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Picking Friends From the Crowd: Amicus Participation as Political Symbolism

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The modern process of amicus curiae participation is a form of political symbolism reflecting the Supreme Court's irreconcilable role in American democracy as a quasi-representative policy-making institution. Specifically, this political symbolism reassures the public, particularly vulnerable groups, of the Court's democratic character. Amicus participation dispels external public criticism that the Court is detached and indifferent to the public, without significantly undermining the Court's independence. Ultimately, the Court's institutional legitimacy rests upon the dual pillars of independence and inclusion. Amicus participation contributes significantly to the latter. Critics of the Court's current open door policy to amicus participation fear that the lack of additional constraints governing the submission of amicus briefs encourages partisan excess, promotes judicial activism, and unduly burdens the Court. However, the benefits to the Court and its multiple stakeholders outweigh these concerns. This Article builds upon the existing legal literature by (i) exploring amicus participation's value to multiple stakeholders, not simply the Court and (ii) highlighting the important link between amicus participation, political symbolism, and the Court's institutional legitimacy.

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Picking Friends From the Crowd: Amicus Participation as Political Symbolism

OMARI SCOTT SIMMONS*

I. INTRODUCTION

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.[1]

The separation of governmental powers and a system of checks and balances to counter autocratic abuses within any branch of government are at the heart of democratic tradition in the United States. In theory, the Supreme Court is expected to provide stability in the administration of justice ensuring some degree of both horizontal and vertical equity for the polity.[2] For many groups and entities, the courts are the best, if not the only, government branch capable of guaranteeing substantive and procedural justice to all.[3] For vulnerable groups, the court system, at least from a symbolic perspective, is the "great leveler."[4]

Unlike other branches of government, ascendancy to the Supreme

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[1] Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia J., dissenting).

[2] Horizontal equity is the equal treatment of equals. An example of this principle is seen in the equal protection context, which demands that similarly situated persons receive like treatment. *See generally*, U.S. CONST. amend. XIV. Vertical equity, on the other hand, is disparate treatment on account of legitimate differences. An example of vertical equity would be the heightened scrutiny afforded to racial and gender classifications in the equal protection context. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ("Our decisions . . . establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification.").

[3] *See* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 8 (Oxford Univ. Press 2000) (asserting that systems of representation are most inclusive when they encourage the "perspectives of relatively marginalized or disadvantaged social groups to receive specific expression"). Throughout this nation's history, the Supreme Court has played a critical role in securing justice for groups that held little legislative weight or where political realities constrained the other branches of government from acting. A vivid example is the Warren Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

[4] HARPER LEE, TO KILL A MOCKINGBIRD 218 (1960). For almost a decade, cases involving the 2000 presidential election, affirmative action, capital punishment, sodomy laws as well as potential Court vacancies have all kept the Supreme Court thoroughly immersed in political discourse. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 555–56 (2005); Lawrence v. Texas, 539 U.S. 558, 562, 566 (2003); Grutter v. Bollinger, 539 U.S. 306, 311, 313–14, 316 (2003); Bush v. Gore, 531 U.S. 98, 100–01 (2000).

Court is not conditioned upon electoral politics or constituency demands. The lifetime appointment of Justices, in theory, frees them from being accountable to any particular ruling regime or constituency.[5] Thus, pluralistic and partisan politics should play a limited role in judicial decision making. But, just how different is the Court from the legislative and the executive branches where organized interest groups mobilize to sway government outcomes?[6] Undoubtedly, certain institutional similarities exist.

The Supreme Court's role in American democracy manifests a tension between the Court's duty to adjudicate disputes between two parties, resolving the specific conflict before it, and its role to create law, settling disputes between circuits and answering novel legal questions. By definition, every question the Supreme Court answers is either of constitutional significance, unanswered, or a source of confusion or disagreement between courts.[7] A decision that says "party X prevails over party Y" simultaneously establishes victories and losses for others and implicitly affirms, provides further guidance, or overrules court decisions

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[5] *See* THE FEDERALIST No. 78 (Alexander Hamilton) (discussing the importance of permanent and independent judges in achieving and preserving justice).

[6] The debate surrounding the question of whether and/or how much politics affects judicial decision making is not new. Proponents of legal formalism argue that the Supreme Court is not inherently political or subject to interest group pressures that plague the other branches of government. Instead, they envision an objective judiciary that is constrained by legal doctrine. Legal realists, on the other hand, assert that ideology and contextual factors are a driving force behind judicial decision making, not simply doctrine. *See* Stewart Macaulay, *The New Versus the Old Legal Realism: 'Things Ain't What They Used to Be'*, 2005 WIS. L. REV. 365, 370 (2005) (providing a history of legal realism). Also, legal realists are most likely to contend that decision making is more about judicial activism as opposed to judicial restraint. Notwithstanding, judges, irrespective of political party affiliation, ardently refute the assertion that political ideology trumps adherence to doctrine. *See* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 229–30 (1999) (providing an empirical study of the effect of political ideology on judicial decision making). Tiller and Cross acknowledge a partisan component of judging at the federal circuit court level but also recognize that doctrine matters as well. Tiller and Cross are more concerned with eliminating the partisan component of judicial decision making. Accordingly, they identify particular instances where doctrine is most likely to matter and then propose that circuit panels be divided along party lines rather than being randomly selected. Tiller and Cross reason that the presence of a minority "whistleblower" has a disciplining effect on ideological decision making. Tiller and Cross's assertions have been challenged and, in some instances, mischaracterized by esteemed members of the U.S. Court of Appeals. *See* Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 235 (1999) ("Although judges, as human beings, cannot help but be influenced by their life experiences, it is not fair to say that political philosophy is the invisible hand guiding all or even most appellate decisionmaking."). For example, Harry T. Edwards former Chief Judge for the U.S. Court of Appeals for the D.C. Circuit, inaccurately dubbed Tiller and Cross's arguments as such: "Where the authors might have one believe that judging is entirely political, I maintain, and always have maintained, that appellate judging is fundamentally a principled practice." Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1337–38 (1998). Tiller and Cross, however, are not suggesting that judicial decision making is "entirely" political or unprincipled. This reluctance to acknowledge the potential of partisan influence on the part of the judiciary is perhaps because any admission that judicial decision making is partisan implies that the decision making process is impugned by bias.

[7] *See* SUP. CT. R. 10 (providing considerations governing review of certiorari); *see also* U.S. CONST. art. III (vesting the Supreme Court with judiciary authority).

on other cases. The Supreme Court cannot escape the reach of its decisions. It functions as a proxy for the entire judicial system. Although Supreme Court Justices are not elected like members of Congress, they nonetheless engage in law making. This institutional fact has led commentators to assert that the Supreme Court's legitimacy is inseparable from other governmental institutions in our society.[8] Therefore, it is not surprising that the Court seeks and accepts input from many sources—particularly in the form of amicus briefs.[9]

Justices cannot simply rely on the immediate case and the skill (or lack thereof) of the immediate parties. Decisions are published pronouncements that must reflect good law and policy.[10] The Court operates within a broader context of a "constitutional culture" that involves an ongoing conversation with non-judicial actors.[11] The modern process of

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[8] *See, e.g.*, Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 154 (1986) ("[T]he legitimacy of courts is inseparable from the legitimacy of other institutions of our society.").

[9] *See* BLACK'S LAW DICTIONARY 93 (8th ed. 2004) ("Amicus Curiae. . . . [Latin 'friend of the court'] A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.").

[10] Alexis de Tocqueville recognized this unique dilemma:

> The peace, the prosperity, and the very existence of the Union are vested in the hands of seven judges. Without their active co-operation the Constitution would be a dead letter: the Executive appeals to them for assistance against the encroachments of the legislative powers; the Legislature demands their protections from the designs of the Executive; they defend the Union from the disobedience of the States; the States from the exaggerated claims of the Union, the public interest against the interests of private citizens, and the conservative spirit of order against the fleeting innovations of democracy. *Their power is enormous, but it is clothed in the authority of public opinion. They are the all-powerful guardians of a people which respects law, but they would be impotent against popular neglect or popular contempt. The force of public opinion is the most intractable of agents, because its exact limits cannot be defined; and it is not less dangerous to exceed than to remain below the boundary prescribed.*

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 150 (Henry Reeve trans., Colonial Press 1900) (emphasis added); *see also* Linda Greenhouse, *What Got into the Court? What Happens Next?*, 57 ME. L. REV. 1, 7 (2005) ("But no great Supreme Court case is only a question of law."). De Tocqueville also believed that:

> Federal judges must not only be good citizens, and men possessed of that information and integrity which are indispensable to magistrates, but they must be statesmen—politicians, not unread in the signs of the times, not afraid to brave the obstacles which can be subdued nor slow to turn aside such encroaching elements as may threaten the supremacy of the Union and the obedience which is due to the laws.

DE TOCQUEVILLE, *supra*, at 150.

[11] *See* Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003) (noting that "constitutional law emerges from an ongoing dialectic between constitutional culture and the institutional practices of constitutional adjudication"). Public perception and the legitimacy of the court are valid concerns as the following comments illustrate:

> Indeed, the courts cannot do their job of fair and just adjudication of disputes without the trust and faith of the community, the bar, and even their own employees. The courts depend on the cooperation and participation of people from all three communities. If significant parts of those communities mistrust the impartiality of the courts, they will not provide the cooperation, participation, and support the system needs to function properly.
>
> It is not enough for the courts to be just; they must also be perceived to be just.

amicus curiae participation is a form of political symbolism reflecting the Court's irreconcilable role in American democracy as a quasi-representative policy making institution. Specifically, the political symbolism of amicus curiae participation reassures the public, particularly vulnerable groups, of the Court's democratic character. Amicus participation dispels external public criticism that the Court is detached and indifferent to the public, without significantly undermining the Court's independence. Ultimately, the Court's institutional legitimacy rests upon the dual pillars of independence and inclusion. Amicus participation contributes significantly to the latter.

Critics of the Court's current open door policy to amicus participation fear that the lack of additional constraints governing the submission of amicus briefs encourages partisan excess, promotes judicial activism, and unduly burdens the Supreme Court.[12] However, the benefits to the Court *and* its multiple stakeholders outweigh these concerns. Amicus participation has received significant scholarly treatment in the legal and political science literature. Most of this literature either attempts to

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> Otherwise, the courts lose legitimacy as dispute resolvers and instead may be perceived as irrelevant or, worse, as instruments of oppression. The courts must, therefore, do more than simply avoid legally actionable bias. They must make certain that members of the three communities believe both that the courts are fair and that they will be treated equally when they enter the courthouse.

Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 176 (1996).

[12] This risk is underscored by evidence and arguments presented in amicus briefs that have not been challenged through the litigation process and are not subject to the same evidentiary safeguards as the parties' briefs. In *Akins v. Federal Election Commission*, the D.C. Circuit expressed its disapproval of a Supreme Court action that relied on an argument presented by an amici and not the immediate parties:

> I recognize that the Supreme Court has moved pretty far from traditional notions of judicial restraint that confine courts to issues presented by the parties . . . but I think this decision represents another large step in that regrettable process insofar as it was an amicus—an amicus who had not appeared until the case reached the Supreme Court—who made the dispositive argument, one which was never once made before us.

Akins v. Fed. Election Comm'n, 146 F.3d 1049, 1050 (D.C. Cir. 1998); *see also* Jaffee v. Redmond, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting) (noting that no organizations seek the truth besides the Court); Philip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court O.T. 1982*, 50 U. CHI. L. REV. 628, 647 (1983) (asserting amicus briefs are "a waste of time, effort, and money in a useless function"). Judge Richard Posner cites three limited instances in which amicus submissions should be permissible: (i) where "a party is not represented competently or is not represented at all"; (ii) where "the amicus has an interest in some other case that may be affected by the decision in the present case"; and (iii) where "the amicus has unique information or perspective that can help the court beyond the help that the lawyers of the parties can provide." Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

Most critics of amicus participation equate the value of amicus participation solely with the informational value it offers to Justices rendering decisions. These commentators, however, should consider adopting a more expansive approach to valuing amicus participation that takes into account multiple constituencies and embraces a broader understanding of the impact of symbolic reassurance on the Court's legitimacy. *See* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 357 (2008) ("Increased amicus participation will have a democratizing influence on the litigation process . . . ." Moreover, "it is often more cost effective for social movements to make their voices heard as amicus parties than as parties bringing litigation.").

anecdotally illustrate the impact of amicus briefs or empirically validate the impact of amicus briefs on judicial decision making.[13] This Article builds upon this valuable literature by (i) exploring amicus participation's value to multiple stakeholders, not simply the Court and (ii) highlighting the important link between amicus participation, political symbolism, and the Court's legitimacy.

Part II of this Article provides historical background on amicus curiae participation before the Supreme Court and identifies factors that have contributed to its extensive use and transformation into a symbolic mechanism reflecting democratic inclusion.

Part III asserts modern amicus participation is a form of political symbolism that reassures the public—particularly vulnerable groups—of the Supreme Court's democratic character. This is especially true in cases having broad social impact and political salience, such as cases involving capital punishment, affirmative action, free speech, and assisted suicide. In this context, amicus participation provides a link between the Supreme Court and the polity, reinforcing the Court's institutional legitimacy. Amicus participation illustrates that inclusion, like independence, is a key pillar upon which the Court's institutional legitimacy rests.

Part IV provides an expansive view of the value of modern amicus participation to various stakeholders—the immediate parties, the Court, and the amici. The current legal literature does not incorporate the value amicus participation provides to the Court's various constituencies, namely the parties and the amici. Limiting the value analysis to the Court exclusively, while excluding other constituencies, understates the value of modern amicus participation.

Part V examines, at an aggregate level, the different entities that participate as amici before the Supreme Court. These diverse group dynamics reflect the Court's important societal function as a quasi-representative body and how the Court's inclusionary function reinforces

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[13] *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 784 (Aug. 1990); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Kelly Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Briefs*, 20 J.L. & POL. 33, 49 (2004) (analyzing the effectiveness of amicus briefs from the perspective of Supreme Court clerks); Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 129–32 (Nov.–Dec. 2005). For example, Kearney and Merrill interpret their empirical evidence concerning amicus briefs as an indication of the validity of certain judicial decision making models, i.e., the legal model, attitudinal model, and interest group theory of the judicial process. *See id.* Ultimately, they suggest that there is more empirical support for the legal model, than for the other decision making models. *See id.* Kearney and Merrill admittedly rely on three overly-simplistic models for judicial decision making, which as defined, do not contemplate that judicial decision making may employ a hybridized approach requiring a mixture of the models; or that certain types of cases (e.g., capital punishment, reproductive rights, voting rights, and affirmative action) and other contextual factors will determine the level of influence a particular decision making model may indeed have on swaying outcomes. Minus actual citation of amicus briefs such validation is difficult due to the number of intervening variables.

its institutional legitimacy.

Part VI analyzes the Supreme Court's decisions in *Washington v. Glucksberg* and *Roper v. Simmons*, which exemplify the types of politically salient cases where the Court symbolizes a quasi-representative body.[14] These examples provide a vivid illustration of the dynamics of amicus participation, the diverse interests involved, the types of argumentation employed, and the discursive exchange of perspectives. In this section, a deeper content-based analysis of the amicus briefs further reveals how the Court engages non-judicial actors in an ongoing dialogue.

