authorities in Supreme Court opinions); cf. Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 Seton Hall L. Rev. 909, 911–12 (2011) (observing how the digital revolution has “blurr[ed] . . . the line between legal and nonlegal authority” in recent judicial opinions).

¹⁰² 410 U.S. 113, 153 (1973).

¹⁰³ 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting).

Supreme Court opinions.¹⁰⁴ As Professors Ryan Owens and Lee Epstein have documented, “When the opportunity arises to cite an *amicus curiae* brief, which it now does in about nine out of every ten cases . . . , majority opinion writers often take advantage of it.”¹⁰⁵ During the Rehnquist Court, in fact, Owens and Epstein observed that majority opinions “referenced at least one amicus in 38 percent of the 687 cases in which one or more friends participated,” and the rate surpassed 40% in 2002 and 2003.¹⁰⁶ “Relative to earlier years,” they explain, “this is an astonishingly high figure.”¹⁰⁷

But how often are these growing amicus brief citations used to support assertions of fact? I took a look at every citation to an amicus brief in a Supreme Court opinion from the last five years. By my count, there have been 606 citations to amicus briefs in the 417 Supreme Court opinions decided from 2008 to 2013.¹⁰⁸ Of those 606 citations, 124 of them—or roughly 20%—were citations to amicus briefs to support assertions of legislative fact.

A close look at those 124 factual citations reveals some surprising patterns (reflected in the chart attached in the Appendix to this Article). First, relying on amicus expertise on factual matters is not a trend dominated by any particular Justice, any particular ideology, or any particular brand of fact. I found citations to amicus expertise on factual matters by eleven different Justices during this five-year period.

It is also not the case that these citations relate to just one narrow scientific subject matter. Justice Alito relied on an amicus brief from the New York County District Attorney’s Office to assert that numerous lab technicians routinely have their hands on DNA evidence.¹⁰⁹ Justice Sotomayor relied on a brief from an economics professor to establish the average length of time of a Chapter 12 bankruptcy.¹¹⁰ And, in the challenge to the Affordable Care Act in 2012, Chief Justice Roberts relied on a brief from “America’s Health Insurance Plans” to assert that the

¹⁰⁴ See Owens & Epstein, *supra* note 19, at 128 (“By 1971, for the first time in the Court’s history, one or more amici appeared in a majority of its cases (56 percent). Since the 1970s that percentage has steadily increased with time—to the point where it is now the rare case in which at least one amicus *does not* file.”).

¹⁰⁵ *Id.* at 130.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ This number includes all opinions (majority, dissenting, and concurring).

¹⁰⁹ *Williams v. Illinois*, 132 S. Ct. 2221, 2244 (2012).

¹¹⁰ *Hall v. United States*, 132 S. Ct. 1882, 1900 (2012).

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new law “will lead insurers to significantly increase premiums on everyone.”¹¹¹

These citations come from dissents, concurrences, and also majority opinions—indeed 75 of the 124 citations came from an opinion for the Court. Also of interest, as noted above, less than a third of the amicus factual claims that make it into the opinions were actually contested in the party briefs—only 35 out of 124 (or 28%) generated a response from a party.¹¹²

Perhaps most surprising of all, however, is what I did not find. More often than not a Justice citing an amicus brief to support a factual claim relies on *only* the amicus brief as authority without accompanying evidence (studies, articles, statistics, etc.) that can be found from within the brief. In fact, 61% of the time (76 of the 124), a citation to an amicus brief rests alone—without a “see also” cite and without a parenthetical highlighting the source of the evidence that may or may not be contained in the brief.

This practice indicates that the Justices treat amici as experts, not as a research tool. So, for example, when discussing the constitutionality of strip searches under the Fourth Amendment, the Court cites a brief for the National Association of Social Workers to support the claim that such searches result in “serious emotional damage.”¹¹³ And, in a case challenging the federal ban on providing material support to designated terrorist groups, the Court cites a brief from the Anti-Defamation League (“ADL”) to describe the activities of terrorist group fundraising and to support the claim that “[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.”¹¹⁴

This robust practice of amici expertise on factual matters is not only new but is also unique to the U.S. Supreme Court. For the sake of comparison, I also looked at citation rates to amicus briefs for factual claims in the 50 state supreme courts. In the same five-year time period (2008–

¹¹¹ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585 (2012).

¹¹² My search for party rebuttal included not just searching for the amicus by name, but also for key words surrounding its factual claim.

¹¹³ Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009) (internal quotation marks omitted).

¹¹⁴ Holder v. Humanitarian Law Project, 561 U.S. 1, 31 (2010) (alteration in original) (internal quotation marks omitted).

2013), there were only 56 citations to amicus briefs for factual claims in all 50 states, compared to 124 in the U.S. Supreme Court.

Of course it cannot be denied that state supreme courts do not receive the same number of amicus briefs as their brethren Justices on the U.S. Supreme Court. But amicus participation in the state supreme courts is also increasing,¹¹⁵ and even for those state supreme courts that do cite to amicus briefs frequently—like Pennsylvania, Washington, and New Jersey—it was very rare to find such a citation to support a claim of fact. Of the 52 citations to amicus briefs from the Supreme Court of Pennsylvania, for example, only once was a brief used to support a statement of fact.¹¹⁶

C. The Significance of Amicus Citations

Why does a citation count like this matter? It is impossible, of course, to identify the influence any study, brief, or piece of evidence has on a judge or justice. Political scientists, in fact, generally struggle to measure the influence amicus briefs have on judicial decisions in general. The typical strategy is to compare amicus participation with case outcome and to track correlations between having amici support and winning one's case.¹¹⁷

But as Professor Paul Collins and colleagues suggest in a fascinating new article, tracking case outcomes seems an inadequate measure because it fails to “address the content of the Court’s opinions, which is the most significant means by which the Court contributes to legal and social policy.”¹¹⁸ Collins used new plagiarism detection software to assess whether language used in amicus briefs later turned up in majority opinions. He and his colleagues found that indeed “the justices systematically incorporate language from amicus briefs into the Court’s majority

¹¹⁵ Jenna L. Becker Kane, *Measuring the Influence of Amici in State Supreme Courts* 21–22 (Am. Political Sci. Ass’n Annual Meeting Paper, 2013), available at <http://ssrn.com/abstract=2300527> (observing rise of amici in state supreme courts).

¹¹⁶ See *Fross v. Cnty. of Allegheny*, 20 A.3d 1193, 1201 n.10 (Pa. 2011) (citing a brief for the Association for the Treatment of Sexual Abusers about the significant effect of residency restrictions). Similarly, in New Jersey there were 45 citations to amicus briefs generally and only 2 were to support statements of fact. In Washington there were 74 citations to amicus briefs generally and only 15 of them were to support statements of fact.

¹¹⁷ Collins et al., *supra* note 21, at 1 (“Though there has been no shortage of research on friends of the court, scholars have overwhelmingly examined the ability of amici to influence case outcomes or the justices’ voting behavior in those cases.”).

¹¹⁸ *Id.*

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opinions”—particularly language from the Solicitor General and other “high quality amicus briefs” (coded for cognitive clarity and use of plain language).¹¹⁹

Both the results of this new study and my own observations on citation practice indicate that the Justices are reading and incorporating arguments from amici into their opinions. But the question remains, why should that matter? Some people believe that the Justices decide how they want the case to come out first and then use the facts as mere “window dressing.”¹²⁰ Professor Dan Kahan’s recent work on how deep-seated values undermine the way we process facts (and even math) supports this intuition.¹²¹ On this view, it does not really matter how the Justices find their facts; who cares if they find data from amicus briefs or just make it up if it is not going to affect the outcome in any event?

I resist the temptation, however, to ignore the reasons the Justices provide as explanation for their decisions. Authorities matter in the law—regardless of outcome. Fred Schauer has explained, “[T]he law’s practice of using and announcing its authorities . . . is part and parcel of law’s character.”¹²² Or, as Professor Frank Cross and colleagues put it recently, “Citations function something like the currency of the legal system.”¹²³ To me, the Court’s use of factual authorities generally (and amicus authorities specifically) is relevant and significant for at least three practical reasons.

For one, as I have observed before, a factual statement in a Supreme Court opinion today can easily drift over to a new context and make an

¹¹⁹ Id. at 14, 21–22.

¹²⁰ See Brian Leiter, In Praise of Realism (and Against “Nonsense” Jurisprudence), 100 *Geo. L.J.* 865, 885 (2012) (“After all, if we were all Dworkinian Moralists, then we would take every judicial opinion at face value and never inquire into the politics or the individual or group psychology of the decisions, as Realists like Posner, Llewellyn, and the contemporary political scientists do. We would only ask about the theory of justificatory ascent that supports the decision and never entertain the hypothesis that the best way to make sense of what judges like Cardozo or tribunals like the U.S. Supreme Court are really doing is that they are making decisions on nonlegal grounds and then offering legalistic window dressing for those quasi-legislative decisions.”).

¹²¹ See Dan M. Kahan, The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 *Harv. L. Rev.* 1, 34–36 (2011); Dan M. Kahan et al., Motivated Numeracy and Enlightened Self-Government 6, 25 (Yale Law Sch. Cultural Cognition Project, Working Paper No. 116, 2013), available at <http://ssrn/abstract=2319992>.

¹²² Schauer, *Authority and Authorities*, supra note 100, at 1935.

¹²³ Frank B. Cross et al., Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance, 2010 *U. Ill. L. Rev.* 489, 490.

appearance in a subsequent lower court opinion—affecting new parties and creating new law.¹²⁴ For example, studies on juvenile brain development presented by an amicus and blessed by a Justice in a case debating age restrictions on abortions can be found later in a state supreme court opinion upholding juvenile criminal penalties.¹²⁵ The importation of factual claims from one context to another is an example of the significance such claims carry in the first place.

Second, the U.S. Reports are full of examples of legislative facts that seem outcome determinative, or at least that would make the outcome more difficult to sustain if revised. Sometimes, for example, the Court's legal rules seem premised on factual claims. As is well known, the amicus-presented social science data on educational benefits of racial diversity played a prominent role in *Grutter v. Bollinger*—so much so that Justice O'Connor referenced the brief in her oral announcement of the affirmative action decision from the bench. And in *Gonzales v. Raich*, the principal question in the case—whether Congress could regulate homegrown marijuana—turned almost entirely on the factual question of whether the larger marijuana market would be affected.¹²⁶

Attempting to measure whether the Justices cite amicus briefs for facts that matter is an exceedingly difficult endeavor. For a conservative estimate, however, I went through these 124 citations to amicus briefs for facts and identified the ones that are used to answer outcome-determinative questions—meaning the ones that the Justices use to answer a question they must address to resolve the case. I attempted, in other words, to screen out the “window dressing” facts used by the Justices just to tell a narrative.

Of the 124 citations to amicus briefs for factual claims, I counted 97 of them that were used to answer what I have described as outcome-determinative questions.¹²⁷ This demonstrates that a significant number

¹²⁴ See examples gathered in Larsen, *Factual Precedents*, supra note 2, at 81–97.

