

## COMMENTS

### THE EFFECTIVENESS OF STATE-FILED AMICUS BRIEFS AT THE UNITED STATES SUPREME COURT

*Brandon D. Harper*\*

#### INTRODUCTION

Who has the biggest stake in a given litigation? The answer should be “the parties to the case.” After all, federal courts exist to decide cases and controversies between parties. Practice before the Supreme Court has evolved to allow another voice in the conversation. Amici Curiae, who are non-parties to a litigation, have begun filing briefs at rapidly increasing rates.

Amicus Curiae briefs serve an important function in the American legal system. These “friend of the court”<sup>1</sup> briefs allow interested non-parties to provide their expertise in a particular subject area or state their otherwise important interest in the case.<sup>2</sup> By filing an amicus brief, a third party may signal that “[t]he Court’s decision may affect its interest.”<sup>3</sup> Some of the Supreme Court’s most influential decisions, including *Baker v. Carr*<sup>4</sup>, *Brown v. Board of Education*<sup>5</sup>, and *Fur-*

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\* Editor-in-Chief, Vol. 16 *University of Pennsylvania Journal of Constitutional Law*, J.D. Candidate, 2014, University of Pennsylvania Law School. I am most grateful to Professor Matthew Wiener, whose advice and counsel during the multiple rounds of research and editing was invaluable. Additionally, special thanks are due to the *Journal’s* Volume 15 Board for selecting this Comment for publication, and the entire staff of Volume 16 for its immeasurable feedback and editing. All remaining errors are my own.

1 See *Amicus Curiae*, CORNELL LEGAL INFO. INST. WEX LEGAL DICTIONARY, [http://www.law.cornell.edu/wex/amicus\\_curiae](http://www.law.cornell.edu/wex/amicus_curiae) (last visited Nov. 8, 2012) (noting that “amicus curiae” translates from latin to English as “friend of the court”).

2 See generally Stephen M. Shapiro, *Amicus Briefs in the Supreme Court*, APPELLATE.NET (1999), <http://www.appellate.net/articles/amicusbriefs.asp> (describing the uses of amicus briefs, the process for filing, and the ways practitioners may effectively present Supreme Court amicus briefs).

3 WILLIAM H. REHNQUIST, *THE SUPREME COURT* 89 (1987).

4 369 U.S. 186, 237 (1962) (holding that redistricting disputes present justiciable questions that may be heard by federal courts).

5 347 U.S. 483, 494–95 (1954) (overruling the separate but equal public schooling rationale of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

*man v. Georgia*<sup>6</sup> relied on arguments and expertise supplied in amicus briefs.<sup>7</sup> While amicus briefs may be filed by virtually anyone (even Mother Teresa submitted a brief to the Supreme Court<sup>8</sup>), this Comment will focus on the increasing number of amicus briefs filed by states and will seek to ascertain the effectiveness of those briefs as compared to those filed by private organizations.<sup>9</sup>

The purpose of this Comment is both descriptive and evaluative. The first Part will describe the current state of the law with respect to amicus briefs filed by states at the Supreme Court. Next, the Comment will review the increasing literature on the subject as well as identify cases where the presence of state-filed amicus briefs is clear. In Part III, the Comment will evaluate the effectiveness of state-filed amicus briefs during the Roberts Court.<sup>10</sup> Finally, the Court's use of state-filed briefs will be compared to those filed by private organizations. A number of issues will be tackled by this Comment across the Parts, including the normative reasons for using amicus briefs at all, whether briefs filed on behalf of state governments deserve more or less credence than those prepared by private organizations, and whether the increased politicization of the state attorney general's office has led to more or less effective Supreme Court amicus briefing.<sup>11</sup>

## I. THE HISTORY OF AMICUS BRIEFS

Before continuing with a descriptive review of the current literature on amicus brief filing, it makes sense to analyze whether the briefs have any place in the legal system at all. To those in the academy and the legal profession, filing amicus briefs makes sense.<sup>12</sup> In some complicated or otherwise important cases, non-parties should have an avenue to present their beliefs about how the outcome of a

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6 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (arguing that consistency is required by the Eighth Amendment in determining when and how the death penalty is imposed).