Ultimately, this Article contends that modern amicus participation is a valuable symbolic mechanism reflecting democratic inclusion that, *inter alia,* provides a dotted line between the Court and the polity. This link reinforces the Court's institutional legitimacy. Consequently, efforts to restrict amici before the Court rather than encourage greater participation via the present "open door" policy should be approached with caution.

II. HISTORICAL DEVELOPMENT OF AMICUS PARTICIPATION

A. *Historical Beginnings*

The submission of amicus briefs dates back as far as ancient Rome.[15] Under the English common law system, amici provided the courts with impartial legal information beyond the court's expertise or immediate knowledge.[16] Whereas the name amicus curiae or "friend of the court" described the function of amici at common law, today, some argue that the more apt description of amicus participation before the Supreme Court is "friend of a party."[17] Today, the amicus brief "as a form of information gathering may provide the judicial counterpart of lobbying and congressional hearings in the legislative process."[18] Amicus participation is just one of several mechanisms used by interest groups to influence government decision making.[19]

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[14] Washington v. Glucksberg, 521 U.S. 702 (1997); Roper v. Simmons, 543 U.S. 551 (2005); *see also infra* Part VI.

[15] *See* Krislov, *supra* note 13, at 694.

[16] *See* 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 (2004) ("[T]he amicus submission originally was intended to provide a court with important legal information that was beyond its notice or expertise . . . ."); Krislov, *supra* note 13, at 694–95.

[17] *Ryan*, 125 F.3d at 1063 (explaining that the "term 'amicus curiae' means friend of the court not friend of a party"); *see also* Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1, 6 (2000).

[18] Krislov, *supra* note 13, at 717.

[19] *See* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1123 (1988) [hereinafter Caldeira & Wright, *Organized Interests*]. Whereas interest group lobbying appears most prominently at the legislative level, interest groups actively lobby to alter the composition of the Supreme Court via the judicial appointments process and participate as amici.

Historically, the increased use of amicus briefs mirrored a "change in tactics and structure of interest articulation in American politics as a whole that occurred during the latter quarter of the nineteenth century."[20] This period saw interest group activity transform "from personal, face-to-face contacts (including corruption) to impersonal, organized, and systematic, bureaucratically undertaken and oriented activity."[21] The advantages accruing to "bureaucratically sophisticated groups in other political arenas" became evident in the judicial context as well.[22] These interest groups were characterized by their ability to mobilize resources, their use of expertise, their flexibility to respond quickly before policy was set, and their sensitivity to raising new issues.[23] Other influences on the use of amicus briefs included the growth of administrative agencies, the growth of the welfare state, and the government's increased intervention in broad social problems such as school desegregation, racial covenants, and redistricting legislation.[24] During the initial decades of the twentieth century, amici filed briefs in only 10% of cases before the Supreme Court.[25] From 1986 through 1995, amici filed briefs in 85% of the Court's argued cases.[26] Between 1945 and 1995, the number of amicus brief filings increased by more than 800%, while the numbers of cases decided on the merits did not increase.[27] Between 1996 and 2003, at least one amicus brief was filed in 95% of cases.[28]

Some of the first private interest groups to effectively use the opportunity for broader access that amicus briefs provided included labor unions, "racial minority groups, securities and insurance interests, railroad interests, and miscellaneous groups under severe attack, notably the liquor interests in the first quarter of th[e] twentieth century."[29] These groups perhaps selected this new channel of "self-protection or aggrandizement" due to "[s]heer familiarity with the intricacies of the existing system, strong dissatisfaction with it, and relative desperation."[30] Yet, widespread use by civil rights organizations such as the American Civil Liberties Union ("ACLU") and the National Association for the Advancement of Colored People ("NAACP") drew public attention to the issue of amicus

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[20] Krislov, *supra* note 13, at 704.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 704–05.

[24] *Id.* at 706.

[25] *See* Kearney & Merrill, *supra* note 13, at 744.

[26] *See id.* at 744, 753.

[27] *See id.* at 749. Actual citations and quotations of amici in Court opinions may suggest some degree of growing impact or value to the Court. Supreme Court citation and quotation of amicus briefs have undoubtedly increased over the past fifty years. *Id.* at 757–58. Thirty-seven percent of cases between 1986–95 cited amici. Over the same period, amici were quoted at a rate of fifteen percent, which was double the amount for the previous three decades. *Id.* at 757–59.

[28] Owens & Epstein, *supra* note 13, at 129 fig. 1.

[29] *Id.*; *see also* Krislov, *supra* note 13, at 707.

[30] *Id.*

participation.[31] The NAACP (particularly the Legal Defense Fund ("LDF")), almost since its inception, has participated as amicus curiae in Supreme Court litigation.[32] The NAACP "[i]n the face of failures to gain concessions from Congress, due in large part to the power wielded by the Southern Delegation, particularly in the Senate," turned to the judiciary where they experienced significant success.[33] NAACP victories altered the doctrinal development of the Fourteenth and Fifteenth Amendments and elevated the legal status of African Americans.[34] Whether expanding the rights of blacks to vote,[35] preventing the systemic exclusion of blacks from juries,[36] or desegregating public schools,[37] litigation became the primary mechanism for championing minority rights that were difficult to obtain in other political venues. Not surprisingly, increased amicus participation ensued.

The coordination among primary litigants and amici was an essential aspect of the NAACP's litigation strategy.[38] The *Restrictive Covenant Cases* of 1948 are a classic example of amicus participation reflecting the norm of democratic inclusion.[39] In those cases, amicus briefs on behalf of American Indian groups, Japanese American groups, Jewish American groups, religious organizations, labor organizations, and others supported the black litigants, who were represented by the NAACP LDF lawyers.[40]

The extensive use of amicus briefs and extralegal facts in Supreme Court jurisprudence can be attributed, in part, to a shift from exclusive

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[31] *See id.* at 709 ("[I]t was the use of [amicus briefs] by civil rights organizations which drew widespread public attention."); *see also* Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 W. RES. L. REV. 101, 104–05 (1955) (analyzing NAACP strategy in the *Restrictive Covenant Cases of 1948*). The ACLU filed briefs in sixteen percent of all cases from 1986 to 1995. Kearney & Merrill, *supra* note 13, at 753 n.25. During the same period, the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") also appeared frequently before the Court in over six percent of the cases. *Id.*

[32] Krislov, *supra* note 13, at 707; *see also* Vose, *supra* note 31, at 102 ("From 1915 to January, 1948, when the *Restrictive Covenant Cases* were argued, 23 of 25 sponsored cases were won by the Association."). "Since 1939 the NAACP has, strictly speaking, devoted itself to legislative activities while, a separate organization, the NAACP Legal Defense and Education Fund, Inc., has had the exclusive task of conducting legal action." *Id.* at 103.

[33] *Id.* at 102.

[34] *Id.*

[35] *See* Nixon v. Herndon, 273 U.S. 536, 539–41 (1927); Guinn v. United States, 238 U.S. 347, 353–54, 361 (1915); Lane v. Wilson, 307 U.S. 268, 277 (1939).

[36] *See* Hale v. Kentucky, 303 U.S. 613, 616 (1938); Hollins v. Oklahoma, 295 U.S. 394, 395 (1935).

[37] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[38] *See* Vose, *supra* note 31, at 134 (discussing the NAACP's strategy of limiting the number of briefs filed in a particular case so as not to flood the Court with too many redundant arguments).

[39] *See id.* at 141–43 (discussing participation in the *Restrictive Covenants Cases* by cultural associations, labor groups, religious organizations, and liberal groups).

[40] *Id.* at 133–34. In the famous Grandfather Clause case, *Guinn v. United States*, the NAACP participated as amici and justified its participation on the following grounds: "[T]he vital importance of these questions to every citizen of the United States, whether white or colored, seems amply to warrant submission of this brief." *See* Brief for NAACP as Amicus Curiae at 2, Guinn v. United States, 238 U.S. 347 (1915) (No. 96). The brief is in the microfiche containing Supreme Court cases and briefs.

reliance on the dominant paradigm of legal formalism during the nineteenth century to a greater influence of legal realism during the first half of the twentieth century.[41] Legal realists rejected formalism and tried to convey how law operated in social, political, and economic contexts.[42] As the Court became more accepting of extra-legal facts and social science evidence, progressive groups began to use amicus briefs to lobby the Court in politically charged cases such as those involving social legislation and desegregation.[43] The Warren Court in *Brown* was one of the first courts to use social science data extensively. In the wake of *Brown*, the submission of extra-legal evidence via amicus participation increased.[44]

B. *Modern Amicus Participation*

Former Justice Felix Frankfurter argued for the restrictive use of amicus participation within the confines of the adversary system.[45] Frankfurter did not want to see the Court exploited or used as soapbox for interest group activity.[46] This narrow view of amicus participation and the adversarial system would support limiting the number of amici. Alternatively, Justice Hugo Black supported broadening amicus participation to a wide array of groups.[47] Black's broader vision of the adversarial system allowed for extensive participation by amici—acknowledging that cases before the Court affected many people beyond the immediate parties.[48] Under Black's approach, the Court acts in a quasi-representative capacity. Today, Supreme Court rules (or more accurately the lax enforcement of those rules) reflect Black's vision of amicus participation.

Presently, the Supreme Court allows for virtually unlimited amicus participation.[49] Amicus participation may take place at two stages in the

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[41] *See* Macaulay, *supra* note 6, at 366–403 (describing this evolution in detail).

[42] *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 100–03 (1993) (describing the importance of social context to legal realism); Hazard, *supra* note 8, at 171–72 ("[W]hether moderate or radical, realism theorized that a decision was not compelled by precedent, but expressed a choice on the part of the judges who made the decision.").

[43] Rustad & Koenig, *supra* note 42, at 108–10. The Committee of Law Teachers Against Segregation in Legal Education filed a brief urging the Court to desegregate the nation's schools in *Sweatt v. Painter*. Brief for the Committee of Law Teachers Against Segregation in Legal Education et al. as Amici Curiae Supporting Petitioner, Sweatt v. Painter, 339 U.S. 629 (1950) (No. 44), 1950 WL 78683; Rustad & Koenig, *supra* note 42, at 110 n.85.

[44] *See* Brown v. Bd. of Educ., 349 U.S. 294, 297 (1955) (listing seven amicus briefs).

[45] *See* Caldeira & Wright, *supra* note 13, at 784; Krislov, *supra* note 13, at 717.

[46] Caldeira & Wright, *supra* note 13, at 784.

[47] *See* Krislov, *supra* note 13, at 717 ("[T]o the extent that Mr. Justice Black resists such restraints, he is supporting a broadening of the interests likely to come before the Court and the issues presented to it for resolution.").

[48] *See* Caldeira & Wright, *supra* note 13, at 784–85 (quoting Justice Black: "'I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs.'").

[49] *See* Kearney & Merrill, *supra* note 13, at 761–65 (discussing the history of the liberal filing

Supreme Court litigation process—the agenda setting stage (i.e., decisions on petitions for writs of certiorari and jurisdictional statements) and at the merits stage.[50] Supreme Court rules require organizations and individuals that wish to participate as amici to obtain permission from both parties involved in the litigation.[51] If either party refuses, the individual or entity wishing to participate must file a motion for leave to file an amicus curiae brief to the Supreme Court.[52] On the other hand, governmental entities such as the Solicitor General and individual states do not need the permission of either party.[53] Although the Court has power to limit amicus participation by denying motions for leave to file, it seldom exercises this discretionary power despite an already heavy workload.[54] Supreme Court Rule 37.1 articulates the purpose and desired contents of an amicus brief: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens Court, and its filing is not favored."[55] Supreme Court rules expressly recognize both the utility and the excess of amicus briefs.[56] Some commentators argue that too much amicus participation and over-reliance on such briefs may unfairly disadvantage the immediate parties to the litigation.[57] Despite these concerns, "[t]he Supreme Court's continued willingness to receive this rising tide of briefs from not-so-disinterested

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requirements and the open door approach to amici).

[50] SUP. CT. R. 37.2–37.3; *see also* Caldeira & Wright, *supra* note 13, at 784 ("These rules apply to amicus briefs on petitions for [certiorari] and jurisdictional statements as well as to briefs on decisions on the merits.").

[51] *See* SUP. CT. R. 37.2(a), 37.3(a).

[52] *See* SUP. CT. R. 37.2(b), 37.3(b).

[53] Supreme Court Rule 37.4 provides that:

> No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

SUP. CT. R. 37.4. Moreover, Supreme Court Rule 37.6 requires amici other than governmental entities to:

> [I]ndicate whether counsel for a party authored the brief in whole or in part . . . and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

SUP. CT. R. 37.6. Supreme Court rules explicitly distinguish between governmental and non-governmental entities by placing more stringent requirements on non-governmental amici. Supreme Court Rule 37.6 reflects the court's interest in evaluating bias on the part of amici.

[54] Caldeira & Wright, *supra* note 13, at 785. Between 1969 and 1981 the Court denied only 91 of 832 motions to file for leave to file an amicus curiae. *Id.*

[55] SUP. CT. R. 37.1.

[56] Tony Mauro, *Bench Pressed*, AMERICAN LAW., Apr. 15, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1113296708400 (quoting statements by Justices Sandra Day O'Connor and Ruth Bader Ginsburg concerning amicus participation).

[57] *See* Akins v. Fed. Election Comm'n, 146 F.3d 1049, 1050 (D.C. Cir. 1998).

third parties is, in our view, tacit recognition that most matters before the justices have vast social, political, and economic ramifications—far beyond the interest of the immediate parties."[58] Just as interest groups have mobilized in Congress, they are lobbying before the Supreme Court as amici.[59]

Although amici are represented in all types of Supreme Court litigation, they are most visible in cases that involve contentious and politically salient issues like abortion, eminent domain, free speech, capital punishment, and affirmative action.[60] These cases generate unusually large numbers of amicus briefs and political fervor.[61] This is one of the most important findings from an empirical survey conducted by Joseph Kearney and Thomas Merrill.[62] This finding indicates that in politically salient cases, the Court operates most like a quasi-representative body and reflects the norm of democratic inclusion.[63] *Washington v. Glucksberg* and *Roper v. Simmons*, which are explored in greater detail in Part VI, fall into this category of cases.[64]

III. AMICUS PARTICIPATION AS SYMBOLIC REASSURANCE OF DEMOCRATIC INCLUSION

A. *Symbolic Reassurance*

Democratic procedures serve as a proxy for legitimacy. Specifically, amicus curiae participation provides symbolic reassurance of the Court's receptiveness to the norm of democratic inclusion. In this sense, "men may dislike a winning candidate, law, or judge's decision, yet be reassured by the forms of the election, legislature, or the court."[65] In the judicial context, democratic inclusion provides that persons impacted by decisions should participate in the lawmaking process. The routinization

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[58] Caldeira & Wright, *supra* note 13, at 783.