¹²⁵ Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 18–19, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-1125, 88-1309), cited in *Roper v. Simmons*, 543 U.S. 551, 617–18 (2005) (Scalia, J., dissenting). Justice Scalia's reference to the amicus brief is then cited in *State v. Ninham*, 797 N.W.2d 451, 473 (Wis. 2011). See Larsen, *Factual Precedents*, supra note 2, at 81–82, for discussion of this example and others.

¹²⁶ *Gonzales v. Raich*, 545 U.S. 1, 19 (2005). For an in-depth discussion of facts that are used to form and apply constitutional rules, see Faigman, supra note 2, at 46–62.

¹²⁷ As mentioned, what is or is not outcome determinative is highly subjective and thus subject to possibly random variation in practice. Of three readers to go through the citations

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of these citations are central to the Justice's explanation for his or her decision. Even if it would be possible to work around inconvenient facts to preserve desired outcomes, it would presumably be more costly for the Justices to do so (politically, ideologically, and psychologically).

Finally, even if one is skeptical that the Court's fact finding affects the case outcomes, the authorities the Justices use can still carry independent political consequences. In *Gonzales v. Carhart*, the Court's decision on partial birth abortion, Justice Kennedy cited an amicus brief to support the claim that women may regret their abortions later.¹²⁸ The testimony collected in this brief was gathered by a group called Operation Outcry. As Professor Reva Siegel observes, before 2007, Operation Outcry had been hard at work without much success promoting the "woman-protective antiabortion" theory—the belief that women are harmed by permissive abortions and that abortions should be banned for that reason.¹²⁹ Following the decision in *Carhart*, the group announced triumphantly on their website that "the Supreme Court is listening!"¹³⁰ Siegel, in fact, credits Justice Kennedy's citation to this amicus brief with a resurgence in this aspect of the anti-abortion political movement.¹³¹

I do not believe in a pure fact-finding process at the Court where the Justices canvass all possible factual authorities and decide the cases solely based on the best available evidence. But nonetheless I still believe that the authorities they choose to cite are significant and have real consequences both inside and outside the Supreme Court building. It thus becomes relevant where that information comes from, and specifically whether the amicus process is a good place to find it.

and holdings of the relevant cases, however, even the most conservative found 75 of the 124 citations (over half) to be used to answer a question she deemed outcome determinative.

¹²⁸ 550 U.S. 124, 159 (2007).

¹²⁹ Siegel, *Politics of Protection*, supra note 78, at 1726 (explaining that woman-protective anti-abortion theory proponents assert that "women will be harmed by abortion"); see also *id.* at 1727 n.95 (documenting Operation Outcry's efforts).

¹³⁰ *Id.* at 1734 n.114.

¹³¹ Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 *Duke L.J.* 1641, 1648 (2008) [hereinafter Siegel, *The Right's Reasons*] ("Until the Court's decision in *Carhart*, the rise of gender-based anti-abortion arguments was barely noticed in the mainstream press or by scholars outside the public health field.").

III. SUBSTANCE-BASED OBJECTIONS TO AMICUS EXPERTISE

Since the Justices are relying on amici as experts—routinely citing their “testimony” (the briefs) alone without more—it becomes more important to investigate the quality of this testimony. Put differently, would this extra-record evidence hold up on cross-examination had it come in at trial?

After digging into amicus briefs that present factual information to the Court, I am convinced the answer to that question in many instances is no. It should come as no surprise that amicus briefs are more aggressive or perhaps more creative with their factual claims than are judicial opinions. As Dan Ho and colleagues recently observed, amici are generally more policy motivated than the Justices.¹³² Most political scientists agree that amici engage in “partisan advocacy of specific positions” and “argue their positions for the primary purpose of shaping the Court’s policy output.”¹³³

What this means, of course, is that the factual data amici present to the Court and the studies they choose to highlight are all funneled through an advocacy sieve. The cost of such advocate fact gathering is periodic unreliability. Several troubling patterns emerge and are described below.

A. Amici Citing No Source or a Source Not Publicly Available

If all amicus briefs were citing reputable peer-reviewed scientific journals or statistics from the State Department to support their factual claims, we should not care that much if the Justices are citing to the briefs themselves or to the authorities presented by the amici. To be sure, some amici do cite very reliable peer-reviewed studies and the like to support their assertions of fact. It turns out, however, that this is not universally true.

The worst offenders, I think, are the amici who make a factual claim—numbers gleaned from a survey for example—and then drop a footnote to explain that the actual results are not in a published study, or even posted on the organization’s website, but are simply “on file with” the amicus. Amicus briefs filed in the 2012–2013 Term alone are full of

¹³² See Dunworth et al., *supra* note 93, at 20–21.

¹³³ *Id.* at 21 (internal quotation marks omitted).

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examples.¹³⁴ Social scientists supporting Hollingsworth in the Proposition 8 case, for instance, filed data supposedly culled from the Canadian census to support the claim that children of gay and lesbian couples are less likely to finish high school.¹³⁵ This study is “on file with” the authors and not available publicly.

One may be tempted to assume such opaque factual authorities will be ignored by the Justices who have incentives not to embarrass themselves with unreliable claims. That assumption, however, would be false. In *Caperton v. A.T. Massey Coal Co.*, the Court had to determine if the U.S. Constitution was violated when a state judge refused to recuse himself from participation in a case where one of the parties had spent \$3 million in support of the judge’s election campaign.¹³⁶ In dissent, arguing that this situation did not offend due process, Chief Justice Roberts cites an amicus brief for numerous “examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign.”¹³⁷ The amicus brief cites a law review article for the fact, which, in turn, cites an e-mail from a state judge that is only “on file with the author.”¹³⁸

Likewise, in *Florence v. Board of Chosen Freeholders*, a case about routine prison strip searches, many of the factual claims referenced by Justice Kennedy with a cite to an amicus brief are not in fact accompanied by any supporting authority once one actually opens the brief. The

¹³⁴ See, e.g., Brief of Social Science Professors as Amici Curiae in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 23, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Brief of Social Science Professors] (using data that come from a study not publicly available); Brief of Houston Community College System as Amici Curiae in Support of Respondents at 5 n.8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (citing “Office of Institutional Research, Houston Community College System, Transfers to 4 Year Institutions by Academic Year and by Ethnicity (Jul. 31, 2012) (on file with author)”).

¹³⁵ Brief of Social Science Professors, *supra* note 134, at 23–24 (citing Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households* 4 (2012) (unpublished manuscript) (on file with the Department of Economics, Simon Fraser University)).

¹³⁶ 556 U.S. 868, 872 (2009).

¹³⁷ *Id.* at 901 (Roberts, C.J., dissenting).

¹³⁸ Brief of the Conference of Chief Justices as Amici Curiae in Support of Neither Party at 27 n.50, *Caperton*, 556 U.S. 868 (No. 08-22) (citing Anthony Champagne, *Interest Groups and Judicial Elections*, 34 *Loy. L.A. L. Rev.* 1391, 1404 n.66 (2001)). Champagne’s footnote then references an “E-mail from Rhoda Billings to Anthony Champagne, (Oct. 16, 2000) (on file with author).”

increasing number of gang fights, for example, is just baldly asserted in the brief for the Policemen's Benevolent Association with the preface "[t]here is no doubt."¹³⁹ And the claim that strip searching is necessary because of dangerous goods smuggled into prison in body cavities comes from a brief filed by the City of San Francisco which, in turn, cites a dissent from a decision in the U.S. Court of Appeals for the Ninth Circuit, which actually cites anecdotal stories gleaned from an amicus brief, not available online.¹⁴⁰

Similarly when NASA employees challenged background checks as a violation of their constitutional privacy rights, Justice Alito, writing for the majority, rejected their claim in part because "millions of private employers" use background checks just like the ones in question.¹⁴¹ For support he cites a brief filed for the Consumer Data Industry Association, which asserts in its self-description ("statement of interest") that its clients are among the "88% of U.S. companies that perform background checks on their employees."¹⁴² Where this number comes from is a mystery. It is asserted in the brief without citation. And indeed at least one other publicly available survey puts that number at significantly lower than 88%.¹⁴³

¹³⁹ Brief of Policemen's Benevolent Ass'n, Local 249 et al. as Amici Curiae in Support of Respondents at 14, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (No. 10-945) ("There is no doubt that gangs are becoming increasingly prevalent in correctional facilities throughout the Country."). Justice Kennedy cites this brief for that fact in *Florence*, 132 S. Ct. at 1518.

¹⁴⁰ Brief of City and County of San Francisco et al. as Amici Curiae in Support of Respondents at 10, *Florence*, 132 S. Ct. 1510 (No. 10-945), cited in *Florence*, 132 S. Ct. at 1519. This brief cites to the dissent in a Ninth Circuit opinion. See *Bull v. City & Cnty. of San Francisco*, 539 F.3d 1193, 1211 (9th Cir. 2008) (Tallman, J., dissenting) (citing an amicus brief from San Mateo County Sheriff Don Horsely and the County of San Mateo that is not available online).

¹⁴¹ *NASA v. Nelson*, 131 S. Ct. 746, 758 (2011).

¹⁴² Brief of Consumer Data Industry Ass'n et al. as Amici Curiae in Support of Petitioners at 2, *Nelson*, 131 S. Ct. 746 (No. 09-530).

¹⁴³ I make no assertion, of course, as to what the correct statistic may actually be. My point is only that the factual claim is contestable. The Society for Human Resource Management, for example, does a survey of U.S. companies every year where it obtains information on employer background checks and a variety of other human resource topics. The organization claims the number in question is less than 88%. For criminal background checks, see Background Checking—The Use of Criminal Background Checks in Hiring Decisions, Soc'y for Human Res. Mgmt. (July 19, 2012), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx>. It seems odd in light of that uncertainty to cite an amicus brief for a statistic that does not include a publicly available source for the number it provides.

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Lest one think this “take their word for it” practice is only committed by fringe-players, the Solicitor General of the United States—the most influential amicus out there—has also made unsupported factual assertions (later proved erroneous) that have ultimately found their way into the U.S. Reports. In her recent article on the subject, Professor Nancy Morawetz describes what she calls a disturbing trend of the Solicitor General (“SG”) making unsupported factual assertions to the Court about internal government operations that are not part of the record or publicly available.¹⁴⁴

Her principal example of the disturbing consequences that can come from this practice is the story of what happened in a case called *Nken v. Holder*.¹⁴⁵ *Nken* was an immigration case about whether a non-citizen’s removal from the country constituted irreparable injury requiring a stay pending appeal.¹⁴⁶ In its brief to the Court, the SG stated that it was the government’s “policy and practice” to “facilitat[e]” an alien’s return to the United States if he ended up winning his case on appeal.¹⁴⁷ This statement was later cited by Chief Justice Roberts in his majority opinion for the Court ruling that removal was not irreparable harm.¹⁴⁸ The description of the policy came as a surprise to immigration attorneys who had clients unable to return to this country even after winning their cases. Some of these attorneys (headed by Professor Morawetz, who runs an immigrant rights clinic at NYU Law), filed a Freedom of Information Act (“FOIA”) request to the SG’s Office seeking the basis for their factual assertion to the Court.