7 *Furman v. Georgia*, 408 U.S. 238 (1972); *Baker v. Carr*, 369 U.S. 186, 187 (1962); *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 297 (1955).

8 *Mother Teresa's Letter to the US Supreme Court on Roe v. Wade*, [http://groups.csail.mit.edu/mac/users/rauch/nvp/roe/mothertheresa\\_roe.html](http://groups.csail.mit.edu/mac/users/rauch/nvp/roe/mothertheresa_roe.html) (last visited Nov. 8, 2012) (reprinting Mother Teresa's amicus brief asking the Court in *Roe v. Wade*, 410 U.S. 959 (1973), to not permit legal abortions in the United States).

9 I use the term private organizations to include any non-governmental amici. For example, the National Association for the Advancement of Colored People (NAACP) or the Chamber of Commerce would be included within my definition of private organizations.

10 The analysis begins in 2008 and concludes with the 2012 terms of the Roberts Court.

11 Effectiveness is measured by both number and depth of citations as explained below. Because there exists no standard coding, such as the Martin/Quinn scores for judicial impact, the analysis that follows will be largely descriptive.

12 Amicus briefs are filed every day in all levels of state and federal courts.

case might affect their interests. However, when taking a step back, there is a valid question of whether amicus briefs should be permitted at all. In amicus briefs generally, and in those advanced by states specifically, it is often the case that “most of such briefs are filed by ideological allies of one or another party.”<sup>13</sup> Once described as “lobbying a court” and “unseemly” by Professor Kurland,<sup>14</sup> some have suggested that such practices should be banned.<sup>15</sup>

#### A. *Amicus Briefs Generally*

It has been argued that amicus briefs are essential in Supreme Court litigation.<sup>16</sup> Indeed, amici are often able to bring new perspectives to legal disputes and may often illuminate or frame completely new legal issues.<sup>17</sup> Even so, the costs associated with producing and filing good amicus briefs are often so great that they may outweigh, or at least match, the potential benefits.<sup>18</sup> Of course, some disputes are of such legal significance that no cost associated with the filing of a brief could outweigh the potential benefit of the Court siding with amici.<sup>19</sup> However, briefers should conduct a cost-benefit analysis before determining whether filing would be appropriate.

Recall the first day of law school’s first-year Civil Procedure course. Students are instructed that courts of the United States are formed to decide a case or controversy between two or more parties. At the district court, a judge or jury reviews the evidence presented by the parties. At the circuit court, a panel of judges reviews the legal conclusions of the district court. And, as a first-year student is in-

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<sup>13</sup> Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 371 (2012).

<sup>14</sup> Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 632 (1974) (“[T]he process of lobbying a court, which is the primary role of [amicus] briefs, is unseemly.”).

<sup>15</sup> See, e.g., Solimine, *supra* note 13, at 371 (noting that some have argued against admitting amicus briefs (citing Kurland, *supra* note 14, at 632)).

<sup>16</sup> See generally Omari Scott Simmons, *Picking Friends From the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185 (2009) (discussing the importance of amicus briefs in ensuring the Supreme Court provides a deliberative and discursive forum).

<sup>17</sup> See *id.* at 198 (“This value [of citizen participation] includes not only the prospect of better substantive legal outcomes via discursive debate, but also the enhanced legitimacy of such reforms.”).

<sup>18</sup> See Ed R. Haden & Kelly Fitzgerald Pate, *The Role of Amicus Briefs*, 70 ALA. LAWYER 115, 115–16 (2009) (arguing that while helpful, amicus briefs often drive up the cost of litigation and increase the workload on federal judges).