[59] Although the actual degree of influence amicus briefs have is difficult to quantify, the lofty expense and resources required in filing such briefs, at a minimum, suggests that groups filing amicus briefs believe they have some instrumental impact. Some commentators suggest that the cost of filing an amicus brief can range from $15,000 to $60,000. *See* Caldeira & Wright, *Organized Interests*, *supra* note 19, at 1112; *see also* Kearney & Merrill, *supra* note 13, at 801–19 (examining the impact of amici briefs through the legal model, which predicts that the Court is influenced by briefs that present especially valued information but not by briefs that are merely repetitive of the parties' briefs).

[60] *See* Kearney & Merrill, *supra* note 13, at 754–56 (categorizing the cases since 1970 that have generated twenty or more amicus briefs).

[61] *Id.*

[62] *See generally* Kearney & Merrill, supra note 13.

[63] Less salient political issues such as business and market regulation, although important, do not generate the same attention from amici. Ironically, there is anecdotal evidence that the Court finds amicus briefs exploring technical areas of the law more useful than constitutional arguments where the Court has ample expertise. *See* Lynch, *supra* note 13, at 42. From the Court's perspective, briefs filed in less politically salient cases might address technical issues where the Court lacks expertise.

[64] For a discussion of the significance of these cases within the scope of this Article, see *infra* Part VI.

[65] MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 12 (1985).

characteristic of modern amicus participation creates the impression, whether actual or perceived, that groups have the opportunity to weigh in on judicial decisions that have broad social and political ramifications. Arguably, the Supreme Court and its decisions—with majority, concurring, and dissenting opinions along with supporting rationale, deserve greater respect than pronouncements from other government branches whose procedures may appear more ad hoc, arbitrary, less transparent, and less independent. The process of amicus curiae participation provides an additional layer of legitimacy and illustrates that the Court's "judicial authority might best be reconceived as a relationship of trust that courts forge with the American people."[66] In this sense, the Court's multiple constituencies coalesce around procedures that, irrespective of their tangible impact, symbolize elements of fairness. From this perspective, the Court's legitimacy is viewed primarily through a procedural lens rather than a substantive one. Yet, despite much disagreement concerning the shape of substantive judicial outcomes, democratic procedures add to the legitimacy—or promote the acquiescence—of the Court's rulings.

Democratic features in the judicial context are especially compelling because they provide symbolic reassurance for threatened or vulnerable groups who lack political capital in other venues such as Congress where political spoils go to the well-funded and well-organized. Democratic theorists espouse the value of citizen participation in the "design and implementation of policies that affect them."[67] This value includes not only the prospect of better substantive legal outcomes via discursive debate, but also the enhanced legitimacy of such reforms. Amicus participation provides a "deliberative forum" for groups excluded from the legislative process.[68] The absence or retraction of this participatory mechanism might result in discontent and exclusion.

The fair adjudication of cases alone will not always enhance the Court's legitimacy. The Supreme Court's legitimacy hinges upon the perception among multiple constituencies. Without a favorable perception among the polity, the Supreme Court loses it credibility as an arbiter of disputes or, even worse, becomes viewed as an agent of oppression.[69] And "[s]ince most societies claim to offer their citizens equal justice under the law, the courts are presumed repositories of equality and the solemn fora for the just adjudication of the law without regard to race, creed, color, appearance, or any other categorical distinction."[70] Therefore, the symbolism of broad amicus participation reinforces the Supreme Court's

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[66] Post, *supra* note 11, at 11.

[67] William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 175 (2004) (describing associative democracy).

[68] AMY GUTMANN & DENNIS F. THOMPSON, DEMOCRACY AND DISAGREEMENT 42 (1996).

[69] *See* Peterson, *supra* note 11, at 176 (noting the importance of the courts being perceived as just).

[70] A. LEON HIGGINBOTHAM, SHADES OF FREEDOM 130 (1996).

institutional legitimacy.

Despite the benefits of symbolism, fair questions remain as to whether (i) there is a gap between democratic symbolism and democratic reality, and (ii) if so, does this present a problem? The answer to the first question is clearly yes, but the degree of discrepancy may also be relevant. The answer to the second question is less certain. One can make a credible argument that affected vulnerable groups are not adequately represented by amici especially in less politically salient cases. However, a strong argument can be made that amici adequately reflect vulnerable group interests especially when one acknowledges the historical use of amicus participation by civil rights organizations. Without question, amicus participation provides real democratic benefits to vulnerable groups. Nonetheless, there is a greater discrepancy between the Court's democratic symbolism and democratic reality when compared to other branches of government (e.g., Congress) characterized by electoral politics. Yet, the greater discrepancy in the judicial context should be viewed in a positive light because the Court's institutional legitimacy is also a function of its independence that would be undermined if the same degree of interest group influence prevailed. Moreover, the dichotomy between real democratic benefits versus symbolic ones may be overstated because legitimacy is determined from the observer's socially constructed vantage point.[71] In other words, perception, to a large degree, is reality. Fair and independent adjudication is a necessity, but not a sufficient condition for the Court's legitimacy. The Court is unavoidably an independent body and a political actor. And the Court's institutional legitimacy rests on the dual pillars of inclusion and independence.

B. *Defining Legitimacy*

Few legal scholars dispute the importance of legitimacy and even fewer can define it in a concise manner.[72] Legitimacy is a complex

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[71] EDELMAN, *supra* note 65, at 200.

[72] Although few legal scholars dispute the importance of "legitimacy," most scholars have difficulty adequately defining legitimacy in a concise manner. Social scientists have tried to equate legitimacy with public opinion surveys; however, other scholars contend that such surveys oversimplify the complex nature of legitimacy. Moreover, some commentators assert that the general public is not well informed of the Court's practices and as a result opinion surveys may be misleading. *See* Richard Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1825–26 (2005) (discussing the public's lack of "sufficient information" about the judiciary). In other words, being a legitimate institution does not mean people feel that the Justices are currently doing a good job. Richard Fallon asserts that legitimacy has three separate dimensions: legal, sociological, and moral. *See generally id.*; *see also* David A. Strauss, *Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1866 (2005) ("To question the legitimacy of something—a constitution, a statute, a legal regime—is to question whether it is entitled to obedience."). Under Fallon's framework, legal legitimacy is gauged by consistency with legal norms. A sociologically legitimate decision would be a decision that is accepted as deserving respect, obedience, or acquiescence. Moral legitimacy is a function of consistency with moral norms. *See* Fallon, *supra*, at 1794–96. Even within these three categories, Fallon identifies subcategories that reflect the complex nature of legitimacy. For example, sociological legitimacy has

concept, and its measurement is at best a speculative exercise. Despite measurement difficulties and competing views concerning legitimacy, this Article maintains that the Court's institutional legitimacy is enhanced by broad amicus participation—especially in politically-charged cases.[73] For purposes of this Article, to challenge the legitimacy of the Supreme Court "is to question whether it is entitled to obedience."[74] In this sense, the Supreme Court is a legitimate institution because of diffuse support and the general public's belief that it is a trustworthy decision maker whose rulings deserve to be obeyed.[75] This perception, in part, stems from procedures preserving the Court's independence. Yet the effective functioning of political institutions also requires the goodwill of the public.

Unlike Congress and the President, the Supreme Court lacks a formal ongoing connection to the electorate.[76] This suggests that the Court "must depend to an extraordinary extent on the confidence, or at least the acquiescence, of the public."[77] Despite the formal lack of electoral

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three subcategories: (i) institutional legitimacy, i.e., the diffuse public belief that the court is a trustworthy decision maker whose rulings deserve obedience; (ii) substantive legitimacy, i.e., public belief that a decision is substantively correct that may vary from group to group; and (iii) authoritative legitimacy, i.e., a public belief that decisions ought to be obeyed or deserve acquiescence. *See id.* at 1828. Despite considerable categorization, Fallon acknowledges the limits of sorting legitimacy into neat linguistic categories and how certain categories may be interrelated. His analysis recognizes that a decision may be legally correct, but morally illegitimate or vice versa. Nearly twenty years before Fallon's legitimacy analysis, Geoffrey Hazard identified four separate aspects of legitimacy: (i) legal precedent; (ii) right-outcome; (iii) legal realism; and (iv) legal process. *See* Hazard, *supra* note 8, at 161–62. Under Hazard's framework, legal precedent asserts that judicial decisions are legitimate insofar as they are consistent with precedent. A legal realism basis of legitimacy maintains that reference to the text of a decision should be augmented by the political, social, and economic consequences of a decision. *See id.* at 171. The right outcome basis of legitimacy rests in the Justices' awareness of their own political viability. The legal process basis for legitimacy can be contrasted with the legislative process because there is no "log rolling, pork barreling, and substantive compromise" with the Court's interpretative practices and procedures. *Id.* at 183.

[73] From another perspective, legitimacy may reflect the belief that particular decisions of the Court are substantively correct. Substantive legitimacy, however, may vary from group to group, case to case, and methodology to methodology. Some fear broad amicus participation and subsequent reliance upon it may increase the risk that a form of judicial activism will result displacing legal doctrine. A study reported a negative relationship between judicial activism—as measured by the number of statutes invalidated by the Supreme Court—and public confidence. *See* Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1223 (1986) (stating that the "public responds in a negative fashion to judicial negations of congressional statutes"). The question of whether the invalidation of a statute reflects judicial activism is a separate issue not argued here.

Thus, one could argue that the Court's legitimacy should be gauged according to its adherence to legal doctrine and precedent. But, one could also claim a decision is legitimate because its decisions reflected legal realism and were augmented by the consideration of circumstantial factors like economics and politics. *See* Hazard, *supra* note 8, at 171–72. Accordingly, "[t]here is too much controversy among legal elites, and too little informed endorsement among the mass public, to warrant strong claims of legal legitimacy (as opposed to weak or disputable ones) for the interpretive methodologies that substantially define the judicial role." Fallon, *supra* note 72, at 1827.

[74] Strauss, *supra* note 72, at 1866.

[75] *See* Fallon, *supra* note 72, at 1828.

[76] One must, however, acknowledge the link, albeit tenuous, between the public and the Supreme Court appointment and confirmation process.

[77] Caldeira, *supra* note 73, at 1209.

pressures to provide democratic legitimacy, the Court has traditionally fared well "in the estimations of the public, especially in comparison with other political institutions."[78] The positive perception is perhaps due to the Court's independence. But, amicus participation also heightens the Court's legitimacy through allowing participation of interested third parties and providing a dotted-line link to the electorate. Some political theorists contend that "[t]he normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes."[79] The large number of amicus briefs filed in politically-charged cases as well as the actual content of the arguments raised within the briefs illustrate how "interest group amici may genuinely believe that the court responds to the principles of democratic rule."[80] In this sense, the Supreme Court engages in a continuous dialogue and exchange with various constituencies via amicus participation and its opinions. Enhanced Supreme Court legitimacy as a matter of democratic inclusion may provide the strongest support for Justice Black's vision of broad amicus participation.[81]

The Court's role in American democracy demands some knowledge of public forces and opinion—especially when Justices share policy-making authority with elected politicians.[82] Justices may consider the prospect of being overridden or ineffective enforcement by the other branches of government.[83] Therefore, "[J]ustices who wish to exert authority over the direction of American life will anticipate actions of the other branches of government."[84] In addition, some scholars argue that the Court will avoid public defeat that would undermine its institutional authority—and as a result compromise to maintain the institution's public authority.[85] This does not suggest, however, that the Court pays attention or responds to public demands like elected officials. Instead, the Court assumes a less dynamic, more symbolic quasi-representative function.

Although useful, public opinion is an inadequate proxy for legitimacy because it may oversimplify the complex and nuanced concept of legitimacy. For example, the public may disagree with a particular decision, but nonetheless acquiesce and obey the decision out of respect for

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[78] Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992). "Even during the 1960's, when support for other institutions plummeted, public evaluations of the Court remained relatively high." *Id.* Public confidence, however, may not be an adequate proxy for legitimacy.

[79] *See* YOUNG, *supra* note 3, at 5–6.

[80] Paul 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, 812 (2004).

[81] *See supra* Part II.B. (discussing modern amicus participation).

[82] *See* James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 555 (1995).

[83] *See id.*

[84] *Id.*

[85] Public opinion also plays a role in the appointment and confirmation process. *See id.*

the institution. Moreover, the mass public is not that familiar with the Court and its interpretive practices.[86] Whereas public opinion may vary widely, the Court's institutional legitimacy is more static.[87]

The Supreme Court is a proxy for the entire U.S. judicial system and therefore an integral part of American democracy. As a matter of constitutional principle the Court "[m]ust be beyond politics," but it is unavoidably a political institution.[88] The Court's legitimacy rests with multiple constituencies and stakeholders. Consequently, the symbolic role of amicus participation is crucial because "more amicus participation may also increase the faith in the judicial system [and government] that is eroding in some quarters today."[89] Despite its imperfections, amicus participation is beneficial to advocating the public interest[90] and promoting the norm of democratic inclusion, which is a crucial element of the democratic ideal.[91]

IV. THE VALUE OF AMICUS BRIEFS[92]

The existing literature on amicus participation embraces a restrictive view on the value of amicus participation by correlating the value of amicus participation to the impact it has on assisting judges rendering a decision.[93] Adopting a broader perspective, this Article contends that such a restrictive view may both understate and oversimplify the value of amicus participation to the Supreme Court's multiple constituencies (e.g., the parties, the amici, and the Justices). Accordingly, any discussion of reforming amicus participation before the Supreme Court (i.e., limiting access) should contemplate a more expansive view of value that considers amicus participation's symbolic reassurance of constituents and its preservation of institutional legitimacy.

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[86] *See id.* at 1825–26.

[87] *See* Fallon, *supra* note 72, at 1827–29.

[88] Hazard, *supra* note 8, at 157. According to Hazard, the Court's role reflects an irreconcilable contradiction between constitutional principle and institutional fact. The constitutional principle is that the Court should be independent from primary political authority or should be beyond politics. The institutional fact is that the Court makes laws as well as applies them. The amicus brief is a crude device that has morphed into a multi-purpose instrument that helps reconcile the Court's role as an independent body and political actor. *See id.* at 153–57.

[89] Garcia, *supra* note 12, at 358.

[90] *See* Schachter, *supra* note 16, at 143–44 (discussing the positive effect of amicus representation on unrepresented and under privileged parties).

[91] *See* YOUNG, *supra* note 3, at 125.

[92] Part IV focuses on amicus participation at the merits stage because the decision of whether a court will grant a petition of certiorari is generally limited. This section also focuses on the broader value of amicus participation to the parties, amici, and the Court. Finally, this section makes the distinction between potential value as opposed to influence on the Court's decisional outcomes.

[93] But, without actual citations or discussion in Court opinions, determining the actual influence of amici on judges can be a speculative exercise. *See* discussion *infra* Part IV.C.