Over the course of this FOIA litigation—and after the SG was ordered by a court to turn over internal e-mails—the SG’s Office wrote to the Supreme Court to correct its statement in the *Nken* brief and concede that there was no such uniform practice facilitating the return of deported non-citizens who won their appeals. As Morawetz says, however, “[T]he damage was done. The language in *Nken* was on the books, and

¹⁴⁴ Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. Rev. 1600 (2013).

¹⁴⁵ 556 U.S. 418 (2009).

¹⁴⁶ *Id.* at 422.

¹⁴⁷ Brief for the Respondent at 44, *Nken*, 556 U.S. 418 (No. 08-681).

¹⁴⁸ *Nken*, 556 U.S. at 435.

lower courts had already revised caselaw about stays in light of the Supreme Court's pronouncement."¹⁴⁹

Morawetz recognizes the SG's well-earned reputation for producing "high quality briefs,"¹⁵⁰ but she claims that the SG's Office also has "a history of using its position to inject specific factual claims that appear to be supplied by government agencies"¹⁵¹ but are not publicly available.¹⁵² It "repeatedly [tells] the Court that it has been 'advised' of facts that are relevant to a case."¹⁵³ The moral of the *Nken* story, Morawetz argues, is that the Solicitor General—like any good advocate—is too tempted to include factual information to support his claims even if this information has not been "thoroughly vetted."¹⁵⁴

One has to wonder if even the Solicitor General—sometimes called the Tenth Justice and often applauded for its candor and balanced advocacy—is tempted to use facts loosely in support of a legal claim, the same must be true with at least equal force to other amici who are not as constrained by a desire to keep a balanced reputation intact.

B. Amici Citing Sources Created in Anticipation of Litigation

A second concerning pattern of unreliability in amicus briefs is a claim of fact followed by an authority that seems to have been created for the purpose of the litigation at hand. Just as the Federal Rules of Evidence discount business records created in anticipation of litigation because they seem unlikely to accurately reflect the regular course of business,¹⁵⁵ factual authorities created for a cause and with a case in mind lack an important credibility. The temptation to create one's own factual authorities is one that has likely always existed for well-funded amici, but it is aggravated now in the digital age with the new cheap and convenient method to publish data.

A classic example of this sort of fact manufacturing has arisen in constitutional challenges to punitive damages awards—that is, empirical

¹⁴⁹ Morawetz, *supra* note 144, at 1602. For discussion about this and other examples of lower court reliance on Supreme Court statements of fact, see my prior work. Larsen, *Factual Precedents*, *supra* note 2.

¹⁵⁰ Morawetz, *supra* note 144, at 1653.

¹⁵¹ *Id.* at 1608.

¹⁵² *Id.* at 1608–10.

¹⁵³ *Id.* at 1608.

¹⁵⁴ *Id.* at 1612. She suggests full disclosure from the SG to the Court and the litigants about the basis for its factual claims. *Id.* at 1657.

¹⁵⁵ Fed. R. Evid. 803(6).

claims that punitive damages awards have “exploded” in size.¹⁵⁶ Professors Michael Rustad and Thomas Koenig warned of this trend in a 1993 article on “junk social science” in which they argued that “the empirical findings presented to the Justices [by amici in these cases] have the aura of social science but do not follow the scientific truth-seeking norms that regulate valid research.”¹⁵⁷

Rustad and Koenig examined the data submitted by amici in three high-profile punitive damages cases brought to the U.S. Supreme Court. They did not find any “outright fabrications” in the briefs, but they did discover “systematic misuse of empirical research.”¹⁵⁸ They noted several scientific examples of funny business, including “making normative statements that appear to be empirically based, and quoting studies out of context.”¹⁵⁹ Another observation these authors made in 1993, however, is particularly relevant now: They noticed that amici commonly “produc[e] studies designed for advocacy purposes.”¹⁶⁰

For example, Rustad and Koenig discuss a popular study that examined punitive damages awards and their growth over time.¹⁶¹ The study was financed by Texaco and authored by three Texaco employees and two attorneys at King & Spalding.¹⁶² It was then published as a working paper by the Washington Legal Foundation in November 1992—the exact same month that the Supreme Court granted certiorari in *TXO Production Corp. v. Alliance Resources Corp.*, a case that considered whether a \$10 million punitive damages award against an oil-and-gas production company violated the Due Process Clause.¹⁶³

Despite the fishy timing, one cannot know for certain that the study was commissioned in anticipation of litigation. But several amicus briefs did present the Texaco study to the Court in that case—including one authored by the Washington Legal Foundation (the same organization that published the study in the first place).¹⁶⁴ According to Rustad and Koenig (a professor of law and a professor of sociology), the study suf-

¹⁵⁶ See Rustad & Koenig, *supra* note 6, at 121 n.143.

¹⁵⁷ *Id.* at 91.

¹⁵⁸ *Id.* at 128.

¹⁵⁹ *Id.* at 100.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 144 (citing Stephen M. Turner et al., *Punitive Damages Explosion: Fact or Fiction?* (Wash. Legal Found., Critical Legal Issues, Working Paper No. 50, 1992)).

¹⁶² *Id.* at 144 & n.262.

¹⁶³ 509 U.S. 443, 446 (1993).

¹⁶⁴ Rustad & Koenig, *supra* note 6, at 144 & n.263.

fers from several methodological flaws and should be “of little or no value to the Court.”¹⁶⁵ Indeed, Rustad and Koenig “suspect that Texaco, the firm that was assessed the largest punitive damages award ever paid, has a strong bias against the remedy.”¹⁶⁶ They warn generally against “studies financed by a partisan source, with the results presented in a manner that advances the purposes of the funding source.”¹⁶⁷ The conflict of interest in such studies is inescapable.

Empirical studies like the Texaco one are expensive, and before the dawn of the Internet it would be tempting to assume that only deep pockets could afford to publish “working papers” conveniently presenting relevant facts on the eve of a major Supreme Court decision.

Times have changed, however. The Internet now presents a wide-open forum for “working papers.” It is theoretically possible for anyone with an iPhone and an agenda to assemble data convenient to his policy position and then post it to the world.

This reality is particularly salient given the rise of the Supreme Court bar and the entrenched relationships between institutional amici and their retained Supreme Court attorneys. As in the Texaco example just discussed, an attorney in a Supreme Court practice can author a “working paper” supporting a favorable factual position for his or her institutional client, and shortly thereafter that “working paper” will show up as an authority in an amicus brief to the Court sponsored by the organization and written by the law firm.

In fact, a quick look at the tables of authorities in the amicus briefs filed in the 2012–2013 Term reveal that it is not at all rare for an amicus to cite a study it funded or conducted itself. Examples include: the Generic Pharmaceutical Association presenting a study it sponsored on the money saved through generic drugs,¹⁶⁸ the National Venture Capital As-

¹⁶⁵ *Id.* at 145. The authors point to three main flaws with the study. First, it “lumps all punitive damage awards assessed against businesses into a single category, making it impossible to pinpoint whether there is a problem in some particular substantive area,” like asbestos litigation. Second, it focuses only on states that are “hotspots” of business litigation, causing a distortion in the total increase of punitive damages awards. Third, Texaco fails “to publish any details beyond the total amount collected on appeal,” therefore concealing any pattern of growth in punitive damages. *Id.* at 144–45 (internal quotation marks omitted).

¹⁶⁶ *Id.* at 145.

¹⁶⁷ *Id.* at 143.

¹⁶⁸ Brief for the Generic Pharmaceutical Ass’n as Amicus Curiae Supporting Respondents at 8–9, *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (No. 12-416) (citing Generic Pharm. Ass’n, *Economic Analysis: Generic Pharmaceuticals 1999–2008: \$734 Billion in Health Care Savings* (2009)).

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sociation describing a study it funded about how investment drives medical innovation,¹⁶⁹ and a statistical survey about the erosion of the criminal intent requirements in federal law, co-authored by an employee of the National Association of Criminal Defense Lawyers and then presented to the Court by the same organization.¹⁷⁰

I have only demonstrated so far that amici are citing studies that seem to be manufactured for litigation. The question remains whether any of these studies actually get through to the Justices, or whether this is a lot of effort by advocacy groups for no reason. It is important to recognize, as mentioned above, that tracking citations to amicus briefs greatly underemphasizes the influence such briefs may have. But even looking at the times when a Justice will actually cite an amicus brief reveals examples of factual authorities that (circumstantial evidence strongly suggests) were created in anticipation of the litigation.

Last Term the Court decided *Kirtsaeng v. John Wiley & Sons*, in which it confronted the “first sale doctrine” in copyright law, which means that a copyright owner maintains control only on the first sale of the copyrighted work.¹⁷¹ The question in *Kirtsaeng* was whether there is a geographic restriction on the first sale doctrine; it arose when a Thai native studying in the United States was selling textbooks here that were shipped to him from friends and family in Thailand.

Justice Breyer, delivering the majority opinion, cites a brief from the American Library Association for the fact that “library collections contain at least 200 million books published abroad.”¹⁷² That number matters, of course, because it underscores the scope of the problem. Two hundred million books disappearing from U.S. libraries seems like a good reason to apply the first sale doctrine abroad. What is interesting about this claim, though, is where that number comes from. The amicus

¹⁶⁹ Brief of the National Venture Capital Ass’n as Amicus Curiae in Support of Respondent at 11, *Ass’n for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. 2107 (2013) (No. 12-398) (citing Nat’l Venture Capital Ass’n, *Patient Capital: How Venture Capital Investment Drives Revolutionary Medical Innovation* (2007)).

¹⁷⁰ Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners Supporting Reversal at 15, *Smith v. United States*, 133 S. Ct. 714 (2013) (No. 11-8976) (citing Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010), available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17613>).

¹⁷¹ 133 S. Ct. 1351, 1354–55 (2013).

¹⁷² *Id.* at 1364 (citing Brief of the American Library Ass’n et al. as Amici Curiae in Support of Petitioner at 4, 15–20, *Kirtsaeng*, 133 S. Ct. 1351 (No. 11-697)).

brief cites to a *blog post*.¹⁷³ The blog is called “Metalogue,” and it is principally dedicated to posts about metadata—which makes the post about the number of foreign books in U.S. libraries seem a little out of place.

The post in question comes from a person named Ed O’Neill who works at the Online Computer Library Center (“OCLC”), a worldwide library cooperative organization. His post begins, “OCLC was recently asked to provide an estimate on the number of books held by US libraries that were published outside of the United States.”¹⁷⁴ The blogger does not specify who asked for the information, but it does not matter anymore because the very next post after O’Neill’s says the authors will no longer be updating the blog. It ceased to exist after the litigation ended.

O’Neill’s blog post is dated June 24, 2010—less than a year after the district court decision in *Kirtsaeng* that would eventually reach the Supreme Court. The timing could be a coincidence, but one is left to wonder whether the people who asked for the blog post from Ed O’Neill did so with an agenda in mind. At the very least, that is a question that would have been asked of him had he presented his facts as an expert witness subject to cross-examination.