A. *Value to the Parties*

1. *Endorsement*

A common question surrounding amicus briefs is how much informational or strategic value they offer. Independent of legal argumentation, an amicus brief may serve as a group endorsement of a particular party or outcome in the hope that political pressure will bolster a party's case. Within the amicus brief and a motion for leave to file an amicus brief, groups (regardless of whether parties grant consent) indicate their "size, status, and expertise" through a required "statement of interest."[94] This "statement of interest" allows amici to communicate information about the political, social, economic consequences of the Court's decision as well as the legitimacy of their cause.[95] In such cases, groups may add their own prestige to the primary litigant's case or signal the presence of widespread and diverse support. For example, anecdotal evidence shows Supreme Court clerks give the ACLU's amicus briefs more consideration on account of their perceived superiority.[96] As one former Supreme Court clerk indicated, certain groups, such as the ACLU, are habitual filers and always make the "first cut" of amicus review.[97] This perception among clerks is, in part, due to organizational reputation and expertise.[98]

Generally, the most cited amicus briefs come from frequent filers.[99] "Repeat players" are more likely to have an impact because they develop expertise and have access to specialists.[100] Amici are more likely to attract the Court's attention if the organization or its attorneys have a strong and extensive record of Supreme Court advocacy.[101] Endorsement by reputable amici arguably bolsters a party's standing.

2. *Supplementary Strategies*

a. Bolstering a Party's Weak Legal Argumentation and Resources

Some amicus briefs serve an important function by providing legal guidance for the Court when the principal litigant lacks the legal talent of

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[94] Caldeira & Wright, *supra* note 13, at 786.

[95] *Id.*

[96] *See* Lynch, *supra* note 13, at 49.

[97] *See id.*

[98] *See id.* (noting that "a few clerks noted an ideological preference for ACLU briefs"). Others clerks commented that the ACLU has experienced litigators who tend to raise salient legal arguments. *Id.*

[99] *See* Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group* Amici Curiae *in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187, 196, 204 (1991) (discussing how this benefit is derived by "repeat players").

[100] *Id.* For example, Pacific Legal Foundation is the most active amicus filer in environmental cases and is at the forefront of an expanding conservative interest group movement. *Id.*

[101] *See id.* ("[*A*]*mici* should retain counsel with a strong record of Supreme Court advocacy to increase their persuasive force.").

the amici.[102] Amicus briefs, especially those from the government, can "buttress" a party's weak presentation and even forward an argument not pursued by the parties.[103] These situations often occur when there is a stark contrast between the principal litigant and the amici in legal expertise and resources. In this sense, amici are crucial to articulating the public interest "both as a means of urging justice for underprivileged factions and in order to rebut opposing positions."[104] For example, in *Metromedia, Inc. v. San Diego*, the City of San Diego sought to exclude billboards in certain areas of the City on grounds of traffic safety and aesthetics, but the billboards were a mix of commercial and political messages.[105] Since the billboard owners were not in a position to argue credibly on behalf of political speech because they themselves did not engage in political speech, their attorney requested that the ACLU file an amicus brief emphasizing the political speech aspects of the case.[106] In a close decision, the Court ultimately ruled the ordinance was unconstitutional because it regulated political speech.[107] Here, the billboard owners advanced their cause by enlisting the resources and support of the ACLU.[108]

b. Presenting Subtle Variations or Emotive Arguments

Even when the representation for the principal litigants is relatively adequate, amicus curiae may still perform an important "subsidiary role."[109] In this role, amici present "subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict, but are too risky to be embraced by the principal litigant."[110] By injecting these arguments via amicus briefs, "[a] minimum

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[102] *See* Krislov, *supra* note 13, at 711.

[103] James L. Cooper, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 691 (1990).

[104] Schachter, *supra* note 16, at 143.

[105] 453 U.S. 490, 493–98.

[106] Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 607 (1984). *Id.* at 493.

[107] *Metromedia*, 453 U.S. at 521.

[108] *See* Ennis, *supra* note 106, at 607. In "*Toll v. Moreno*, the World Bank submitted an amicus brief urging the Supreme Court to rule, on Supremacy Clause grounds, that certain state statutes which disadvantaged alien college students were unconstitutional." *Id.* at 606 (citing Toll v. Moreno, 458 U.S. 1 (1982)). Ultimately, the Court ruled for the students on the basis of the Supremacy Clause theory that had been discussed mainly by the amici. *Id.* at 606. In *Nollan v. California Coastal Commission*, the Nollans—beach-front property owners—challenged the validity of a building permit provision that required property owners to give the public access to their land to pass from one public beach to another. 483 U.S. 825 (1987); *see also* Hedman, *supra* note 99, at 195. In *Nollan*, the building industry amici worked closely with the parties asserting takings claims to coordinate the content of briefs and to help the parties' attorneys with moot court sessions. *See id* at 196. Furthermore, Justice Scalia cited twenty cases and notes the source for the list of citations as the amicus brief sponsored jointly by the National Association of Homebuilders and the California Building Industry. *Id.* at 196–97. In establishing the new legal rule, the Court noted that it was relying on legal authority contained exclusively in the amicus brief of an interest group. *Id* at 197. This suggests that interest group amici had a critical "impact" on the *Nollan* court's majority and, concomitantly, the evolution of land use. *Id.*

[109] Krislov, *supra* note 13, at 711.

[110] *Id.*

[of] disapprobation attaches to the official cause."[111] Simply stated, arguments that may anger the Justices, unorthodox legal theories, vast amounts of social science data, and emotive appeals are perhaps better suited for amici than the immediate parties.[112]

B. *Value to Amici*

1. *Counteractive Lobbying*

Interest groups may submit amicus briefs, despite the ideological or partisan composition of the Court, to counteract other amici. For example, in a situation where the composition of the Court would appear to almost guarantee a decision in a group's favor, interest groups may still have an incentive to submit briefs to counteract the influence of opposition groups.[113] Although most research explaining this phenomenon focuses on the legislative context, it is nonetheless instructive for the Supreme Court context in which amici must strategically consider the efforts of competing groups when attempting to influence three types of decision makers—those predisposed to favor the group's position, those predisposed to disapprove, and those who are uncommitted.[114] The popularity of the amicus brief as a lobbying tool may stem from the fact that amicus participation is a less expensive alternative than standard lobbying or a publicity campaign.[115] Similarly, when compared to filing a separate lawsuit, amicus participation may be a more effective strategy because it lacks the procedural complexity of a separate lawsuit and is less expensive.[116] Although lobbying the Court may still place certain groups with fewer organizational resources at a disadvantage, the Court nonetheless is more democratic given the presence of amici.[117] Moreover, a credible argument can be

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[111] *Id.* at 711–12.

[112] *See id.*

[113] *See generally* David Austen-Smith & John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25 (1994).

[114] Commentators also acknowledge that groups have other reasons for filing briefs such as showing the groups importance to its own members even if there is little evidence that a brief will influence judicial outcomes. *See* Collins, *supra* note 80, at 825–26. The relatively low costs of amicus participation make this possible. *See* discussion *infra* Part IV.B.3.

[115] Schachter, *supra* note 16, at 116.

[116] *See id.* at 117 (discussing the complexity of joinder and intervention in the context of class actions).

[117] Commentators acknowledge how amici have a democratizing influence on the Court, but also cite certain drawbacks:

> Increasing technological complexity and the need for information will likely make the U.S. Supreme Court a more democratic place, but the democracy that will flourish in the marble palace will be pluralistic, and organized interests with significant lobbying strengths in those other branches will exercise considerably more influence than those less well endowed. Thus, lobbying the Court will continue to become more akin to lobbying the legislatures, and groups with fewer organizational resources will not likely overcome their political disadvantages by entering the judicial arena.

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made that certain amici such as LDF and the ACLU do reflect the interests of vulnerable groups.

2. *Highlighting Externalities or Silently Impacting Other Contexts*

Different organizations do not enter the fray of amicus participation on the same terms. For example, for organizations such as the NAACP and the ACLU, it is their business to litigate on behalf of groups. In other scenarios, the amici's connection to the immediate parties can be indirect or tenuous at best. Yet, amicus participation may bring the consequences of a decision on discrete interests or third parties to the attention of the Court.[118] In this sense, amicus participation provides a vehicle for discrete interests, who either lack standing or are unaccomplished litigators, to lobby the Court and perhaps raise its awareness of third parties and the effect of a decision beyond its immediate context.[119] Groups may also desire third party consequences and outcomes, but choose not to alert the Court. By planting language and arguments in the instant case, groups can strategically advance their cause in other contexts. For instance, a pro-life group may participate as an amici in a physician-assisted suicide case (without mention of the abortion issue) understanding that a favorable disposition may undermine the pro-choice position in the abortion context.[120] Thus, the arguments made by amici may only be a pretext for a group's true motivations or intended results.

3. *Signaling Amici's Involvement to its Own Members, Potential Members, and Other Organizations*

Interest groups have other motivations than to simply influence the Supreme Court's output. The existing amicus participation literature fails to adequately explain or entertain the secondary motivations of multiple stakeholders. One study of amicus participation has determined that coalition amicus briefs may not play a statistically significant role in increasing success before the Supreme Court, and as a result, interest

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[118] In *Grutter v. Bollinger*, 539 U.S. 306 (2003), a particular amicus brief filed by former prominent military personnel attracted significant attention from the Court. *See* Sylvia H. Walbolt & Joseph H. Lang Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171, 177 (2003). The brief did not simply replicate the legal arguments in each party's brief. Rather, this brief introduced an entirely unique factual perspective by articulating the "importance of race-conscious admissions and recruiting practices of service academies and the ROTC." *Id.* at 179. In addition, this amicus brief was particularly compelling because it was presented during a period of armed conflict when the Nation's attention was focused on the war in Iraq. *See id.* Here, the amici prompted the Court to consider the consequences of the decision "outside the narrow scope of one particular university's admissions procedures." *Id.* at 180. Similarly, in a right to die case, the AMA may not argue the law as much as the policy burden on doctors and medical ethics because they have no direct interest in the parties involved in the case. *See* discussion *infra* Part V.A.

[119] The brief submitted by the women's groups in *Washington v. Glucksberg* is an example. *See* discussion *infra* Part V.A.

[120] *See* discussion *infra* Part VI.A.1.b.iii.

groups may have other motivations.[121] Interest groups are always interested in satisfying their current membership, attracting additional membership, and building relationships with similarly aligned organizations. Thus, amici coalition briefs are a low-cost mechanism for showing a group's members and potential members that the organization is actively pursuing policy goals and wielding influence in the judicial arena.[122] In addition, coalition amici activity is a low cost method for group interaction and collaboration.

C. *Value to the Court*

1. *Information Gathering*

One can argue that amicus briefs alleviate costly information gathering which adds to the stability of the political system.[123] Governmental and non-governmental organizations have access to a plethora of information that is not readily available to the Court.[124] By providing supplemental information, amici can preserve judicial resources whereas repetitive information may do the opposite. Amicus participation provides valuable information in two principle ways: (i) acting as barometer for interest group activity and public opinion[125] and (ii) providing supplemental substantive legal, policy, and social science arguments.[126]

a. The Barometer Function

Amicus participation serves as a crude barometer of public opinion, particularly in politically-charged cases. However, unlike public opinion surveys and other fora where interest groups participate, amicus briefs are more focused on case related issues and the audience is more clearly defined via the statement of interest.[127] Justices can acquire information about societal demand and significance by observing the extent of amicus

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[121] *See* Collins, *supra* note 80, at 825–26.

[122] *See id.*

[123] *See* Caldeira & Wright, *Organized Interests*, *supra* note 19, at 1123.

[124] *See* Collins, *supra* note 80, at 808–13 (asserting the so-called information hypothesis that amicus briefs are effective because of the additional information they provide litigants and offering anecdotal evidence that Justices pay attention to interest groups 'supporting briefs').

[125] *See id.* at 814. ("Thus, the affected groups hypothesis holds that it is not the social scientific, legal, or political arguments briefs contain that influence the court, but instead the mere presence of a large number of interest on one side of the dispute relative to another.").

[126] *See id.* at 814–15. Information theory maintains that the value of amicus briefs is not merely as a proxy for interest group activity, but the actual arguments legal and otherwise contained in the briefs. *See Amici Curiae Briefs: The Court's Perspective* 181–83 (dividing informational value into three categories: (i) supplemental or new information; (ii) implications of decisions; and (iii) identifying important cases).

[127] A study of amici participation at the certiorari stage asserted that the informational value of briefs lies in their presence or absence and not necessarily in their substantive arguments advanced. *See* Caldeira & Wright, *Organized Interests*, *supra* note 19, at 1113. Contrary to what many organizations may think, studies indicate opposition briefs at the certiorari stage significantly increase the likelihood that certiorari will be granted. Instead of decreasing the court's interest, opposition briefs may pique it.

participation.[128] However, the exact degree of responsiveness the Justices exhibit when selecting their dockets or rendering a decision remains uncertain.[129]

b. Substantive Information

Beyond signaling interest group or public support, amici also provide valuable information in the form of substantive legal, policy and social science arguments. Amicus brief submission is the most widely used method for submitting social science data as non-record evidence.[130] However, some commentators argue that the politicization of amicus briefs is alarming because Justices do not have an adequate mechanism for independently assessing the claims, the research, and the evidence submitted.[131] From this perspective, the Justices are vulnerable to being "misled" by politically distorted social science data.[132] Notwithstanding these criticisms, amici continue to lend support to the Court in this manner.[133]

Scholars further speculate that information presented to the Court via amici will become increasingly influential. For example, cases involving highly technical issues, such as new reproductive technologies that have only been heard in lower federal and state courts, will eventually reach the Court.[134] While seeking to understand these complex issues, the Justices will rely on information provided by medical, scientific, and legal experts about the nature of these technologies and the role of social norms and traditions in determining issues like parental status.[135] Anecdotal evidence indicates that amicus briefs addressing specialized areas of law (e.g., tax, bankruptcy) provide valuable guidance to the Court whereas briefs reiterating constitutional arguments made by the parties are of lesser value.[136]

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[128] *See* Lucius T. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 J. POL. 41, 56 (1967) ("The amicus brief, in a sense, also allows the Court to weigh 'political' information in a judicial way.").

[129] *See* 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, 528 (2004) ("Amicus briefs can also be helpful if central, unifying themes emerge from the cacophony of voices in front of the court. In this respect, amicus briefs that focus solely on external organizations' own agendas are not as helpful as briefs that highlight the broader societal impact . . . .").

[130] *See id.*

[131] *See* Rustad & Koenig, *supra* note 42, at 93–94.

[132] *Id.* at 94.

[133] For example, in *Thompson v. Oklahoma*, the Court discussed the treatment of juvenile death penalty in other nations and revealed that "all information regarding foreign death penalty laws is drawn from [the Appendix to the] Brief for Amnesty International as Amicus Curiae . . . and from *Death Penalty in Various Countries*, prepared by members of the staff of the Law Library of the Library of Congress." Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281 n.12 (1999).

[134] *See* SAMUELS, *supra* note 117, at 219.

[135] *See id.*; *see also* Lynch, *supra* note 13, at 41 (describing how clerks found amicus briefs addressing technical issues among the most useful).

[136] *See* Lynch, *supra* note 13, at 41–42 (stating that "there exists a positive correlation between

Unlike other forms of evidence that have been presented and challenged throughout the litigation process, evidence contained in amicus briefs is not subject to cross-examination or expert testimony from either side.[137] Amicus briefs lack the safeguards characteristic of other forms of evidence. Parties, however, do receive the briefs and have the opportunity to respond or rebut information, facts, and arguments contained in the briefs. Nonetheless, such a task may be unduly burdensome and drain resources. Furthermore, amici, unlike the parties, do not have to work from a trial record or preserve issues for appeal. These concerns, however, are mitigated via (i) disclosure requirements under Supreme Court Rules to identify potential bias; (ii) the conservation of judicial resources via information gathering; and (iii) the skill of the Justices and their clerks.[138] In the absence of rules restricting access, the Court has developed its own filtering mechanisms for analyzing amicus briefs[139] and, upon occasion, provided informal guidance to potential filers concerning the Court's (or Justices') preferences.[140] Ultimately, the usefulness of findings and arguments presented in amicus briefs hinges on their adequate evaluation.[141]

2. *Legitimacy*

Legitimacy is rarely mentioned in the legal literature addressing amicus participation, but its importance cannot be ignored. The normative basis for broad amicus participation as currently practiced in not simply informational value. The Court's institutional legitimacy depends on both norms of inclusion and independence. Amicus participation contributes to the former.[142]

V. WHO PARTICIPATES AS AMICI

This section focuses on the dynamics of amicus participation—who, when, and why amici participate. The Supreme Court is accessible to a wide array of interests via amicus participation. This broad participation reinforces democratic norms of inclusion. Often entities become amici because they lack direct litigant status, they fail to meet the standard for intervention,[143] or simply because of the advantages that amicus status brings (i.e., flexibility and cost). Some organizations may not have the

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legal obscurity of [the] subject matter and the helpfulness of amicus participation").

[137] *See id.*

[138] Schacter, *supra* note 16, at 136, 143–44.

[139] Anecdotal evidence suggests that Supreme Court clerks play a filtering role for amicus filings. *See* Lynch, *supra* note 13, at 43–46. A number of factors may determine the degree of review a brief receives include, but are not limited to: the reputation of the filer, the substantive nature of the case, and Court workload.

[140] *See* Mauro, *supra* note 56 (discussing comments of Justices concerning amicus briefs).

[141] *See* Rustad & Koenig, *supra* note 42, at 99.

[142] *See* discussion *supra* Part III.B.

[143] *See* FED. R. CIV. P. 24.

resources to achieve their goals through litigation or an organization may not find a suitable plaintiff to represent at the trial stage. For such groups, amicus participation can provide a rare opportunity to affect policy at the top. In 1982 alone, the Supreme Court had over 3000 amici representing over 1400 distinct organizations.[144] Generally, amici fall into two broad categories—non-governmental and governmental entities.[145]

A. *Non-Governmental Entities*

The broad category of non-governmental entities includes a myriad of subcategories: individuals; charitable and community organizations; public interest law firms and policy research groups; citizen and public interest advocacy groups; business, trade, and professional organizations; and unions.[146] These organizations are very diverse in their membership, ideology, resources, focus, and flexibility. For example, the principal function of public interest advocacy organizations such as the LDF, Lawyers Committee for Civil Rights Under Law ("LCCRUL"), and ACLU is litigation. Meanwhile, for community organizations such as the Boy Scouts, professional organizations such as the American Medical Association ("AMA"), and unions like the AFL-CIO, litigation does not constitute the bulk of their activities, but when it does, it usually takes the form of amicus participation.[147] Even within organizational categories there is significant differentiation. Whereas LDF confines itself to issues related to racial and ethnic discrimination, the ACLU litigates a broader range of issues. It is important to note that organizations may have a direct or indirect interest in a case's outcome. An organization may support a party only because an unfavorable decision in the instant case may have consequences in other contexts. For instance, a pro-life interest group may weigh in on an issue such as physician-assisted suicide only because of the potential implications in the abortion context.[148]

B. *Governmental Entities*

Governmental entities participate more than other groups of amici. These entities include state, county, district, municipal, and the federal government (e.g., the Solicitor General).[149] In fact, individual states alone participate more than other groups at both stages of amicus participation.[150]

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[144] Caldeira & Wright, *supra* note 13, at 789.

[145] Supreme Court Rule 37 makes a similar distinction by imposing greater filing requirements on non-governmental entities. SUP. CT. R. 37.

[146] *See* Caldeira & Wright, *supra* note 13, at 791 (providing a table classifying amici by type of organization).

[147] *See* Kearney & Merrill, *supra* note 13, at 807–08.

[148] *See* discussion *infra* Part VI.A.

[149] Caldeira & Wright, *supra* note 13, at 791.

[150] *Id.* at 793–94. States account for approximately over one-third of amicus participation at the agenda setting stage and a quarter of amici at the plenary stage. *Id.*

According to one study, state amici filed briefs in 14.5% of cases from 1946 to 1995.[151] As previously mentioned, Supreme Court Rules impose fewer filing restrictions on governmental entities favoring the participation of governmental amici. Widespread state participation is also related to the wide reach of Court decisions. Whenever the Supreme Court addresses the constitutionality of a statute with statewide application, the Supreme Court considers the view taken by a state or its agents as "highly relevant."[152] For example, when a state's assisted suicide law is under constitutional scrutiny, not just that state will participate, but every other state with a similar law will also attempt to influence the Court's decision.[153] The high degree of state participation is evidence of intergovernmental lobbying of the Supreme Court.[154]

The most influential governmental entity, however, is the Office of the Solicitor General.[155] The Solicitor General, the Government's chief litigator before the Supreme Court, is appointed by the President.[156] The United States (or the Solicitor General) is the most successful as well as the most frequent amici before the Court.[157] The Solicitor General has

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[151] Kearney & Merrill, *supra* note 13, at 753 n.25.

[152] *See* New York v. Uplinger, 467 U.S. 245, 248 n.1 (1984) (acknowledging that the position taken by a state attorney in an amicus brief provided additional support for the conclusion that a grant of certiorari was improvident).

[153] *See* discussion *infra* Part VI.A.; *see also* Washington v. Glucksberg, 521 U.S. 702, 719–30 (1997) (analyzing whether assisted suicide violates the Fourteenth Amendment).

[154] *See* discussion *infra* Part VI.

[155] According to the Kearney study, the Solicitor General filed briefs in sixteen percent of cases (991 cases) from 1946–95. Kearney & Merrill, *supra* note 13, at 753 n.25. Moreover, the Solicitor General's amicus briefs are cited most frequently by the Court. In fact, the Court cited the Solicitor General as amici in "[forty percent] of cases in which the Solicitor General filed a brief" between 1946 and 1995 (402 cases). *Id.* at 760.

[156] The functions of the Office of the Solicitor General are as follows:

> The task of the Office of the Solicitor General is to supervise and conduct government litigation in the United States Supreme Court. Virtually all such litigation is channeled through the Office of the Solicitor General and is actively conducted by the Office. The United States is involved in approximately two-thirds of all the cases the U.S. Supreme Court decides on the merits each year.
>
> The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the Court. The Office's staff attorneys, Deputy Solicitors General and Assistants to the Solicitor General, participate in preparing the petitions, briefs, and other papers filed by the government in the Supreme Court. The Solicitor General conducts the oral arguments before the Supreme Court. Those cases not argued by the Solicitor General personally are assigned either to an Assistant to the Solicitor General or to another government attorney. The vast majority of government cases are argued by the Solicitor General or one of the office attorneys.
>
> Another responsibility of the Office is to review all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken. Moreover, the Solicitor General determines whether the government will participate as an amicus curiae, or intervene, in cases in any appellate court.

Office of the Solicitor General, About the Office of the Soliciter General, http://www.usdoj.gov/osg/about_us.htm (last visited Sept. 7, 2009) (discussing the functions of the Office of the Solicitor General).

[157] *See* Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court*

monopolistic authority to choose whether the government will litigate, how the government will litigate, and how legal resources will be allocated. The Solicitor General's decision to allocate resources toward arguing as amicus curiae in lieu of litigating cases where the agencies are directly involved potentially "exacerbates the risks of political partisanship . . . ."[158] The decision to file an amicus brief is largely a discretionary exercise. The Solicitor General can submit an amicus brief any time a federal interest can be shown in a case.[159] Supreme Court Rule 37.4 does not require the Solicitor General to acquire consent from either of the parties. Furthermore, the Supreme Court "often invites the Solicitor General to file an amicus brief in order to ascertain the opinion and otherwise unavailable information" from the federal government or the executive branch.[160] Approximately one-third of the United States' participation as amicus curiae is the result of Court invitation.[161]

Amicus participation may present an opportunity for the Solicitor General's Office to interject the partisan ideology of the executive branch at the expense of the individual agencies.[162] The Solicitor General's ambiguous and unique role leads critics to question his ultimate allegiance because the office embodies an agency problem that only worsens when filing amicus briefs.[163] The most evident connection the Solicitor General has is to the President who appoints him. The President may exert both direct and indirect influences on the Solicitor General's activities. The need for monitoring by the President is mitigated by the fact that the President usually appoints individuals who share the President's views.[164]

Litigation, 66 JUDICATURE 256, 261 (1983) ("[T]he solicitor general's success rate as amicus curiae surpasses the high win-loss ratio that the government enjoys as a party to a suit."); *see also* Todd Lochner, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 561 (1993) ("By far[,] the most frequent amici before the Court, the United States, is also one of the most successful."); Lynch, *supra* note 13, at 46 ("Approximately 70% of the seventy clerks interviewed emphatically cited the solicitor general as the most important filer.").

[158] Lochner, *supra* note 157, at 551.

[159] *See* Lynch, *supra* note 13, at 47 ("[T]he government need not seek the permission of the litigants in order to file an amicus brief.").

[160] Lochner, *supra* note 157, at 561.

[161] *Id.*

[162] A counter-argument to this claim is that the President appoints the various agency heads and this lessens the need for partisan excess by the Solicitor General.

[163] The government has wide discretion to enter any case and take any substantive position. *See* Cooper, *supra* note 103, at 680, 685 ("[W]here the government acts *sua sponte* it does not confront the barriers that other parties do."). The Solicitor General may file amicus briefs that differ from the positions taken by the various agencies.

[164] *See id.* at 681. For example, when President Lyndon B. Johnson offered the Solicitor Generalship to Thurgood Marshall, "he complimented Marshall's ability as a lawyer and said he needed an outstanding legal mind to represent *him* before the Supreme Court." JUAN WILLIAMS, THURGOOD MARSHALL: AN AMERICAN REVOLUTIONARY 314–15 (1998) (emphasis added). Johnson also was very clear about making no explicit future promises about a Supreme Court appointment: "I want that distinctly understood—there's no quid pro quo here at all. You do your job. If you don't do it, you go out. If you do it, you stay here. And that's all there is to it." *Id.* Moreover, when Johnson heard of Marshall's plans to commute from New York, he articulated his disapproval. *See id.* at 318. Almost three weeks later Marshall sent the President a note expressing his plans to move his family to

Furthermore, "in many amicus appearances, the issues are rather apolitical and unlikely to be of special interest to the President."[165]

The federal government's submission of amicus briefs has increased over time.[166] Between 1966 and 1977 amicus briefs constituted only twenty percent of the federal government's participation before the Supreme Court.[167] Today, as much as forty-five percent of the Solicitor General's argumentation is through amicus submission.[168] Surprisingly, the United States has a higher success rate when it participates as amici as opposed to participating as a party. According to some studies, the United States' view prevails in approximately seventy-five percent of the cases in which it participates as amici.[169] An amicus brief from the Solicitor General's office is a political barometer from which the Court can ascertain the likely executive reaction.[170] In *Brown*, the Solicitor General's amicus brief provided the Court with the needed assurance that the chief executive supported an order ruling against segregation.[171]

The Solicitor General may have other important goals for filing amicus briefs besides espousing executive ideology that may include providing the Court with unavailable information,[172] presenting her own views on important government issues,[173] protecting the government who may be a party in interest, articulating a singular government voice,[174] and providing a flexible strategy for dealing with agencies.[175] Other factors supporting the Solicitor General's broad discretionary power include the fact that the Solicitor General's staff are regarded as among the best attorneys in the country and that the Solicitor General plays a crucial role by decreasing the

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Washington, D.C. *See id.* In August of 1965, Thurgood Marshall became the 33rd Solicitor General in U.S. history. Although the above is an anecdotal reference, it nonetheless suggests the influence and allegiance between the President and the Solicitor General as well as the tenuous connection between the Solicitor General and the administrative agencies.

[165] Cooper, *supra* note 103, at 681.

[166] The Solicitor General's use of the amicus brief began in 1909; however, amicus participation remained infrequent until the 1950s. *See* Lochner, *supra* note 157, at 561.

[167] *Id.* at 561.

[168] *Id.*

[169] *Id.* However, the success rate varies with the particular Solicitor General.

[170] *Id.* at 562.

[171] *Id.*; *see also* Brown v. Bd. of Educ., 349 U.S. 294 (1955). *But see* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a University of Michigan admissions policy despite government opposition as amici).

[172] The Government's resources are vast. They include unpublished studies from various agencies as well as congressional transcripts.

[173] Elana Kagan became the first woman to serve as Solicitor General of the United States in 2009. *See* Office of the Solicitor General, *supra* note 156.

[174] Commentators argue that the Solicitor General must take a broader view than the parochial view of an individual agency; and even if a narrow viewpoint is required, the Solicitor General, in all likelihood is in the best position to do it. *See* Lochner, *supra* note 157, at 570.

[175] *Id.* at 562. For example, in *Bob Jones University v. United States*, the Court requested an amicus brief from the Solicitor General "when the government and the taxpayer took the same view of the legislation at issue." Philip B. Kurland & Dennis J. Hutchinson, *With Friends Like These . . .*, 70 A.B.A. J. 16, 20 (1984) (citing Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).

Court's workload.[176] The latter "gatekeeper" function is perhaps the most important.[177] The Solicitor General's influence is indisputable in both agenda setting and asserting the Government's position at the merits phase of Supreme Court litigation.

C. *When Groups Enter as Amici*

At the Supreme Court, there is a fairly constant "mix of interest representation across institutional contexts."[178] Approximately thirty percent of all amicus activity occurs at the certiorari or agenda setting stage.[179] In general, governmental entities and business groups are more active than other organizations at the agenda setting stage. As a result, one would expect governmental entities and business groups to play a larger role in setting the Court's agenda.[180] Some argue that this discrepancy may be due in part to informational advantages.[181] Public choice accounts of interest group participation also support this result.[182] The majority of amicus participation, however, takes place at the merits phase where the discrepancies between governmental entities and non-governmental participation become less pronounced.[183] Most organizations participate at the merits phase rather than the agenda setting stage, due in part to cost effectiveness, but also due to the fact that cases become more visible once the Court grants certiorari.[184] Accordingly, citizen groups and public interest law firms allocate most of their resources toward the merits phase. Once cases appear on the Court's docket, organizations can prepare more effectively, and the stakes rise as well.[185] At the later merits stage, amicus participation becomes more pluralistic symbolizing democratic inclusion.[186]

The different strategies governmental entities and non-governmental entities use to determine when and how to participate as amici may be a

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[176] Lochner, *supra* note 157, at 570. The resumes of recent Solicitor General's such as Seth Waxman, Walter Dellinger, and Ted Olsen add to the prestige and perception of the office.