Even if the idea of librarians blogging convenient facts for their cause does not cause one to lose sleep at night, citation to biased factual authorities posted on the Internet does not stop there. In 2010, the Supreme Court decided *Holder v. Humanitarian Law Project* in which it rejected a First Amendment challenge to a law that prohibits nonviolent “material support” to groups affiliated with designated terrorist organizations.¹⁷⁵ Writing for the majority, Chief Justice Roberts cites an amicus brief as part of his support for the claim that “[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups

¹⁷³ Brief of the American Library Ass’n et al. as Amici Curiae in Support of Petitioner at 12, *Kirtsaeng*, 133 S. Ct. 1351 (No. 11-697) (“Cumulatively U.S. libraries hold an estimated 200 million copies of foreign published books. Posting of Ed O’Neill to Metalogue: New Directions in Cataloguing and Metadata From Around the World, <http://community.oclc.org/metalogue/> (June 24, 2010, 8:29 AM).”).

¹⁷⁴ See Ed O’Neill, How Many “Foreign” Books Are in US Libraries?, Metalogue (June 24, 2010, 8:29 AM), <https://web.archive.org/web/20110706155135/http://community.oclc.org/metalogue/archives/2010/06/how-many-foreign-books-are-in.html> (accessed through the Wayback Machine). For an explanation of the Wayback Machine, see *infra* note 183.

¹⁷⁵ 130 S. Ct. 2705, 2712 (2010).

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to fund the purchase of arms and explosives.”¹⁷⁶ The brief comes from the Anti-Defamation League, a non-profit civil rights organization created “to stop the defamation of the Jewish people and to secure justice and fair treatment to all.”¹⁷⁷

Digging into the brief, one discovers the ADL’s principal support for this claim comes from a series of “fact sheets” that it authored and published on its own website.¹⁷⁸ The links provided for some of the fact sheets in the amicus brief are now broken (perhaps alarming for its own reason about the longevity of authorities relied on in Supreme Court decisions),¹⁷⁹ but archived versions can be found by researching the ADL website.¹⁸⁰

The ADL is a reputable organization that does important work, but it cannot be denied that the interest group has a stake in the enforcement of

¹⁷⁶ Id. at 2726 (alteration in original) (quoting the declaration of Kenneth R. McKune, an official from the U.S. Department of State) (internal quotation marks omitted) (also citing “Brief for Anti-Defamation League as Amicus Curiae 19–29 (describing fundraising activities by the PKK, LTTE, and Hamas)”).

¹⁷⁷ About the Anti-Defamation League, Anti-Defamation League, <http://www.adl.org/about-adl/> (last visited Sept. 15, 2014) (internal quotation marks omitted).

¹⁷⁸ Brief of the Anti-Defamation League as Amicus Curiae in Support of Petitioners at 20, 22, 29, *Humanitarian Law Project*, 130 S. Ct. 2705 (No. 08-1498). The brief cites three fact sheets that the ADL wrote and posted; they discuss three different terrorist organizations. See Hamas Fact Sheet, Anti-Defamation League (Jan. 30, 2006), http://archive.adl.org/main_israel/hamas_facts.htm; Kurdistan Worker’s Party (PKK), Anti-Defamation League, http://www.adl.org/terrorism/symbols/pkk_1.asp (last visited Sept. 15, 2014); Liberation Tigers of Tamil Eelam, Anti-Defamation League, http://archive.adl.org/terrorism/symbols/liberation_tigers_tel.asp (last visited Sept. 15, 2014).

A careful reader will observe that the ADL brief also relies on a State Department report about these terrorist organizations. The report, however, only supports the claim that these terrorist groups—specifically the PKK—maintain a “large extortion, fundraising, and propaganda network in Europe.” See Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, *Country Reports on Terrorism 2008*, at 307 (2009), available at www.state.gov/documents/organization/122599.pdf. The report does not mention money funneled from charities, which is the proposition the ADL (and subsequently the Chief Justice) seems to use the report to support.

¹⁷⁹ For other discussions about the longevity of web links in Supreme Court opinions, see Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996–2010)*, 15 *Yale J.L. & Tech.* 273 (2013); Adam Liptak, *In Supreme Court Opinions, Web Links to Nowhere*, *N.Y. Times*, Sept. 24, 2013, at A13.

¹⁸⁰ Of the three fact sheets, not all of them support the claim in the brief that money has been re-routed from terrorist groups and used for violent purposes. The closest the PKK fact sheet comes is the claim that the group “has extensive fundraising and propaganda operations throughout Europe, and often relies on violent crime for funding.” *Kurdistan Worker’s Party (PKK)*, *supra* note 178.

this law. The ADL website brags that the group “[a]ctively lobbied” for stronger laws to restrict support for terrorist groups.¹⁸¹ Indeed, the Congressional Record reflects this support. When introducing the bill that ultimately resulted in the “material support” language in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Senator Orrin Hatch said, “I was really pleased to see the help that we have had and the positive work that we got from the Anti-Defamation League. They deserve a lot of credit. They have been very, very concerned about this.”¹⁸²

The ADL seems hardly a neutral expert to generate fact sheets on whether charitable contributions to these groups actually do end up funding violence. And the dates of these fact sheets (created while the Ninth Circuit decision in the case was pending) open up the possibility that these fact sheets were created with the *Humanitarian Law Project* litigation in mind.¹⁸³

¹⁸¹ Recalibrating the Balance Between National Security and Individual Rights, Anti-Defamation League, http://archive.adl.org/Civil_Rights/national-security-and-individual-rights.asp (last visited Sept. 15, 2014). For an example of this lobbying, see Brief of the Anti-Defamation League as Amicus Curiae in Support of Defendants-Appellees, *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) (No. 98-56062). See also Recalibrating the Balance Between National Security and Individual Rights, *supra* (“ADL supported enactment of the PATRIOT Act in October 2001 because we firmly believed that law enforcement and intelligence officials needed additional tools to identify, track, and prosecute terrorists and their supporters, and to prevent future attacks.”); *id.* (“[ADL] actively lobbied for strengthening America’s anti-terror laws to enhance law enforcement’s ability to prevent terrorism and meet a real and present threat.”); *id.* (“[ADL] supported the ban on fundraising for designated foreign terrorist organizations, enacted as part of the Anti-Terrorism and Effect [sic] Death Penalty Act of 1996 (AEDPA), and has continued to file amicus briefs in successful litigation supporting the constitutionality of those aspects of the AEDPA.”).

¹⁸² 142 Cong. Rec. S3363 (daily ed. Apr. 16, 1996) (statement of Sen. Orrin Hatch). The next day, April 17, he said, “In the fundraising provisions, I might add that the [Anti-Defamation] League, and others of similar mind—and I am of similar mind—believe that our fundraising language is far superior in this bill than it was in the Senate bill. I know it is far superior. . . . As I have said, the Anti-Defamation League, AIPAC, and a whole raft of others that are concerned in this area, like the language in this bill much better than the language in the Senate bill.” 142 Cong. Rec. S3459 (daily ed. Apr. 17, 1996) (statement of Sen. Orrin Hatch).

¹⁸³ Only one of the ADL fact sheets referenced in the brief is dated at all (the Hamas fact sheet is dated January 2006), but some Internet sleuthing—specifically a program called the Wayback Machine that takes snapshots of websites over time and allows a user to look at archived versions of a website—reveals that the other two fact sheets date back to late November 2005. See Hamas Fact Sheet, *supra* note 178 (fact sheet dated January 30, 2006); Kurdistan Workers Party (PKK), Anti-Defamation League, https://web.archive.org/web/20130123121604/http://adl.org/terrorism/symbols/pkk_1.asp (fact sheet archived by the Wayback Machine on November 30, 2005); Liberation Tigers of Tamil Eelam, Anti-

An important disclaimer is in order. To be sure, some legitimate scientific research is funded by those with an interest in the results or is initiated because a forthcoming Supreme Court decision raises the issue's salience. Just because the punitive damages study was funded by Texaco, or the librarian blog post was solicited after litigation commenced, or the terrorism claim from the ADL fact sheets was generated by a motivated interest group to support a law it lobbied to enact, does not mean that these facts should be discredited per se.

But it is also hard to deny, as Rustad and Koenig put it over a decade ago, that manufacturing research for litigation purposes results in factual findings that are “designed to persuade rather than to inform the Court.”¹⁸⁴ There is an unavoidable conflict of interest. Much like the discount one gives to a corporate-sponsored “review” of a product advertised online, supposedly neutral data should be given a skeptical eye when it is motivated by those who are guided not by scientific objectivity but by “the ideology of advocacy.”¹⁸⁵

C. Amici Citing Authorities with Minority Views in Their Field

A final noteworthy trend of factual claims in amicus briefs is the presentation of an authority who holds a minority view in his field without revealing the countervailing evidence. Again, a helpful way to conceptualize this question is to contemplate whether this “testimony” would survive cross-examination had it been entered at trial.

Gonzales v. Carhart—the Court’s 2007 decision on partial birth abortion—provides a controversial example. Writing for the majority and acknowledging that he could “find no reliable data to measure the phenomenon,” Justice Kennedy wrote that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life

Defamation League, https://web.archive.org/web/20130123121628/http://adl.org/terrorism/symbols/liberation_tigers_tel.asp (fact sheet archived by the Wayback Machine on November 28, 2005). Again, it could be a coincidence, but it seems possible that these fact sheets were created with the *Humanitarian Law Project* litigation in mind. The district court decision enjoining the enforcement of the law (in part) was entered in July 2005, see *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005), meaning that the fact sheets were created and posted while the appeal to the Ninth Circuit was pending. This case has a long and complicated twelve-year procedural history involving several trips to the Ninth Circuit and the Ninth Circuit en banc. For a description of the highlights, see *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2714–16 (2010).

¹⁸⁴ Rustad & Koenig, *supra* note 6, at 100.

¹⁸⁵ *Id.*

they once created and sustained. . . . Severe depression and loss of esteem can follow.”¹⁸⁶ The authority he cites for this proposition is an amicus brief filed by Sandra Cano, the “Mary Doe” in *Doe v. Bolton*,¹⁸⁷ and 180 women who alleged injuries from abortions.¹⁸⁸

The relevant pages of the Cano brief, in turn, rely on the work of Dr. David Reardon to demonstrate what he claims are serious adverse psychological consequences that accompany a decision to have an abortion.¹⁸⁹ Dr. Reardon is a trained electrical engineer who holds a Ph.D. in bioethics from an unaccredited and now non-existent school in Hawaii.¹⁹⁰ He runs the “Elliot Institute,” which is a non-profit organization known for its anti-abortion advocacy. Since the early 1990s, Reardon has sought to anchor the pro-life movement in arguments that speak in terms of women’s regret:

After all, in God’s ordering of creation, it is only the mother who can nurture her unborn child. All the rest of us can do is to nurture the mother.

This, then, must be the centerpiece of our pro-woman/pro-life agenda. The best interests of the child and the mother are *always* joined—even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it.¹⁹¹

Dr. Reardon’s research has been the subject of much controversy. His work on the psychological harm caused by abortion has been consistently refuted by psychologists and psychiatrists, including groups such as the American Psychological Association (“APA”) and the American

¹⁸⁶ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

¹⁸⁷ 410 U.S. 179 (1973).