[177] Cooper, *supra* note 103, at 682 (1990) (noting that the Court has acknowledged the importance of this function both publicly and privately).

[178] Caldeira & Wright, *supra* note 13, at 797.

[179] *Id.* at 803. *See also* SUP. CT. R. 10. (outlining the procedure for reviewing requests for certiorari, as well as the writ approval process).

[180] *See* Caldeira & Wright, *supra* note 13, at 797.

[181] *See id.* at 793 (noting the existence of institutionalized forms of communication among government units).

[182] *See* Gordon Tullock, *Public Choice*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 1040, 1044 (John Eatwell et. al. eds., 1987).

[183] *See* Caldeira & Wright, *supra* note 13, at 801.

[184] *See id.* at 792.

[185] *See id.* at 792–93.

[186] The character of the information and the nature of the influence may shift depending on the particular stage of litigation. *See* David Austen-Smith, *Information and Influence: Lobbying for Agendas and Votes*, 37 AM. J. POL. SCI. 800, 825 (1993) (concluding that lobbying Congress is more effective at agenda setting stage).

function of organizational concerns such as cost effectiveness,[187] constituencies, and information asymmetries.[188] Instead of pooling resources and filing coalition briefs, the general pattern is for groups, both governmental and non-governmental, to file multiple separate briefs, which are more costly.[189] But more coalition activity occurs with governmental entities, especially among states.[190] This may suggest some form of signaling that groups value. Coalition briefs give the appearance of widespread, diverse, and prestigious support. Although the degree of influence that groups exert over the Court is uncertain, the continued presence of heightened group activity, at a minimum, signals that amici value their own participation. In this sense, the Court's institutional legitimacy is reinforced through the symbolic reassurance and discursive process of amicus participation.

VI. THE EXAMPLES OF *WASHINGTON V. GLUCKSBERG* AND *ROPER V. SIMMONS*

Amicus participation plays a symbolic role and the Court operates most like a quasi-representative body in cases involving contentious social and political issues such as abortion, free speech, affirmative action, and physician-assisted suicide. The types of issues involved in a case may influence the Court's receptiveness to amici.[191] For instance, topics such as physician-assisted suicide and capital punishment have broad social consequences that stretch across individual, organizational, jurisdictional, and moral boundaries.[192] Under such circumstances, Justices cannot confine themselves to the immediate parties or dispute—otherwise they risk damaging the Court's institutional legitimacy. In other contexts,

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[187] The cost of filing an amicus brief can range between $15,000 and $60,000. *See* Caldeira & Wright, *supra* note 13, at 800; *see also* Caldeira & Wright, *Organized Interests*, *supra* note 19, at 1112. Hence, the cost is not trivial.

[188] *See* Caldeira & Wright, *supra* note 13, at 794, 798.

[189] *See id.* at 804. There is anecdotal evidence suggesting that the Justices would prefer that parties file coalition briefs when possible to limit the burden on the court. *See* Mauro, *supra* note 56 (quoting Justice Sandra Day O'Connor and Ruth Bader Ginsburg concerning participation by amici).

[190] *See* Caldeira & Wright, *supra* note 13, at 798–99.

[191] There is anecdotal evidence that the Court values external input in certain cases as opposed to others. *See* Lynch, *supra* note 13, at 41–42 ("The majority of clerks (56%) explained that amicus briefs were most helpful in cases involving highly technical and specialized areas of law, as well as complex statutory and regulatory cases."). Amici may be more influential in cases addressing technical and scientific issues beyond the Court's expertise. *See* Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici Before the Supreme Court*, 78 WASH. U.L.Q. 789, 794–97 (2000) ("The unique perspectives, facts, and arguments of scientific disciplines can inform that Court of the broader legal and policy implications of its rulings."); *see also* Mauro, *supra* note 56. However, this is difficult to empirically validate. Nonetheless, interest groups seize the opportunity to influence or sway outcomes.

[192] Although cases involving business and market regulation do not attract nearly the same level of public attention as abortion or affirmative action, they are undoubtedly just as vital. *See* Ronald A. Cass & Kenneth W. Starr, *The Supreme Court's Business*, WALL ST. J., Oct. 20, 2005, at A14. The effect of poor decisions in these cases could have a crippling economic impact on American businesses and markets.

where the issues lack political salience and amicus participation is minimal, the risk is attenuated.

The level of amicus participation, the diversity of amici, and the actual content of the arguments raised by the amici in *Washington v. Glucksberg* (an assisted suicide case) and *Roper v. Simmons* (a death penalty case) are instructive for the overall discussion of political symbolism and the Supreme Court's quasi-representative function. Ultimately, these examples illustrate that the Court "encourages the aggregation and articulation of interests" and shares some similarities with other representative institutions.[193] Yet, the Court's representative function is more symbolic. This, however, does not present a problem. In fact, this may be a source of comfort because the Court's institutional legitimacy is also tied to its stability and independence. The Court's representative capacity must be balanced with its independence. Ultimately, the Court's judgment rests with nine Justices who are not threatened with removal.

In addition to robust participation by diverse amici, the content of the arguments raised by amici illustrates how amicus participation provides a deliberative and discursive forum.[194] The perspectives of amici may enhance the prospect of better substantive decisions and the mere opportunity to participate in the lawmaking process enhances the Court's legitimacy even where a party disagrees with the ultimate outcome.[195] Discursive debate and participation is particularly important for groups normally excluded from the legislative process. In general, amici in *Glucksberg* and *Roper* made one or a combination of six types of argumentation: (i) legal arguments; (ii) ethical arguments raising moral and ethical concerns in support of a particular decision; (iii) emotive arguments using graphic imagery and language intended to evoke an emotional response; (iv) externality arguments intended to inform the Court about the consequences of a decision beyond the immediate context and its effect on third parties; (v) signaling arguments showing the Court the size, prestige, and expertise of the amici; and (vi) policy arguments employing empirical evidence, policy analysis, and social science evidence. The following subsections provide examples of the diverse amici and the content of the arguments they pursued in *Glucksberg* and *Roper*.

A. Washington v. Gluckberg

In *Washington v. Glucksberg*, the Supreme Court addressed the question of whether a state statute criminalizing assisted suicide violated the Due Process Clause insofar as it prohibited physicians from administering lethal doses of medication to competent terminally ill

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[193] Caldeira & Wright, *supra* note 13, at 803. As previously mentioned, the exact degree of influence remains uncertain.

[194] *See* GUTMANN & THOMPSON, supra note 68, at 42.

[195] *Id.*

patients upon their request.[196] The Court held in favor of the State of Washington (the petitioner), concluding that (i) the asserted right to assistance in committing suicide was not a fundamental right protected by the Due Process Clause and (ii) Washington's ban on physician-assisted suicide was rationally related to legitimate government interests.[197] In total, there were over fifty amicus briefs submitted at the merits stage. These briefs represented a diverse range of parties from the Solicitor General to women's rights groups to an individual John Doe afflicted with a terminal illness. These briefs were submitted in support of petitioner (i.e., the State of Washington), in support of respondents (i.e., terminally ill patients, physicians, and nonprofits), and for the purpose of neutral advocacy. Although there was a considerable degree of repetitive argumentation among the different amici who supported the same party, the amici differed in their reasons for support and in the types of argumentation they pursued.

1. *Amici Supporting Petitioners*

a. Governmental Amici

In *Washington v. Glucksberg*, approximately two-thirds of the amicus briefs at the merits stage were in support of petitioners. This support came from a significant number of governmental entities. For example, the Solicitor General asserted that the physician-assisted suicide issue is of governmental interest because the "United States owns and operates numerous health care facilities which permit patients to refuse life-sustaining treatment, but do not permit physicians to assist patients in committing suicide by providing lethal dosages of medication."[198] The Solicitor General argued that although there was a liberty interest (though not fundamental) at stake, "[o]verriding state interests justify the State's decision to ban physicians from prescribing lethal medication."[199] Moreover, the Solicitor General noted that state legislatures "undoubtedly have the authority" to create exceptions to a ban on assisted suicide, "[b]ut

[196] Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997). The suit originated in the United States District Court for the Western District of Washington where four physicians, three terminally ill patients, and a nonprofit organization challenged the statute and prevailed at summary judgment. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454, 1455–56 (W.D. Wash. 1994). Subsequently, the State of Washington appealed to the U.S. Court of Appeals for the Ninth Circuit where the decision was reversed. *See* Compassion in Dying v. Washington, 49 F.3d 586, 588 (9th Cir. 1995). On rehearing the case en banc, the Ninth Circuit affirmed the district court decision. Thereafter, the State of Washington petitioned for writ of certiorari. The Second Circuit case, *Quill v. Vaco*, 80 F.3d 716 (2d Cir. 1996), was merged with *Washington v. Glucksberg* at the Supreme Court. Ultimately, the Court's decision was unanimous.

[197] *See Glucksberg*, 521 U.S. at 735.

[198] Brief of the United States as Amicus Curiae Supporting Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 663185. The brief also noted that the Department of Veteran affairs operated "173 medical centers, 126 nursing homes, and 55 in-patient hospices." *Id.* at 2.

[199] *Id.* at 8–9.

there is no constitutional basis for imposing that exception on all States."[200] The Solicitor General was not the only party from the federal government to submit an amicus brief in this case. Senator Orrin Hatch, Representative Henry Hyde, and Representative Charles Canady submitted a brief arguing for a restraint on judicial review and cautioned against the Court usurping the judgments of state legislatures and courts.[201]

Not surprisingly, many states with similar statutes at risk of being invalidated submitted briefs. Instead of submitting separate briefs, many states submitted coalition briefs. In general, state amici asserted legal arguments that placed extreme emphasis on federalism concerns and "[r]espect for state sovereignty and the power of the people to directly govern their own affairs, unless excluded by the Constitution or valid act of Congress."[202] The states also noted that a majority of states (forty-seven out of fifty) make the distinction between refusing unwanted life sustaining treatment and the act of suicide in their natural death/living will statutes.[203] Here, the states' coalition brief signaled to the Court the presence of a majority consensus.

The State of Oregon submitted a separate individual brief.[204] Although Oregon had altered its laws to permit physician-assisted suicide for the terminally ill, it supported petitioners nonetheless. Oregon asserted that the minority of states that permit physician-assisted suicide (or those that are considering it) also have an interest in the outcome of the case because if terminally ill adults have a fundamental liberty interest in physician-assisted suicide, "state supervision and regulation in this area will be subject to exacting judicial review."[205] Although a decision for respondents would not invalidate Oregon's assisted suicide law, it would undermine state legislative discretion overall. Oregon's brief contended that the approaches of both Washington and Oregon were constitutionally

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[200] *Id.* at 9–10.

[201] *See* Brief of Senator Orrin Hatch, Chairmen of Senate Judiciary Committee et. al. as Amici Curiae in Support of the Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 657755 ("The purpose of this brief is to show that a principled middle ground exists, in which the courts may recognize and enforce constitutional rights in a fashion that gives due respect to the coordinate branches of government and the traditions of the people.").

[202] Brief of Amici Curiae States of California, Alabama, Colorado et. al. in Support of Petitioners State of Washington at 1–3, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 33413986. The states explained:

> Whether that balance should be abandoned and the line redrawn to permit an individual to commit suicide without state interference, and then redrawn yet again to permit assisted suicide, is a matter appropriately left for the people to decide, through their duly elected representatives or by initiative ballot. The principles of federalism embodied in our Constitution require no less.

Id. at 19.

[203] *See id.* ("[S]tatutes in a majority of states . . . codify an individual's right to refuse unwanted medical treatment and, in the same legislation, reject any affirmative act to end life.").

[204] Brief of Amicus Curiae State of Oregon in Support of Petitioners State of Washington et al., Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 663194.

[205] *Id.* at 1–3.

permissible. Although the states' briefs articulated similar arguments, Oregon's brief, coming from a minority jurisdiction's perspective, performed a complementary function.

Another interesting government brief came from prosecuting attorneys in Oakland County, Michigan where the famous Jack Kevorkian had performed more than forty-five physician-assisted suicides.[206] The prosecutors acknowledged that "[b]oth petitioners and amici can inform the Court of the certainty that recognition of a new constitutional right will inevitably start our society on a trip down [a] 'slippery slope' . . . ."[207] The prosecutors wanted to avoid the submission of a "me-too" brief, and accordingly the prosecutors described themselves as the only amicus who could inform the Court about "actual practical experience with the reality of assisted suicide" having attempted to prosecute Jack Kevorkian, the "'poster child' of the assisted suicide movement."[208] The prosecutors cautioned that physician-assisted suicide was incapable of being confined or controlled by specific regulations and that "[o]nly by refusing to recognize a new constitutional right to die can this Court hope to prevent the incursion of more 'Dr. Deaths' who will offer the sick, infirm, depressed, and aged only the siren song of a painless death."[209] This brief utilized signaling, emotive, and policy arguments.

b. Non-Governmental Amici

i. Religious Organizations

Petitioners also received significant support from non-governmental entities. The United States Catholic Conference[210] along with many other religious organizations submitted a coalition brief that included less argument of religious ethics than repetition of the legal arguments made by other amici. Besides repetition, this brief also signaled the breadth and diversity of religious organizations supporting petitioner's arguments.

ii. Medical Health Organizations

Certain members of the health community supported petitioners' position. The AMA's amicus brief took an ethical approach arguing that "[t]he power to assist in intentionally taking the life of a patient is antithetical to the central mission of healing that guides both medicine and

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[206] *See* Brief of for Richard Thompson, Oakland County Prosecuting Attorney as Amicus Curiae Supporting Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 656291.

[207] *Id.* at 4.

[208] *Id.* at 4–5.

[209] *Id.* at 7.

[210] Brief for the United States Catholic Conference et. al. as Amici Curiae Supporting Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 650919. The Conference's members are active Roman Catholic Bishops in the United States. *Id.* at 2. The statement of interest also asserts that "Roman Catholicism is the largest religious denomination in the United States, with over 60 million members in this country." *Id.*

nursing."[211] Other professional health groups signed on to the brief as well. Moreover, the brief cautioned that declaring a fundamental right to physician-assisted suicide may slow efforts to improve the provision of pain relief and "compassionate end-of-life care."[212] The AMA's brief did not simply repeat legal arguments. Instead, the brief made use of ethical, signaling, and externality arguments in an effort to broaden the Court's perspective on the issue.

iii. Conservative Right to Life Groups

A number of briefs supporting petitioner came from conservative right to life groups who anticipated the impact this case would have in the abortion and other legal contexts. At the appellate level, the right to life agenda had suffered a setback when the court relied heavily on the broad construction of liberty defined in *Planned Parenthood v. Casey*.[213] Consequently, these groups attempted to shift the balance, using this case as their platform. The Family Research Council submitted a brief that focused exclusively on the history of abuse surrounding euthanasia.[214] The brief cited the Holocaust as history's most tragic and relevant experience with physician-assisted suicide en route to supporting a blanket ban on physician-assisted suicide.[215] The brief made no mention of the abortion issue, but instead attempted to quietly affect other contexts through emotive appeals. Other right to life organizations took a more direct approach. For instance, the American Center for Law and Justice[216] and the New Hope Life Center, argued against adopting *Casey*'s "existentialist notion of liberty" that would lead "to claims of [the] right to use drugs, and to engage in polygamy, fornication, adultery, divorce, sodomy, bestiality, and consensual sadism."[217] Similarly, the Rutherford Institute[218] and the National Right to Life Committee[219] submitted briefs arguing against the

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[211] Brief for the American Medical Association et. al. as Amici Curiae Supporting Petitioners at 1, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 656263.