¹⁸⁸ *Carhart*, 550 U.S. at 159 (citing Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 22–24, *Carhart*, 550 U.S. 124 (No. 05-380)).

¹⁸⁹ Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 22, *Carhart*, 550 U.S. 124 (No. 05-380).

¹⁹⁰ Pacific Western University folded in 2006 after Hawaii sued it for making misrepresentations. See Press Release, Haw. Office of Consumer Prot., Pacific Western University (Hawaii) aka American PacWest International University (May 19, 2006), available at <http://archive.today/QQgS>.

¹⁹¹ David C. Reardon, *Politically Correct vs. Politically Smart: Why Politicians Should Be Both Pro-Woman and Pro-Life*, Post-Abortion Rev. (Elliot Inst., Springfield, Ill.), Fall 1994, available at <http://www.afterabortion.info/PAR/V2/n3/PROWOMAN.htm>.

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Medical Association (“AMA”).¹⁹² These psychologists have called Reardon’s work “misleading,” and against the weight of the rest of the work in the field.¹⁹³

The other pages of the Cano brief on which Justice Kennedy relies collect the “testimony” of 180 women who have suffered emotionally after an abortion. The affidavits presented by the amicus brief were originally collected by a group called “Operation Outcry” and are “sworn” by virtue of a box checked on the group’s website when the online survey is completed by the user.¹⁹⁴ As Reva Siegel and others have observed, Operation Outcry has been hard at work promoting the woman-protective anti-abortion theory.¹⁹⁵ Siegel in fact credits Justice Kennedy’s citation to this amicus brief for a resurgence in this aspect of the anti-abortion political movement.¹⁹⁶ It is particularly important, she explains, because Congress did not consider this woman-protective rationale in passing the partial birth abortion law in question.¹⁹⁷

To be sure, this is a debate in psychology that is particularly charged politically. Regardless of how one feels politically on the subject, there are two relevant points for now: (1) Dr. Reardon’s research is a minority view in the field of psychology, and (2) by crediting it with a citation,

¹⁹² For a collection of authorities criticizing Reardon’s work, see Siegel, *Politics of Protection*, supra note 78, at 1719 n.81. See also Siegel, *The Right’s Reasons*, supra note 131, at 1681 nn.130–32 (explaining the position of the APA and AMA).

¹⁹³ See Brenda Major, *Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research*, 168 *Can. Med. Ass’n J.* 1257, 1257–58 (2003) (“[David Reardon and his colleagues] report that subsequent psychiatric admission rates were higher for women who had an abortion than for those who delivered. . . . This conclusion is misleading. . . . It is inappropriate to imply from these data that abortion leads to subsequent psychiatric problems. . . . The findings of Reardon and colleagues are inconsistent with a number of well-designed earlier studies. . . . All of these studies concluded that the emotional well-being of women who abort an unplanned pregnancy does not differ from that of women who carry a pregnancy to term.”).

¹⁹⁴ Brief of Sandra Cano et al., supra note 189, at app. 11–106. The form in question is available on Operation Outcry’s website. Declaration: How My Abortion Affected Me, Operation Outcry, <http://www.operationoutcrystories.org/declaration> (last visited Sept. 15, 2014). A user filling out the form is asked to check a box “authorizing” an amicus brief to be filed on her behalf.

¹⁹⁵ Siegel, *The Right’s Reasons*, supra note 131, at 1642–47.

¹⁹⁶ *Id.* at 1648, 1650–51.

¹⁹⁷ *Id.* at 1642 & n.8.

Justice Kennedy actually affected the research and reinvigorated this avenue of study.¹⁹⁸

The *Carhart* example exposes a question that lurks in the background of the entire amicus fact-finding process: Who should the Court trust to represent science (or history, or statistics, or [fill in the blank])? Is the Court limited to the experts whose testimony is in the record? Should the Court evaluate on its own the methodologies of the scientific opinions presented by amici? Should only the institutional organizations—the American Psychological Association, the American Medical Association, and so forth—be allowed to represent the position of a scientific field as an amicus?

These questions are not merely theoretical. They animate a current debate, for example, among sociologists following an amicus brief filed in the 2011 Supreme Court case, *Wal-Mart Stores v. Dukes*.¹⁹⁹ *Dukes* was a large class action lawsuit that claimed gender discrimination at Wal-Mart. At trial the plaintiffs had hired an expert sociologist, Dr. William Bielby, to help establish commonality among the members of the class.²⁰⁰ Dr. Bielby used something called a “social framework analysis” to assert that the organizational culture of Wal-Mart (largely the discretionary and subjective features of its promotion policy) made the company particularly vulnerable to gender bias.²⁰¹ Bielby’s report (which of course was contested by Wal-Mart at trial) was critical to the main issue in the case—whether a large group of women over a vast geographic area had enough common features to be certified as a class.²⁰²

What is interesting for present purposes is what happened after the Supreme Court granted certiorari in the case. The American Sociological Association (“ASA”) filed an amicus brief backing up Dr. Bielby (who, perhaps coincidentally, was a former president of the ASA).²⁰³ In its

¹⁹⁸ Id. at 1648 (“Until the Court’s decision in *Carhart*, the rise of gender-based antiabortion arguments was barely noticed in the mainstream press or by scholars outside the public health field.”).

¹⁹⁹ 131 S. Ct. 2541, 2547 (2011).

²⁰⁰ *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 601 (9th Cir. 2010) (explaining the district court proceedings).

²⁰¹ Id.

²⁰² Id. at 601–03.

²⁰³ Brief of the American Sociological Ass’n et al. as Amici Curiae in Support of Respondents at 9, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Profile of William T. Bielby, Am. Sociological Ass’n, http://www.asanet.org/about/presidents/William_Bielby.cfm (last visited Sept. 15, 2014).

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brief, the ASA assured the Court that Bielby's methods are commonly used among sociologists generally.

This amicus brief stirred up a hornet's nest of controversy among sociologists.²⁰⁴ Some scholars, like Professor Christopher Winship, a sociology professor at Harvard, and Professor John Monahan, a psychologist and law professor at the University of Virginia, said that the ASA was wrong.²⁰⁵ They claim Dr. Bielby went outside the field of sociology and misused the social framework analysis (originally invented by Monahan and his colleague Professor Laurens Walker) by applying it to a specific context. When Bielby testified about Wal-Mart's specific policies, they claim, "[he] made a conclusion that he had no basis to make."²⁰⁶ Other sociologists, like Professors Melissa Hart and Paul Secunda, support the ASA brief and the use of social framework analysis in specific contexts presented by litigation. They claim that Walker and Monahan "seem to suggest that their coining of this phrase gives them a unique right to define the terms and content of expert testimony offered in employment discrimination cases."²⁰⁷

The interesting part of this dispute, to me, is that there is no uniform "sociologist position" on a foundational question of sociologist methodology, that is, when the social framework analysis is appropriately used. Reputable players in the field disagree. It is interesting to ask whether institutional actors—like the ASA here or the APA in the *Carhart* example—should have an umpiring role to play in their fields. One can imagine institutional reasons the ASA may have for filing this brief—to strengthen the role of social science in litigation, perhaps. Should that bias disqualify it from claiming to be representative of the scientists in the field?

Perhaps, then, the better alternative is to educate the Court as best we can on all the positions in any field on any one question and let choosing sides be a judicial prerogative. This, I think, may be too much to demand

²⁰⁴ For a good synopsis of the controversy, see Christopher Winship, What Is Required of Science? The ASA Amicus Brief in *Wal-Mart v. Dukes*, 40 Soc. Methods & Res. 551, 555–56 (2011).

²⁰⁵ John Monahan, Laurens Walker & Gregory Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," 94 Va. L. Rev. 1715, 1745 (2008) ("Dr. Bielby's testimony in *Dukes* departs from our conception of a social framework . . .").

²⁰⁶ Walker is quoted in the *New York Times*. Adam Liptak, Supreme Court to Weigh Sociology Issue in Wal-Mart Discrimination Case, N.Y. Times, Mar. 28, 2011, at A17 (internal quotation marks omitted).

²⁰⁷ *Id.* (internal quotation marks omitted).

from the judiciary, at least at the Supreme Court level. Consider once again the impact of the Internet. A judicial quest for one scientific answer to a question (if ever possible) is doomed from the start today. In the 2012–2013 Term alone, nearly 80% of cases (61 out of 79) generated amicus briefs submitted at least in part to educate the Court on a factual question.²⁰⁸ In this large pool of information and with the time constraints of litigation, it is little wonder that the Court may credit a minority view in a field without knowing it has done so.

Making things more challenging, many of these amicus briefs are also “mismatched” from author to subject matter—meaning that a group who is not an expert on the factual subject submits factual authorities to the Court anyway. It is one thing to accept blog posts from librarians on the number of particular types of books in libraries. It is quite another to accept psychological studies from an anti-abortion group on the risk of suicide in women who get an abortion. With this much information to choose from and hundreds of motivated actors presenting it through an advocacy lens, how is the Court supposed to discern minority views in a scientific field from mainstream ones? If even the sociologists cannot agree on what is “generally accepted” in their field, how can the Justices sort it out for themselves?

D. Where Is the Check from the Adversary Method?

Traditionally, the answer to the questions I have been posing is to point to the adversarial process as a check on amici. Amicus briefs (at the merits stage) are due 7 days after the brief is filed for the side the amici support (petitioner or respondent); the idea is for the respondent to respond to the petitioner and petitioner’s amici in his brief and to give the petitioner the final say (in response to respondent and his amici) in reply.²⁰⁹ Do not worry about unreliable studies or biased amicus authors, the argument goes, because the parties have an opportunity to respond and rebut them. While that answer may have been sufficient pre-1995, the Internet changes the game.²¹⁰

²⁰⁸ A further layer of complication is that, in many fields, the amicus participation is under-representative, meaning many important players do not file briefs to educate the Court. See Tai, *supra* note 11, at 838.

²⁰⁹ See Sup. Ct. R. 37(3)(a).

²¹⁰ Others agree that while fact finding outside party presentation is not new, the effect of the Internet is a game-changer. See Schauer, Decline of “The Record,” *supra* note 53, at 55–56.

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As others have noted, “Legal information is transforming from a stable universe of settled sources into a free-for-all of competing authority.”²¹¹ For Supreme Court advocates today, mastering “the record” means endless Internet research. The Justices are often unpredictable in terms of what factual questions will ultimately be important, and what sources they will use to answer them.

Consider the odd strategic position of a Supreme Court advocate when an amicus presents a shady factual authority to support the other side. On the one hand, there is an instinct to rebut the authority and counteract it with resources supporting your client’s position. On the other hand, drawing attention to that one amicus brief in a sea of amici might be worse than ignoring it and hoping the needle gets lost in the haystack. Particularly when one has limited words for briefing, and without knowing whether the source will attract the Court’s attention, it may be too risky to spend ink on what you might consider to be a minor issue from a fringe player.