[212] *Id.* at 18.

[213] *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[214] *See* Brief for Family Research Council as Amicus Curiae Supporting Petitioners at 1, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 656275. The Family Research Council's mission is the "preservation and defense of traditional values and the family." *Id.*

[215] *Id.* at 2–4.

[216] The American Center for Law and Justice is "devoted to safeguarding the sanctity of human life through education, litigation, legislative assistance, and related activities . . . ." Brief for the American Center for Law & Justice as Amicus Curiae Supporting Petitioners at 1, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 656340.

[217] *Id.* at 3–4.

[218] *See generally* Brief for the Rutherford Institute as Amicus Curiae Supporting Petitioners, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 752715.

[219] *See* Brief for the National Right to Life Committee, Inc. as Amicus Curiae Supporting Petitioners, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 656315 (offering numerous rationales grounded in precedent and policy in support of the right to life position).

constitutionality of assisted suicide using different legal arguments. Beyond the pretextual issue of assisted suicide, right to life groups sought to plant language and arguments that would bolster right to life advocates' position in the abortion context.

2. *Amici Supporting Respondents*

No governmental entities submitted briefs in favor of respondents; however, respondent support came from a number of sources.

a. Brief on Behalf of an Individual

A California resident afflicted with the late stages of the AIDS virus submitted a supporting brief.[220] The amicus, John Doe, had obtained a judgment in the District Court for the Central District of California that found a similar statute criminalizing assisted suicide invalid.[221] Within John Doe's statement of interest, he described in vivid detail the symptoms and effects of his illness asserting that AIDS patients are "emaciated beyond belief, reminiscent of starving individuals in Ethiopia or the dead photographed concentration camp victims from World War II."[222] John Doe argued that a statute imposing an absolute prohibition on physician-assisted suicide intruded into the realm of private decision making "protected by the guarantee of liberty."[223] This brief provides yet another example of emotive and legal argumentation.

b. Legal Organizations

The ACLU, joining many other organizations, submitted a brief in support of respondents.[224] Unlike other amici, the ACLU's basic organizational function is to litigate. The ACLU lacks a discretely defined constituency, but has, according to its statement of interest, over "300,000 members" nationwide.[225] In general, the ACLU's brief used legal argumentation. The thrust of the ACLU's argument (as with other amici supporting respondents) was that a state's categorical ban on physician-assisted suicide as applied to competent terminally ill patients was unconstitutional.[226]

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[220] *See* Brief for John Doe as Amicus Curiae Supporting Respondent, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 743345.

[221] *Id.* at 1–2.

[222] *Id.* at 3–4.

[223] *Id.* at 20.

[224] Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Respondents, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 711194.

[225] *Id.* at app. 1a.

[226] *See id.* at 1–2 ("[A] state denies equal protection of its laws when it provides that one class of persons may exercise th[e] [right to die] while others who are similarly situated for all relevant purposes are wholly denied the opportunity to exercise the same right for the same reason.").

c. Reproductive Rights and Women's Groups

Reproductive and women's rights groups supported respondents because they identified parallels between physician-assisted suicide and abortion legislation. The appellate court decision supported the reproductive and women's rights agenda because the decision relied heavily on a broad construction of liberty asserted in *Planned Parenthood v. Casey*, an abortion case. The National Women's Health Network and the Northwest Women's Law Center together submitted a brief in support of respondents[227] that argued "[i]f the States' position were accepted, an individual's ability to make certain highly intimate and personal choices—whether those choices are about procreation, abortion, or death—could be denied through a blanket ban . . . ."[228] The Center for Reproductive Law and Policy urged the Court not to consider its abortion precedents in the instant case because the "history of discrimination against women, justify a different standard of review . . . ."[229] The amici apparently feared that the close link between the right to an abortion and a right to physician-assisted suicide would potentially weaken the pro-choice position.[230] Therefore, the amici supported respondents. Reproductive and women's rights groups attempted to instruct the Court about externalities beyond the physician-assisted suicide context. These groups were also partaking in counteractive lobbying to offset the efforts of the right to life amici.

d. Gay Rights and AIDS Advocacy Organizations

Constituencies that perceived themselves as disproportionately affected by the Court's decision, such as gay rights and AIDS advocacy organizations, also supported respondents.[231] In a brief submitted by the Gay Men's Health Crisis and Lambda Legal Defense and Education Fund, the amici argued that the right to end one's life was a fundamental liberty interest.[232] The brief contained statements from prominent individuals with disabilities and terminal illnesses and also marshaled the argument that denial of the right to assistance in dying denies people with terminal illnesses equal protection under the law.[233] Besides making legal

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[227] Brief for the National Women's Health Network and Northwest Women's Law Center as Amici Curiae Supporting Respondents, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 709341.

[228] *Id.* at 22.

[229] Brief for the Center for Reproductive Law & Policy as Amicus Curiae Supporting Respondents at 1–7, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 708943.

[230] *See id.* at 1 ("The Center for Reproductive Law and Policy . . . protects the right and ability of women around the world to obtain the full range of reproductive health services including abortion, contraception and new reproductive technologies.").

[231] There is also the prospect that these groups are seeking broad liberty interests in the instant case to impact other contexts.

[232] *See* Brief for Gay Men's Health Crisis and Lambda Legal Defense and Education Fund et al. as Amici Curiae Supporting Respondents at 12–13, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 711205.

[233] *See id.* at 24 app. (including statements of attorney Evan A. Davis and writer and historian Hugh Gregory Gallagher, both of whom became disabled at a young age).

arguments, the amici made emotive and signaling arguments to the Court.

e. Mental Health Professionals

A coalition brief of mental health professionals asserted that "[a]s mental health professionals, we have no interest in 'promoting' assisted suicide. Our interest lies, instead, in the promotion of patient autonomy . . . and in the sound development of the law to that end."[234] Despite an espoused ambivalence about physician-assisted suicide, the amici concluded that the Supreme Court should uphold the lower court decision on patient autonomy grounds. Similarly, a national medical student organization and a group of distinguished medical professionals argued that physician-assisted suicide should be an available option to competent terminally ill patients.[235] In contrast to the AMA brief that focused on a physician's ethical obligation to their patient, amici for respondents focused on patient autonomy arguing that "[t]he principle of patient autonomy is equally central to medical ethics and to defining the physician's role in end-of-life decisions."[236] These briefs in favor of respondents along with the briefs supporting petitioner signaled to the Court the split in the medical community and the health profession.

3. *Neutral Amici*

Not all amici support a particular party; neutral advocacy is also an option. In *Glucksberg*, Choice in Dying, Inc.[237] took no legal position, but instead sought "to establish an empirically based framework by which these important issues may be considered . . . ."[238] Although the organization's name suggests otherwise, Choice in Dying presented themselves to the Court as a neutral amicus participating to clarify misconceptions surrounding physician-assisted suicide. The brief's presentation was neutral in that it cited statistics and observations that could be used by respondents, petitioners, but most importantly by the Court in reviewing the appellate court's decision.

4. *The* Glucksberg *Court's Use of Amicus Briefs*

The majority opinion in *Glucksberg* cited the United States' amicus brief and the states' coalition brief in its discussion of implicated state interests.[239] Also, the opinion cited several briefs in a footnote to express

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[234] Brief for Washington State Psychological Association et. al. as Amici Curiae Supporting Respondent at 29, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 708960.

[235] Brief for the American Medical Student Association and a Coalition of Distinguished Medical Professionals as Amici Curiae Supporting Respondents at 1–4, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 709332.

[236] *Id.* at 13.

[237] Brief for Choice in Dying, Inc. as Amicus Curiae, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 656277.

[238] *Id.* at 1.

[239] *Glucksberg*, 521 U.S. at 728–31.

the Court's recognition of the skepticism surrounding physician-assisted suicide and the potential slippery slope that will follow once a categorical ban is lifted.[240] Although the references to amicus briefs are minimal in the opinion, this is not the best way to gauge their importance. Supreme Court Justices may draw from multiple types of information that come to the Court's attention via amici.

B. Roper v. Simmons

In *Roper v. Simmons*, the Supreme Court addressed the question of whether it was permissible under the Eighth and Fourteenth Amendments of the Constitution to execute a juvenile offender who was under the age of eighteen when he committed a capital crime.[241] The Supreme Court held (5–4) in favor of respondent, Christopher Simmons, concluding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed. In total, there were eighteen amicus briefs submitted at the merits stage. These briefs were submitted in support of petitioner (i.e., Donald P. Roper, Superintendent, Potosi Correctional Center), and respondent (i.e., Christopher Simmons). The overwhelming majority of briefs (sixteen, in fact) were in support of respondent. The briefs came from a diverse range of parties including professional associations, international organizations and leaders, religious organizations, child advocacy groups, legal organizations and governmental amici. The *Simmons* amici opted for coalition briefs, which explains some of the difference in the number of briefs compared to *Washington v. Glucksberg*.

1. *Amici Supporting Petitioners*

Only two amici supported petitioners and sought to reverse the decision made by the Missouri Supreme Court ruling the execution of juveniles under the age of eighteen unconstitutional. These amici fell into two categories: governmental amici and legal organizations.

a. Governmental Amici

The states of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia submitted a brief arguing against a bright line rule forbidding executions for offenders under the age of eighteen.[242] The amici asserted

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[240] *Id.* at 732 n.23.

[241] Christopher Simmons, at age seventeen, committed a brutal murder. Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003). Following a jury trial, Simmons was convicted and sentenced to death. *Id.* Simmons, while on death row, filed a new petition for post conviction relief, arguing that the reasoning of the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), established that the Constitution prohibits the execution of a juvenile who was under the age of eighteen when the crime was committed. *Id.* The Missouri Supreme Court agreed and set aside Simmons' death sentence. *Id.* at 413. The Supreme Court granted certiorari. Roper v. Simmons, 540 U.S. 1160 (2004).

[242] Brief for the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici

that, based upon their experience, there is no basis to categorically exempt juveniles below the age of eighteen from execution. Specifically, amici argued that there is a distinction between juveniles at ages sixteen and seventeen compared to the mentally retarded. Thus, a sixteen- or seventeen-year-old's culpability should be an individualized determination. To demonstrate this, amici provided brutal descriptions of crimes committed by juveniles at the age of sixteen and seventeen to illustrate that certain juvenile offenders demonstrate culpability.[243] Here *amici* relied on legal, signaling, and emotive arguments to persuade the Court to overturn the Missouri Supreme Court's decision.

b. Legal Organizations

The other amici supporting petitioner, Justice for All Alliance, made similar arguments against a bright line prohibition and asked for individualized determinations of culpability for juveniles below the age of eighteen.[244] Whereas legal organizations played a minor role as amici supporting petitioner, they played a much greater role as amici supporting respondents.

2. *Amici Supporting Respondent*

a. Governmental Amici

As a general matter, governmental amici made significant use of legal and signaling arguments. A coalition brief of states argued that there is a legislative consensus (i.e., thirty-one states plus the Federal Government Bar) against imposing the death penalty against juvenile defenders under the age of eighteen.[245] Governmental amici also identified trends toward stricter juvenile justice laws that expose juveniles to adult criminal sanctions, yet still draw a distinction with respect to capital punishment.[246]

Curiae Supporting Petitioner at 1, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 865268 [hereinafter Alabama et al. Brief].

[243] *See id.* at 4–14 (providing case studies demonstrating this phenomenon).

[244] *See* Brief for Justice for All Alliance as Amici Curiae Supporting Petitioner at 2, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 865269 [hereinafter Justice for All Brief] ("[T]he Court [can]not group juveniles together as a class but rather [must] acknowledge that they are all different with respect to their experience, maturity, intelligence, and moral culpability."). The Justice for All Alliance is a victim support organization advocating for change in the criminal justice system to ensure that victim's rights are considered. *Id.* at n.2.

[245] *See* Brief for New York, Iowa, Kansas, Maryland, Minnesota, New Mexico, Oregon, and West Virginia as Amici Curiae Supporting Respondent at 2 n.1, 3, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636449 ("This legislative consensus . . . do[es] not permit the death penalty under any circumstances.").

[246] *See id.* at 18 ("[N]umerous states have drastically toughened their treatment of juvenile offenders by lowering the age at which these offenders may be tried and sentenced as adults. At the same time, however, there has been a trend in many of these states toward explicitly prohibiting execution of these offenders.").

b. Non-Governmental Amici

i. International Organizations

International organizations and actors expressed a keen interest in the juvenile capital punishment issue. A coalition brief from the European Union and other members of the international community signaled the international consensus against the execution of juvenile offenders.[247] A group of esteemed Nobel Peace Prize Recipients, including former U.S. President James Earl Carter, asked the Court to consider the opinion of the international community in deciding the question of whether the death penalty for juveniles under the age of eighteen was constitutional.[248] The brief asserted that a bar of the juvenile death penalty has *jus cogens* status in international law and referenced a number of international treaties and instruments barring the death penalty for juveniles.[249] The brief also signaled international consensus on the juvenile death penalty and portrayed the United States as an anomaly in the international community.[250] The amici cited U.S. Supreme Court precedent for considering international norms when reaching a decision.[251] In addition, the Nobel Prize winners made use of externality arguments, asserting that the United States' sanctioning of juvenile executions would undermine the leverage the United States government would have to influence other countries to improve their own human rights record.[252]

Similarly, a brief from Former U.S. Diplomats argued that continuing the administration of the death penalty against juveniles could negatively impact the United States government's standing in the international community.[253] This brief highlighted the condemnation the United States has received from international bodies like the United Nations concerning the execution of juvenile offenders.[254] The brief also articulated the diplomatic isolation the United States could face given the consensus in the world community, even among nations with poor human rights records, on

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[247] *See* Brief for European Union, et al. as Amici Curiae Supporting Respondent at 1–3, *Roper*, 543 U.S. 551 (No. 03-633) [hereinafter EU Brief]. Admittedly, the EU and other European countries mentioned herein are indeed governmental entities. For simplification purposes, this Article classifies these entities as non-governmental because they are non-domestic.

[248] *See* Brief for President James Earl Carter, Jr. et al. as Amici Curiae Supporting Respondent at 1–3, *Roper*, 543 U.S. 551 (No. 03-633) [hereinafter Carter Brief].

[249] *Id.* at 6–7, 19.

[250] *Id.* at 9–10.

[251] *Id.* at 20.

[252] *Id.* at 27–29.

[253] *See* Brief for Former U.S. Diplomats et al. as Amici Curiae Supporting Respondent at 1, *Roper*, 543 U.S. 551 (No. 03-633) [hereinafter Diplomats Brief] ("The continuation of this practice by a few states in the United States strains diplomatic relations with close American allies, increases America's diplomatic isolation, and impairs important U.S. foreign policy interests at a critical time . . . ."). The named diplomats also filed an amicus brief in *Atkins v. Virginia*. 536 U.S. 304 (2002) (holding that execution of persons with mental retardation violates the Eighth Amendment).

[254] *Id.* at 8–13.

the prohibition of juvenile executions.[255] Another brief from a coalition of human rights organizations highlighted the historical influence of international law and the United Kingdom on the formation of the United States Constitution, particularly the Eighth Amendment's cruel and unusual punishment clause.[256] This brief made several legal arguments as to why the Supreme Court should consider international law and norms (i.e., embrace comparativism) when considering evolving standards of decency under the Eighth Amendment.

ii. Professional Organizations

Professional organizations, particularly medical and psychological organizations, relied heavily on empirical data, social science, and research-based arguments. The AMA and other organizations filed a coalition brief that provided scientific evidence showing the cognitive and physiological differences between adolescents and adults and how these differences support not extending the death penalty to juveniles.[257] Similarly, another coalition brief, filed in part by the American Psychological Association, cited research findings on adolescent psychological development and thought processes that, in the amici's view, undermined the rationale for extending the death penalty to juveniles.[258] The brief also cited research that sentencing proceedings did not adequately account for the mitigating factor of adolescence.[259]

iii. Religious Organizations

Religious organizations also participated as amici, citing their unique qualifications for addressing moral and ethical issues. The Conference of Catholic Bishops and Other Religious Organizations filed a coalition brief asserting the relevance of religious communities' views (e.g., Jewish, Christian, Muslim, Buddhist, etc.) on the imposition of the death penalty and evolving standards of decency.[260] This coalition brief signaled to the

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[255] *See id.* at 14–25 ("If these trends continue, the United States will soon stand alone as the only country in the world that endorses the regular execution of juvenile offenders as part of its ordinary criminal justice system.").

[256] Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent at 2–3, *Roper*, 543 U.S. 551 (No. 03-633) [hereinafter *Roper*, England and Wales] ("[*A*]*mici* consider the history of treatment of juveniles in the United Kingdom, as well as the status of the internal law and practice with respect to the juvenile death penalty, to be of particular interest to this Court.").

[257] *See* Brief for American Medical Association et al. as Amici Curiae Supporting Respondent at 4–16, 21, *Roper*, 543 U.S. 551 (No. 03-633) ("These behavioral differences are pervasive and scientifically documented.").

[258] *See* Brief for American Psychological Association, et al. as Amici Curiae Supporting Respondent at 2–3, *Roper*, 543 U.S. 551 (No. 03-633) ("The unformed nature of adolescent character makes execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment.").

[259] *Id.* at 16–30.

[260] Brief for United States Conference of Catholic Bishops and other Religious Organizations as Amici Curiae Supporting Respondent at 1–2, *Roper*, 543 U.S. 551 (No. 03-633). Another Catholic

Court the consistent view from various religious faiths on the issue of juvenile execution, despite differing views on crime and punishment.

iv. Legal Organizations

Legal organizations supporting the respondent had an active presence as amici. The ABA made legal arguments against extending the death penalty to juveniles as well as acknowledging the growing national and international consensus.[261] The ABA took no position with respect to the death penalty as a general matter. However, the ABA noted its opposition to extending capital punishment to juvenile offenders.[262] In a coalition brief filed by the NAACP LDF and other legal organizations, amici highlighted the racial disparities connected with the imposition of the death penalty to juveniles.[263] For example, the brief cited statistics indicating that over fifty percent of juveniles executed since 1973 were either black or Latino.[264] The National Legal Aid and Defender Association made legal arguments throughout its brief, concluding with the use of emotive persuasion.[265] The conclusion quoted a letter from a former juvenile offender, who, during the 1980s was sentenced to death, but later re-sentenced to life in prison.[266] This type of emotive argumentation is perhaps best suited for amici rather than the immediate parties. If similar arguments are made by the immediate parties, they could potentially stigmatize a party.[267] Although a number of briefs in the legal organization category were prone to repetition,[268] several briefs raised ancillary legal issues such as procedural deficiencies to sway the Court. For example, the Coalition for Juvenile Justice Brief argued that juveniles are "less able to assist counsel, more prone to making false confessions, and more likely to be wrongfully convicted or wrongfully sentenced to death."[269] Robust amicus participation by legal organizations in support of respondent

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organization, the United States Catholic Conference filed a brief in *Washington v. Glucksberg*. *See* Brief for the United States Catholic Conference et al. as Amici Curiae Supporting Respondent, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 650919.

[261] *See* Brief for American Bar Association as Amici Curiae Supporting Respondent at 2–5, 16, 20–21, *Roper*, 543 U.S. 551 (No. 03-633) ("[T]he United States is virtually alone among the world's nations in permitting the execution of juvenile offenders, a factor this Court [has] considered in [the past]." (internal citations omitted)).

[262] *Id.* at 3.

[263] Brief for NAACP Legal Defense and Education Fund et al. as Amici Curiae Supporting Respondent at 3–5, *Roper*, 543 U.S. 551 (No. 03-633).

[264] *Id.* at 10.

[265] *See* Brief for National Legal Aid and Defender Association as Amicus Curiae Supporting Respondent at 27–29, *Roper*, 543 U.S. 551 (No. 03-633) ("Amid the legal arguments and counter arguments made in cases such as th[ese], it is easy to lose track of the truth[,] that these cases affect real lives.").

[266] *Id.* at 28–30.

[267] *See* discussion *supra* Part IV.A.2.b.

[268] *See, e.g.*, Brief for Constitution Project as Amicus Curiae Supporting Respondents, *Roper*, 543 U.S. 551 (No. 03-633).

[269] Brief for Coalition for Juvenile Justice as Amicus Curiae Supporting Respondents at 5, *Roper*, 543 U.S. 551 (No. 03-633).

reinforces the claim that amici act as a surrogate for vulnerable groups.

v. Child Advocacy and Victim's Rights Groups

Participation by child advocacy and victims groups reflected several argumentation styles such as legal, signaling, policy and counteractive lobbying. The coalition brief of the Juvenile Law Center, included over fifty entities who advocate on behalf of juveniles and children.[270] Here, the amici made legal and policy arguments, as well as signaling widespread opposition to the juvenile death penalty.[271] A brief from Murder Victims' Families for Reconciliation asserted an argument rejecting the idea of using victim's rights as a basis to justify the death penalty for juveniles.[272] Here, the amici engaged in a form of counteractive lobbying by asserting that victims are not monolithic in their views of capital punishment.[273] This brief countered arguments made by another victim's rights group in support of petitioner.[274]

3. *The Simmons Court's use of Amicus Briefs*

a. The Majority Opinion's References to Amici

The majority opinion in *Roper v. Simmons* had several direct references to amici. Moreover, information submitted via amici figured prominently into the Court's analysis. The Court acknowledged amici-supporting respondents in several areas. The Court first referenced respondent's amici in its discussion of the key differences between juveniles under eighteen and adults, which demonstrate that juvenile offenders "cannot with reliability be classified among the worst offenders."[275] Yet, respondent's amici were most prominent in the Court's discussion of international legal and social norms.[276] The Court noted that

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[270] *See* Brief for Juvenile Law Center et. al as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1660637.

[271] *Id.* at 19–20.

[272] *See* Brief for Murder Victims' Families for Reconciliation as Amici Curiae Supporting Respondent at 3–4, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1588549 ("There is a prevailing assumption in our society that surviving family members of homicide victims want and need the death penalty in order to feel that justice has been served. In fact, victims come to this devastating experience with diverse beliefs, life backgrounds, and needs, and their response to the horror of having a family member murdered is as varied and diverse as the victims themselves.").

[273] *Id.* at 3–4.

[274] *Compare id.* at 3–5 ("By invoking victims' rights in support of the death penalty, [The Justice for All Alliance] promotes the inaccurate assumption that all victims believe that the execution of offenders is justice for the crime."), *with* Justice For All Brief, *supra* note 244, at 12 ("[C]ommon sense dictates that fifteen-year-olds are capable of being deterred from committing first-degree murder if they know they would receive the ultimate punishment.").

[275] *Roper*, 543 U.S. at 553.

[276] *See* EU Brief, *supra* note 247, at 12–13 (relying on *amicus* study to evaluate international execution practices); Carter Brief, *supra* note 248, at 9 (utilizing *amicus* participation in finding that "the United States [is] the only nation . . . that has not committed itself by treaty to bar the death penalty for offenses committed by persons under 18"); Diplomats Brief, *supra* note 253, at 7 ("Given the near unanimity of law and practice against executing juvenile offenders worldwide, *amici* believe

"[r]espondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990 . . . ."[277] The Court also cited the Brief for Human Rights Committee of the Bar of England and Wales et al., when it acknowledged the "opinion of the world community" and the "overwhelming weight of international opinion against the juvenile death penalty."[278] The Court, however, did not limit it references to respondent's amici with whom the majority agreed. The Court also acknowledged and addressed the arguments raised by state governmental amici for petitioner against a categorical exclusion for juveniles from the death penalty.[279]

b. The Dissenting Opinions of Justices O'Connor and Scalia

Perhaps the most interesting discussion involving issues and information submitted via amici involved the two dissenting opinions of Justice O'Connor and Justice Scalia that discussed the relevance of international law and expressed some skepticism concerning arguments presented via amici. Justice O'Connor criticized the majority opinion asserting:

> Because I do not believe that a genuine national consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such confirmatory role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.[280]

Justice O'Connor acknowledged the relevance of international law and norms to the Court's determination of contemporary standards of decency. Yet Justice O'Connor expressed the opinion that international law has a confirmatory role to play that does not trump domestic standards, values, and consensus as expressed through the actions of the Nation's legislatures.

On the other hand, Justice Scalia's dissent took a more radical

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that the current practice by a few states in the United States violates customary international law . . . ."); *Roper*, England and Wales, *supra* note 256, at 13–14 ("Numerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations, are evidence of [this trend]."). The Court specifically cited these briefs. *Roper*, 543 U.S. at 576.

[277] *Roper*, 543 U.S. at 577.

[278] *Id.* at 578.

[279] *See id.* at 570–74 ("In concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders, we cannot deny or overlook the brutal crimes too many juvenile offenders have committed." (internal citation omitted)).

[280] *Id.* at 604 (O'Connor, J., dissenting).

stance—asserting that international law and opinion had no relevance to the Court's inquiry:

> The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.[281]

Justice Scalia did not limit his criticism to input from international amici. He challenged the methodology and reliability of scientific studies particularly those submitted by the American Psychological Association.[282] Scalia further added:

> Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[283]

Justice Scalia did not support a categorical ban because he was not convinced that there were not individuals under age eighteen who were able to appreciate the nature of their crimes. To highlight this point, he ironically cited the amicus brief from the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia, which provided examples of "monstrous acts" of murder committed by individuals under eighteen.[284]

The majority and dissenting opinions in *Roper* highlight the tension between the Court's role as an independent body and a political actor. They also reflect the inclusionary function of amicus participation.

C. *Political Symbolism as reflected in Glucksberg and Simmons*

The in-depth analysis of the amici arguments in *Glucksberg* and *Simmons* provided herein further reveals how amicus participation

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[281] *Id.* at 608 (Scalia, J., dissenting).

[282] *Id.* at 617–18 ("[T]he American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court.").

[283] *Id.* at 618 (internal citations omitted) (Scalia, J., dissenting).

[284] *Id.* at 618–19; *see also* Alabama et al. Brief, *supra* note 242, at 9–10 (chronicling one such act of violence).

resembles a discursive debate and dialogue among multiple constituencies.[285] The Court also participates in these ongoing discussions—sometimes directly via its published opinions and, at other times, as a mere listener. The Court's listening function is particularly important and should not be discounted.[286] Unsuccessful, but acknowledged, arguments and perspectives from amici, at a minimum, create the impression that Court decisions are the result of vigorous debate and reasoning.[287] In *Glucksberg* and *Simmons*, amicus briefs came from a wide variety of amici reflecting divergent viewpoints. Without the inclusion offered by amicus participation, many of the amici and the interests they represented would have been excluded from the Court's consideration despite being impacted by the scope of the Court's ruling. Exclusion, in this instance, would engender negative consequences for the Court's legitimacy. The presence of an open deliberative forum not only increases the prospect of more balanced and perhaps better substantive outcomes, but also enhances the Court's institutional legitimacy irrespective of a particular decision or outcome.[288] Current Supreme Court rules favoring broad or "open door" participation implicitly acknowledge that the Court's job is not limited to considering the discrete interests of the immediate parties. The "Supreme Court cannot perceive itself as an isolated institution handing down rules from its pedestal in Washington, but instead it should see itself as one actor among many in the midst of a long-term colloquy."[289] Court decisions like *Glucksberg* and *Simmons*, although creating a degree of finality for the immediate parties, are only part of an ongoing dialogue between the Court, the public, and their representatives—and not the final decree.[290] Amicus participation symbolizes the integrated function of the Supreme Court in American society.[291]

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[285] *See* discussion *supra* Parts VI.A.–B.

[286] Kenneth S. Abraham, *The Costs of Attitudes*, 95 YALE L.J. 1043, 1062 (1986) (reviewing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985)) ("[H]onesty is usually the best policy, and that those whose beliefs do not prevail in a conflict should be made to feel that they remain full and respected members of the polity.").

[287] CALABRESI, *supra* note 286, at 90–91 (asserting how some conflicts are best addressed when legal structures allow for recognition or sympathy of various beliefs).

[288] *See* GUTMANN & THOMPSON, *supra* note 68, at 42.

[289] John Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, 47 J. POL. 113, 133–34 (1985).

[290] *See id.* at 134; *see also* Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 575 (2007) (describing courts as catalysts versus the traditional conception as norm elaborators and enforcers).

[291] The amicus brief continues to serve as a "catch-all device for dealing with some of the difficulties presented by the common law system of adversary proceeding." Krislov, *supra* note 13, at 720.

VII. CONCLUSION

This Article does not offer a specific policy or rule revision, but instead recognizes the benefits of preserving the status quo, i.e., broad amicus participation before the Supreme Court. Open door access to amici helps preserve the Court's institutional legitimacy among varied stakeholders without significantly undermining the Court's independence. Amicus participation dispels external criticism that the Court is detached and indifferent to the public. In the absence of a restrictive rule governing amicus participation, the Court has developed its own filtering mechanisms for analyzing amicus briefs and provided informal guidance to potential filers concerning the Court's preferences. Ultimately, criticisms of broad participation are outweighed by the resulting legitimacy gains. The Court's function as a quasi-representative institution is neither without tension nor imperfection. But, in the end, this function is unavoidable.