Indeed, this strategic bind may explain why relatively few of the amicus-provided facts that make it into Supreme Court opinions are contested by the parties. In my research, recall, there were 124 Court citations to amicus briefs for factual claims in the last 5 years. I tracked the briefs in those cases to see what sort of a check the adversary system provided. Of those 124 factual claims, only 35 of them were contested in the briefs by either party (28%), and only 33 of them were contested by another amicus (approximately 25%). This is a surprisingly low rate of response from the adversary system, which is supposed to provide a check on faulty evidence.

This amicus factual information, remember, is presented to the Court at the eleventh hour of litigation—after the record is closed and after the experts have been called. The only check the adversarial system has left to perform is in the Supreme Court briefing. The low rate of response for these claims (among parties and other amici) indicates that the adversarial system is not functioning as the sort of safety net we assume it will be. Indeed, it is catching virtually nothing.

In another time, when amicus participation was low and legislative facts were less important to the Court’s decisions, it was perhaps perfectly reasonable to rely on the advocates to police the factual authorities

²¹¹ Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 *Calif. L. Rev.* 1673, 1675 (2000).

presented to the Court. Now, however, the amicus machine is too big, and the field of possible authorities is too vast for the parties to be able to keep up.

IV. PROCESS-BASED OBJECTIONS

The U.S. Supreme Court is the only American judicial entity that depends so heavily on amicus briefs to educate itself on factual matters. In a trial court, of course, assertions of fact typically come from experts who are cross-examined and subject to the *Daubert* test for reliability.²¹² State supreme courts, interestingly, do not treat amicus briefs with the same respect they are afforded in the U.S. Supreme Court. As noted above, state courts cite amici at a significantly lower rate than does the U.S. Supreme Court, and state amicus briefs are almost never cited for factual claims.²¹³ Lower federal courts are also not moved to consult “expert amici” on questions of fact. As documented by Professor Linda Sandstrom Simard, the citation counts are low even in the courts of appeals, and surveys indicate most judges outside the Supreme Court find this additional fact finding outside the record to be improper.²¹⁴

The fact that the Supreme Court’s modern amicus process is unique in our judicial system should make us pause to consider why. The answer, I think, involves changes in the Court’s decision-making strategy and institutional objectives. These changes emphasize facts but de-emphasize conventional fact-finding reliability checks. The combination of these two developments is procedurally troubling.

The Supreme Court has made subtle changes in the way it operates over the past ten years, and scholars have taken note. Put simply, the shift is away from dispute resolution and towards law declaration.²¹⁵ In the words of Professor Henry Monaghan, the old adjudicatory model of the Supreme Court—one that “focuses upon the actual dispute between the litigants”—has been overtaken by an “emphasis . . . on the judicial role in saying what the law is, . . . not centered on the rights of the litigants.”²¹⁶ He notes several indicators of the shift, including the Court’s

²¹² *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

²¹³ See *supra* notes 115–16 and accompanying text.

²¹⁴ Simard, *supra* note 6, at 686, 695.

²¹⁵ See Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. Chi. L. Rev. 859, 863 (2013); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 680 (2012).

²¹⁶ Monaghan, *supra* note 215, at 668.

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recent tendency to inject questions presented into a case, to use the party stipulations strategically and reach the issues it wants to reach, and to appoint an amicus to defend a judgment when the parties decline to do so. Collectively, he says:

The Court is moving, not linearly, but noticeably, towards a jurisprudence in which only a relaxed case or controversy doctrine, a weakened final judgment rule, and the adequate and independent state ground doctrine restrict the Court's authority to fully and effectively superintend the judicial system on matters of federal law.²¹⁷

This transformation, Monaghan says, is likely inevitable since “[t]he Court’s current place in our constitutional order distinguishes it in kind, not in degree, from other courts.”²¹⁸ The Supreme Court is no traffic court, he says; it stands at the intersection of law and politics in a way that other courts do not.²¹⁹

This shift in emphasis is also apparent in the Court’s recent treatment of legislative facts. As the Supreme Court shrinks the number of cases it agrees to hear every year, there is an increased focus on generalized facts as opposed to case-specific and record-specific ones. In her article *The Adversarial Myth*, Brianne Gorod has noted this phenomenon and spotted the tension between the Court’s commitment to the adversary process and its routine reliance on amicus briefs to answer questions of fact.²²⁰ She argues that although courts “may tout the importance of adversarialism and maintain that they rely on proper parties to develop the factual record, courts often fail to practice what they preach.”²²¹ Specifically, legislative facts are “let loose,” she says, and have come to play an increasingly vital role in the Supreme Court’s decision making.²²²

By setting its own “agenda” (in Monaghan’s words)²²³ and abandoning the “adversarial myth” (in Gorod’s words),²²⁴ the Supreme Court has

²¹⁷ Id. at 680–81.

²¹⁸ Id. at 684.

²¹⁹ Id. at 715, 720.

²²⁰ Gorod, *supra* note 2, at 37.

²²¹ Id. at 25.

²²² Id. at 40–43, 52–53. Gorod proposes “liberalizing standing doctrine when legislative facts are at issue. If courts are going to turn to nonparties for help in resolving disputes of legislative fact, it is better that they be brought into the process earlier so the factual claims they offer can be rigorously tested.” Id. at 2.

²²³ Monaghan, *supra* note 215.

²²⁴ Gorod, *supra* note 2.

acquired a new freedom to shape the disputes it decides and to select the evidence it uses to decide them.²²⁵ In this way, the Court behaves somewhat like an administrative agency proceeding by notice-and-comment rulemaking under Section 553 of the Administrative Procedure Act: It announces a notice of proposed rulemaking (the certiorari grant), lets interested parties comment (by amicus briefs), and announces its decision defended by a statement of basis and purpose (the opinion).

Professor Rebecca Haw has made this analogy explicitly in the context of antitrust cases. She noticed that the Supreme Court was relying on amicus briefs to supply economic information and economic reasoning necessary to interpret the Sherman Act.²²⁶ “[M]aking law under the Sherman Act differs from deciding typical common law questions,” she says, and “demands technical and quantitative reasoning” the Justices are ill-equipped to handle on their own.²²⁷ Filling the void are interested amici; they advise the Court just like interested industry members make comments to advise an administrative agency in rulemaking.²²⁸

To me, this comparison is not a flattering one. There are serious reasons to fret about comparing the Supreme Court to an administrative agency, particularly when it comes to fact finding. Agencies and courts are created for different purposes, are designed to handle facts in different ways, and derive their legitimacy from different sources.²²⁹

Agencies are creatures of statute, typically charged to blend adjudication with rulemaking powers. Legislative facts are thus essential to and openly part of their mandate—their reason for existing. Indeed, recall that the original use of the phrase “legislative fact” came from Kenneth Culp Davis in a seminal article about administrative law. Davis named

²²⁵ For a corollary to this argument, see Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *Colum. L. Rev.* 1093, 1094–95 (1987).

²²⁶ Haw, *supra* note 45.

²²⁷ *Id.* at 1248. Professor Haw's insight extends beyond the antitrust world she describes. As documented above, the Court relies on amicus “experts” to answer all sorts of factual and technical questions about the way the world works—from standard police practices to the impact of copyright restrictions to questions of common terrorism ploys. See *supra* Part II.

²²⁸ Professor Haw suggests going all the way and creating an administrative agency to make Sherman Act rules in the first place rather than relying on unreviewable amicus briefs. *Id.* at 1249.

²²⁹ For a contrary position, see Abramowicz & Colby, *supra* note 6, at 965, 969 (arguing in favor of educating generalist courts on highly technical matters in the spirit of notice-and-comment rulemaking); *id.* at 987 (claiming that “amicus briefs have proven to be quite helpful” in this matter).

these unique types of facts “legislative facts” because they relate to the agency’s legislative-like role: “The ingredients of all lawmaking have to be policy ideas and facts, but the policy ideas are necessarily dependent, immediately or remotely, on facts.”²³⁰

Administrative agencies and courts are set up to process legislative facts in very different ways. To begin with, agencies are typically staffed by people with expertise in the factual area (drugs, economics, environmental toxins, and so forth) relevant to the decisions they are tasked with reaching. Indeed, a principal justification for the very existence of administrative agencies is that they inject factual expertise into policy making in a way that legislators, acting alone, are unable to do.²³¹

Judges cannot provide this same expertise. American judges are generalists, appointed without regard to training outside the law.²³² If a judge has an outside familiarity with neuroscience, or endangered species, or terrorism threats, or another type of relevant legislative fact that aids him in resolving a dispute—that additional knowledge is pure coincidence. Indeed, it may not be a happy one. Neutrality and the absence of pre-existing bias is seen as a virtue of the judiciary: It ensures “[c]lear heads” and “honest hearts,” which Chief Justice Roberts recently reminded us are the very hallmarks of Article III judges.²³³

Further, agencies and courts educate themselves on facts in very different ways. When an agency decides to take an action involving a legislative fact (the long-term health effects of asbestosis, for example), it solicits reports and opinions from within and outside the industry it regulates. The number of comments submitted to an agency while it contemplates a rule varies considerably.²³⁴ Some proposed rules do not attract many comments at all, but major rulemaking endeavors have generated over 100,000 comments, with various participants from businesses and public interest groups.²³⁵ By contrast, although amicus

²³⁰ Kenneth Culp Davis, *Facts in Lawmaking*, 80 *Colum. L. Rev.* 931, 931 (1980); see also Davis, *supra* note 2, at 402–03.

²³¹ James M. Landis, *The Administrative Process* 23–24 (1938).

²³² Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 *Sup. Ct. Rev.* 267, 269.

²³³ *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (alteration in original) (citation omitted) (internal quotation marks omitted).

²³⁴ See Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 *Admin. L. Rev.* 77, 82 (2013).

²³⁵ See *id.*

submissions are up dramatically, the numbers pale in comparison to comments that can be received by an administrative agency. The healthcare decision in 2012 holds the record for the most amicus briefs submitted ever in a Supreme Court case, but even that number was just 136.²³⁶

The Court and an agency also differ dramatically in the way they participate in the evidence-gathering process. As factual evidence is submitted to an agency during the comment period, the agency can be an active participant in soliciting more information or shaping the inquiry going forward. It can highlight the significance of a particular study and ask for responses from others,²³⁷ it can revise the proposed rule (as long as it does so publicly) in reaction to new information, and it can extend the time for comments.²³⁸

A court, however, is necessarily reactive rather than proactive. As Professors Neal Devins and Sai Prakash have argued, “Article III’s embrace of the adversarial model is core to the judicial function.”²³⁹ It violates a norm for an American court to actually solicit a legal opinion or to look beyond the factual record created by the parties.²⁴⁰ Even when courts are authorized to do it (for example, when authorized to appoint expert witnesses on their own), “judges rarely do so for fear that such appointments might ‘inappropriately deprive the parties of control over the presentation of a case.’”²⁴¹

The agency also enjoys a luxury of time that the Court does not. The length of time between a notice of proposed rulemaking and the ultimate

²³⁶ Greg Stohr, Record Number of Amicus Briefs Filed in Health Care Cases, Bloomberg (Mar. 15, 2012, 12:55 PM), <http://go.bloomberg.com/health-care-supreme-court/2012-03-15/record-number-of-amicus-briefs-filed-in-health-care-cases>.

²³⁷ See, e.g., *Bldg. Indus. Ass’n of Superior Cal. v. Norton*, 247 F.3d 1241, 1245–46 (D.C. Cir. 2001) (noting that the agency relied on one particular environmental study and explaining that “[t]he APA generally obliges an agency to publish for comment the technical studies and data on which it relies”).

²³⁸ Courts forbid an agency from adopting a rule that is not a “logical outgrowth” of the proposed one, but in doing so they try to allow flexibility for the agency to adapt rules to new information. See Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 *Admin. L. Rev.* 213, 214, 217 (1996). Agencies are generally permitted leeway to extend the comment period when necessary. See Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking* 252 (5th ed. 2012) (“Even when a shorter comment period is allowed, the agency may extend the period for comment where a legitimate request for extension has been received.”).

²³⁹ Devins & Prakash, *supra* note 215, at 887.

²⁴⁰ *Id.* at 862.

²⁴¹ *Id.* at 887.

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rule can vary (one recent study estimates the average is around a year and a half), but the agency is not burdened by the time constraints of litigation.²⁴² It finishes its factual education when it wants to. The Court is not so lucky. For example, when the Supreme Court decides to evaluate neuroscience studies for the purposes of evaluating a First Amendment challenge to a law banning violent video games for children, it operates under a deadline—namely, the end of the Term in June.

These differences are even more stark when comparing agencies to appellate courts (as opposed to district courts). In theory, at least, trial courts are structured to admit evidence on facts relevant to the dispute. Certainly this works well for adjudicative facts (What time did the victim die? What type of gun was used?), but it also works for generalized legislative facts. Through competing expert witnesses, for example, and strict standards on what evidence is admissible, trial courts educate themselves on medicine, social science, and empirical data in a way that still preserves the ability to spot holes and sniff out unreliability.²⁴³

Appellate courts, however, are in a different position. Legislative facts need not be established at trial. As I have explained, evidence on these facts comes in through briefs at the very last minute of litigation. When the Supreme Court uses amicus briefs in this way, it is bypassing the procedural safeguards that exist at the trial level, and evaluating the studies marshaled by the amici on its own, largely without even a check from the parties and under a tight deadline.

One solution, therefore, to the problems highlighted in this paper is for the Court to stop acting like an agency and to discipline itself from relying on legislative facts so much. Arguably, the use of legislative facts in the Supreme Court's decisions gives them the feel of objectivity and pragmatic flexibility, but, as I hope I have demonstrated, that feel can be an illusion.

²⁴² See Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 *Tex. L. Rev.* 1701, 1708 (2008). There are a growing number of voices in administrative law expressing concern about the clunkiness and “ossification” of this fact-finding process. See Sidney Shapiro & Richard Murphy, *Public Participation Without a Public: The Challenge for Administrative Policymaking*, 78 *Mo. L. Rev.* 489, 499–500 (2013).

²⁴³ Justice Scalia has made this point before, arguing that factual development should occur in trial courts, and not in Supreme Court briefs: “An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies’ findings on faith, without examining their methodology at all.” *Sykes v. United States*, 131 S. Ct. 2267, 2286 (2011) (Scalia, J., dissenting).

Reasonable minds can differ, however, on whether the shift of the Supreme Court away from dispute resolution and towards more generalized fact-laden rulemaking is a good thing. On the one hand, if the Court is going to take fewer cases every year and make rules that extend beyond the parties before it to offer guidance to everyone, we are better served if it does not limit itself to the facts these random people litigating choose to emphasize.²⁴⁴ Concrete cases “are more often distorting than illuminating,” as Fred Schauer puts it,²⁴⁵ and factual authorities thought important by these parties may change or not adequately reflect the situations faced by future parties in similar or related circumstances.

On the other hand, party control and the adversarial method have been around for a long time and comport with our more traditional notions of the judicial role. By abandoning them, the Court also abandons many of the virtues of the adversary system—including the fact that “adverse parties [are] supposed to ensure that courts do not exceed their limited role in a democratic society” and make general rules of policy.²⁴⁶

In any event, even assuming one believes it is a good thing for the Court to act like an administrative agency when it comes to processing facts, there is a further process-based objection that must be addressed. What we have now is a mismatch: a body engaged in something like agency rulemaking but without agency procedural safeguards. Or, if you like, we have a court seeking expert testimony without any limits on the evidence these experts can bring.

The result is a procedural mess: unregulated factual claims coming in by interested parties without transparency (either as to their ultimate source or as to why they are selected by the Justices) and without rebuttal. There is no chance for quality control. The Court should not be using old court-educating tools like the amicus brief to address a new volume of legislative fact questions à la an administrative agency. It is here, thankfully, that analogies to other fact-finding institutions can do some real work.

²⁴⁴ See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 *Cornell L. Rev.* 1, 21–26 (2009); Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. Chi. L. Rev.* 883 (2006) [hereinafter Schauer, *Bad Law*].

²⁴⁵ Schauer, *Bad Law*, *supra* note 244, at 884.

²⁴⁶ Gorod, *supra* note 2, at 15.

V. WHAT'S NEXT? SUGGESTIONS FOR REFORM

Assuming the current Supreme Court amicus process is worrisome (at least for its role in factual questions), the “compared to what?” question immediately arises. One possible solution is to limit amicus briefs and permit only those that offer arguments on questions of law. Another possibility is to let the Justices fend for themselves on the facts, and research these questions on their own. I do not think that the second option is wise (for reasons I have discussed before),²⁴⁷ nor do I think the first restriction is necessary, particularly in light of the value such factual briefs appear to add at times (at least according to the majority of commentators and Justices).

There is another way. Other areas of the law—specifically the law surrounding expert witnesses at trial and administrative law addressing notice-and-comment rulemaking—have evolved over the years to address many of the same reliability and transparency problems that I have highlighted in the Supreme Court amicus process. To reform the latter, it makes sense to apply the well-developed procedural safeguards from the former. I address four rules that come from either administrative law or the law of evidence and recommend applying those quality control safeguards to the Supreme Court rules of procedure.

A. Limiting the Number and Scope of Expert “Witnesses”

When a trial court is educating itself (or a jury) on a generalized factual matter relevant to a pending dispute, it often does so through an expert witness.²⁴⁸ But the court does not generally open itself up to briefing by any so-called expert who can find the courthouse steps. Rather the rules of evidence have developed a gatekeeping system whereby the court will screen out unreliable expert testimony.

The landmark decision on this is *Daubert v. Merrell Dow Pharmaceuticals*, wherein the Supreme Court announced that the trial court must serve as a quality control screen on expert testimony for the fact finder.²⁴⁹ Now, Federal Rule of Evidence 702 codifies *Daubert* and declares that all proffered expert testimony on “scientific, technical, or

²⁴⁷ Larsen, Fact Finding, *supra* note 2, at 1291.

²⁴⁸ To be sure, a court need not admit expert testimony on a question of legislative fact. As explained above, the limits on judicial notice do not apply to legislative facts, and so a trial court is permitted to make a finding of legislative fact without the help of an expert witness.

²⁴⁹ 509 U.S. 579, 592–93 (1993).

other specialized knowledge” must convince the judge of three things: (1) “the testimony is based on sufficient facts or data,” (2) “the testimony is the product of reliable principles and methods,” and (3) “the expert has reliably applied the principles and methods to the facts of the case.”²⁵⁰

There are several ways this quality control measure could be imported to the Supreme Court’s amicus rules. First, the Court could limit the number of amicus briefs filed with new extra-record factual information. This would not require the Justices to decide who is in and who is out. Recall the Supreme Court Rules require party consent to file amicus briefs at all. Although now this consent is freely given, that was not always the case. At one time the Court even encouraged the Solicitor General to deny consent to the filing of amicus briefs.²⁵¹

The Court could entrust the parties to police which groups are permitted to convey expertise on their behalf. This would give the parties an incentive to give their blessing only to the one or two amici with the most reliable information. It would also enable more scrutiny on the factual claims these limited amici present.

With fewer briefs to examine, the party control and check would also be more engaged. The current system puts the party lawyers in a strategic bind, for the decision to contest a factual claim by an amicus also risks drawing attention to that brief in a sea of many briefs. If there were only one or two factual briefs on each side, however, the strategic awkwardness is removed and the parties would feel free to respond to the claims made by the other side’s experts, much like a lawyer would behave cross-examining such a witness at trial.

A second alternative along these lines is that the Court could impose a rule forbidding any amicus brief presenting factual claims from adding accompanying legal argument. Again this reform comes straight from the law of evidence.²⁵² There are strict limits on expert witnesses offering opinions on the law or generally opining on the case’s outcome. The idea of course is that this legal commentary detracts from the status of

²⁵⁰ Fed. R. Evid. 702.

²⁵¹ See Caldeira & Wright, *supra* note 41, at 784 n.3.

²⁵² See, e.g., Hygh v. Jacobs, 961 F.2d 359, 364 (2d Cir. 1992); *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 709 (2d Cir. 1989); *FAA v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983).

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the expert as a neutral advisor, and that it oversteps what is the value and point of an expert witness in the first place.²⁵³

Applying this rule to the amicus process would stem the factual arguments that currently come from the pens of the amicus lawyers rather than from the technical experts themselves (presumably the clients). Of course there is nothing preventing these groups and their counsel from framing factual submissions in a light sympathetic to the side they want to win.

But even so there is still an advantage to divorcing factual claims from legal argument. Because the secret is out that the Justices value briefs that supplement their technical knowledge, the vast majority of amicus briefs stretch to make these factual claims—even if it is beyond their institutional capacity to do so. If the Court forbade factual briefs from making legal arguments, these advocacy groups would face a choice: either present new information for the Court to consider, or make a pitch to get the Court to rule your way. Not both.

This reform would serve to discourage all advocacy groups from jumping in the factual pool and claiming to be experts. Presumably, some advocacy groups write amicus briefs in order to show value to their constituency. Given the choice between weighing in on a policy debate or adding facts to the record, these groups might choose the former. The consequence is a narrowing of the number of factual experts vying for the Court's attention and the allowance of more scrutiny for the Justices (and their clerks) to fact check.

B. Transparency of Data Submitted and Methods Used

Also in the spirit of *Daubert*, the Court could decline to accept any amicus brief filed with factual claims that are not backed up with an explanation of the methods used to discover them. Perhaps it is unrealistic that the Justices (or their clerks) would go through the methods employed by each amicus and evaluate them, but even just having the re-

²⁵³ See, e.g., *Hygh*, 961 F.2d at 364 (“Even if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard—explicit or implicit—to the jury. . . . Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury.” (citations omitted)). For other judicial comments expressing the same point, see *Andrews*, 882 F.2d at 709; *Landy*, 705 F.2d at 632.

quirement at all would serve as a barrier to entry for advocacy groups that do not use rigorous methods for finding their facts.

The Court could easily impose even minor variations of this reform. It could, for example, require that any statement of fact in an amicus brief be supported by data that is publicly available (not “on file with” the author). Or, the Court could require disclosure when an amicus (or a related group) funds or authors a study purporting to establish a factual claim. Although the current Supreme Court Rules require disclosure of who financed a brief, they do not require disclosing who paid for any particular study, “working paper,” “fact sheet,” blog post, e-mail, or whatever authority on which the amicus relies to support its factual assertion.

Alternatively, perhaps the Supreme Court Rules could create a limited way for the parties to respond to unreliability in factual claims. The Court could permit a limited letter at the end of the amicus submissions in which the parties can respond—not to legal arguments—but only to instances where they think the amicus has relied on a shady authority for a claim of fact.

Recall that the rate of response from the parties to the claims of fact presented by amici and ultimately relied on by the Justices is surprisingly low. The adversary system is currently providing only the very weakest of checks on amici fact finding. It is virtually ineffective. As the number of amici grow and the pool of factual data expands, something needs to be done to rehabilitate the check from the adversary method. Even the threat of a response (one that does not take away from the word limits the parties have to reply to the legal arguments) may discourage amici from relying on questionable authorities.

C. Factual Issues Should Be “Adequately Flagged” in Advance

A third quality control safeguard available to reform the amicus process comes from administrative law and could be accomplished by a relatively simple act of the Court.

The Administrative Procedure Act requires that an agency give “[g]eneral notice of proposed rule making,” including “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”²⁵⁴ Over the years, the D.C. Circuit has interpreted this rule to require that the agency adequately flag whatever rule it is likely

²⁵⁴ 5 U.S.C. § 553(b) (2012).

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to adopt.²⁵⁵ This includes requiring the agency to disclose any statistical evidence or other materials that influenced its proposal rule.²⁵⁶ As a corollary, the rule also prohibits an agency from adopting a rule that is not a “logical outgrowth” of the notice.²⁵⁷

The reasons for these rules are well known. After the notice, interested parties are given a chance to comment on the agency’s proposal. If the notice fails to provide an accurate picture of the reasoning motivating the agency’s thinking—including the factual basis for its proposal—the comment period will become meaningless. The fear is that the industry members will not know what criticisms and what factual information to present and then the agency will operate with a mistaken or lopsided view of the issues at stake.²⁵⁸

There is a feature of Supreme Court decision making that is analogous to the notice of proposed rulemaking. As Professor Kathryn Watts has observed, when the Court grants certiorari to hear a case, it is acting similarly to an administrative agency—that is, it is exercising a congressional delegation of discretion to engage in policy making.²⁵⁹ Watts proposes applying administrative law principles to the certiorari process; she suggests public disclosure of the votes and required reason-giving at the certiorari level.²⁶⁰

I propose a different lesson from administrative law to apply to the certiorari grant—one to help reform the Court’s use of the amici as expert witnesses and the subsequent unreliable “evidence” admitted. The Court could ensure that the factual questions relevant to the case are dis-

²⁵⁵ See, e.g., *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1140–41 (D.C. Cir. 1995) (invalidating a rule that was foreshadowed in the notice of proposed rulemaking only in a footnote).

²⁵⁶ See Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 *Fordham L. Rev.* 3339, 3354 n.72 (2013).

²⁵⁷ See, e.g., *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (defining “logical outgrowths” to be confined to situations where interested parties can anticipate that the relevant change was possible); *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1081 (D.C. Cir. 2003) (similar); see also Kannan, *supra* note 238 (discussing the impact of the logical outgrowth doctrine and adequate notice requirements on administrative rulemaking).

²⁵⁸ For thoughts on these rationales, see Boliek, *supra* note 256; Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 *Geo. Wash. L. Rev.* 1397, 1408 (2013).

²⁵⁹ Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. Pa. L. Rev.* 1 (2011).

²⁶⁰ *Id.* at 46–49.

closed in the certiorari grant. And, as a corollary, it could discipline itself not to rely on extra-record facts that were not flagged from the start.

As it currently stands, as Professor Stephanie Tai laments, the scientific community is actually under-represented in the Supreme Court amicus process.²⁶¹ She argues, specifically in the context of environmental law, that the “[p]resentation of information by scientists may reach certain Justices in ways that presentations by environmental advocates do not and cannot.”²⁶²

One way to encourage participation by groups who are more knowledgeable on technical matters and perhaps less biased in their presentation of them is to highlight the importance of the fact at the beginning of the process—that is, in the certiorari grant. Thus, for example, the Court could add a question presented announcing that it is interested in, say, the impact of violent video games on children’s brains or the rate of depression in women post-abortion. It can also highlight the source of the evidence in the record—from testimony before a legislature or experts at trial.

This signal could take one of several forms. The Court could appoint an amicus (or two) to specifically brief the fact they are interested in learning more about. Alternatively, it could appoint a special master to hear all the views submitted and act as a sorting mechanism for the Justices, screening out those factual claims that are unreliable. Or, at a minimum, the public announcement in the certiorari grant could highlight the importance of the fact and be enough alone to entice more reputable factual experts to enter the case.

Granted, some might argue that it is unnecessary for the Justices to “adequately flag” the factual issues they are interested in learning; everyone knows, the argument goes, when a factual issue is embedded in a legal one. Do we really need the Court to announce its intent to delve into neuroscience when the California law banning video games is specifically justified by the legislature that way?

But the same objection could be made in administrative law at some level, and yet agencies proposing a rule must still disclose the factual basis for their proposal. Why? At bottom, the beefed-up notice requirement is about ensuring that an agency makes an informed judgment: “to ensure that agency regulations are tested via exposure to diverse public

²⁶¹ Tai, *supra* note 11, at 793.

²⁶² *Id.* at 827.

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comment . . . [and] to ensure fairness to affected parties.”²⁶³ The same objectives could apply equally to the Supreme Court fact-finding process.

Perhaps the same reasons we force an agency to jump through procedural hoops apply with equal force to the Supreme Court when it is deciding cases with wide policy-making implications. A theme in administrative law is that more process at the front end makes better substantive decisions on the back end. A more detailed certiorari grant when legislative facts are looming would incentivize more reliable players to join the amicus process, would signal to the parties that they need to devote significant time to the issue, and, it is to be hoped, would prevent lopsided, unreliable, and untested information from unduly influencing the Court’s decisions.²⁶⁴

D. Requiring Response to Significant Counter Evidence

A final option would be for the Supreme Court to respond in its opinion to opposing factual claims, ones that—if true—would make the Court’s position untenable.

Once again this suggestion is taken from a page in administrative law. At the conclusion of notice-and-comment rulemaking, the APA requires that an agency justify its rules in what is called a “statement of their basis and purpose.”²⁶⁵ The D.C. Circuit has read this rule to require that an agency respond to every “significant” comment raised by interested parties during the comment period.²⁶⁶ This means the agency must respond to any comment “which, if true, . . . would require a change in [the] agency’s proposed rule.”²⁶⁷ The point, of course, is to make the com-

²⁶³ *Int’l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

²⁶⁴ I propose flagging the relevant legislative facts at the certiorari grant, but there is no reason the Court could not do so later in its decision-making process if it only discovers after the grant that it needs more information on a factual dimension of the case. At that point, the Court could ask for supplemental briefing. For a potential model of this reform, see Cal. Gov’t Code § 68081 (Deering 2011).

²⁶⁵ 5 U.S.C. § 553(c) (2012).

²⁶⁶ See *Reytblatt v. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997); *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990).

²⁶⁷ *Am. Mining Cong.*, 907 F.2d at 1188 (internal quotation marks omitted).

ment period meaningful, to facilitate an “exchange of views,”²⁶⁸ and to ensure “a more accurate foundation”²⁶⁹ for agency policy making.

Taking the analogy to the Supreme Court, this rule would require the Justices to acknowledge and explain away competing authorities for factual claims that may be dispositive to their decision. The point of the rule would be to push back on the natural tendency to cherry-pick the factual authorities that help an argument and ignore the inconvenient ones that do not. For example, this rule would prevent a Justice from citing the Reardon data in the *Carhart* amicus brief about post-abortion depression without acknowledging and explaining away the studies from other psychologists that seek to discredit it.

Certainly requiring the Justices to respond to “significant” opposing authority for factual disputes is an additional burden to place on the Court. But to the extent this seems like too much to ask, consider that the Justices already do this to some extent in at least one context. Rebecca Haw, in reviewing the Court’s treatment of amicus briefs in antitrust cases, notes that the Court “has spent more time discussing the amicus briefs on the losing side than on the winning side.”²⁷⁰ This, she says, “suggests that the Court feels an agency-like responsibility to consider all the perspectives before it.”²⁷¹

Of course I do not mean to suggest that the Court drop a footnote to consider an alternative factual claim before it uses a fact in a rhetorical flourish—as window dressing, or to tell a story. Even administrative law does not require the agency to respond to every comment made by an interested party. Rather, I suggest adopting the same standard that applies to an agency’s statement of basis and purpose: If the factual claim is so significant that the opposing assertion could change the Court’s result (which presumably must be a reason the Court is citing it to begin with), then I suggest it is not too much to ask to require that the Justices respond to opposing authority presented to them.²⁷²

²⁶⁸ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphasis omitted).

²⁶⁹ *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990) (internal quotation marks omitted).

²⁷⁰ Haw, *supra* note 45, at 1257 (emphasis omitted).

²⁷¹ *Id.*

²⁷² It is worth noting that this reform would work well in conjunction with the one previously mentioned—allowing the parties to respond in a limited way to amicus-presented authority.

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CONCLUSION

The amicus brief has served a valuable role over time in educating Supreme Court Justices and supplementing the arguments the parties can make. But times have changed. There is a new emphasis in Supreme Court decision making on generalized factual claims and a turn toward empirical factual support for legal arguments. There is also a brave new world of factual data that can be marshaled easily and quickly by any interested party that can call itself an expert. The Court seems hungry for factual information; it consumes it at a greater rate than the parties and the record can provide. But by turning to motivated interest groups to fill the need—and indeed relying on the amicus briefs themselves as evidence on factual claims—the Court risks tainting its decisions with unreliable evidence. It is time to rethink the expertise-providing role of the Supreme Court amicus, and to refashion this old tool for the new purpose for which it is currently being used.

APPENDIX

Citations to Amicus Briefs in Supreme Court Opinions, 2008–2013					
Total Citations to Amicus Briefs	606				
Citations for Statements of Fact	124	By Justice		By Subject	
		Ginsburg	13	Copyright	13
		Thomas	8	Constitutional Law	79
		Roberts	11	Voting Rights	2
		Breyer	20	Immigration	4
		Kennedy	21	Tax	5
		Alito	19	Medical or Pharmaceutical Research	18
		Souter	2	Healthcare	1
		Kagan	3	Campaign Finance	2
		Scalia	4		
		Stevens	3		
		Sotomayor	20		
Citations for Facts in a Majority Opinion	75				
Citations for Facts Without a Party Response	89				
Citations for Facts to Amicus Briefs Alone (not accompanied by a “see also” cite, a study, or an article)	76				
Citations for Facts to Answer Outcome-Determinative Questions	97				