<sup>19</sup> See *id.* at 118 (“Allowing helpful *amicus* briefs will not waste judicial resources or unnecessarily raise the costs of litigation. In fact, allowing helpful *amicus* briefs may help reduce costs by culling the unnecessary and unintended effects a particular decision may have on other litigation and issues.”).

structed, the Supreme Court reviews the legal determinations of the circuit court. This lesson is easy to understand and plainly stated in the Constitution.<sup>20</sup> While the Supreme Court has accepted amicus briefs for the better part of its existence, the ability of non-parties to speak to the Court is not granted by the Constitution.<sup>21</sup>

The first amicus brief filed in the United States Supreme Court was filed in *Green v. Biddle*.<sup>22</sup> In *Biddle*, the Supreme Court asked Henry Clay, the Speaker of the House of Representatives, for a legal opinion about whether the Commerce Clause applied to a land agreement between Virginia and Kentucky.<sup>23</sup> The Court still occasionally asks outside experts for submissions regarding particular legal topics,<sup>24</sup> but on the whole, amicus briefs have been used more and more by advocates of legal positions. Other than its official policies and rules regarding filing and formatting briefs, the Supreme Court has not issued any opinions about where amicus filers derive their constitutional authority to speak on a case or controversy to which they are not a party.

Since at least 1920, amicus briefs have comprised at least ten percent of the Supreme Court docket.<sup>25</sup> As of the start of the Roberts Court, amicus briefs constituted roughly eighty-five percent of the docket.<sup>26</sup> A frequent measure of brief effectiveness is the number of citations a brief receives. Citations are often seen as a helpful measure because a Justice's decision to cite a brief indicates that, at the very least, something about the brief was relevant to the Justice.<sup>27</sup> As to whether the increase in amicus brief filings means there are more

20 U.S. CONST. art. III, § 2 (noting the instances where the judicial system shall have original or appellate jurisdiction).

21 See SUP. CT. R. 37 (permitting and setting the standards for amicus briefs in the Supreme Court).

22 21 U.S. (8 Wheat.) 1, (1823). See Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 270 n.3 (2003) (arguing that this provides evidence of the true purpose of an amicus brief. That is, amicus briefs should be informative and not argumentative).

23 *Biddle*, 21 U.S. (8 Wheat.) at 17, 38–39.

24 See, e.g., Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 604 (“[T]he Supreme Court requests the United States to participate as amicus a couple dozen times each term.” (internal quotations omitted)). The Court appointed a number of amicus curiae to brief on the issues of severability and the individual mandate in the Patient Protection and Affordable Care Act cases. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2575 (2012).

25 Ruth Colker, *Justice Sandra Day O’Connor’s Friends*, 68 OHIO ST. L.J. 517, 522 (2007).

26 *Id.*

27 Relevance here means simply that the judge found something about the brief helpful. It could be that the brief helped propel the opinion, or provided an argument against which the judge could argue. Either way, it can be reasonably argued that counting the number of citations provides a helpful benchmark for the effectiveness of a brief.

citations to the briefs, Joseph Kearney and Thomas Merrill have concluded that “the rate of citations and quotations per brief is more or less keeping pace with the increase in filings.”<sup>28</sup> That said, all Justices who have been asked have noted “the number of amicus briefs filed tends to have zero influence on their considerations of the case.”<sup>29</sup> The trend at the Court is clear: the number of amicus brief filings will continue to increase so long as, among other reasons, the Court’s opinions continue to reflect some of the positions and arguments advanced by amici.<sup>30</sup>

Not all Justices have agreed with the rapid expansion of amicus brief filings. In 1949, as amicus briefs started to advocate more than inform, Justice Felix Frankfurter cautioned that the Court might be “exploited as a soap box or as advertising medium, or as the target, not of arguments but of mere assertion that this or that group has this or that interest in a question to be decided.”<sup>31</sup> More recently, Judge Richard Posner argued that “[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigants’ brief. Such amicus briefs should not be allowed.”<sup>32</sup> Evidence suggests practitioners have received the message about filing amicus briefs only where they will add significantly to the Court’s understanding of legal issues.<sup>33</sup> The number of briefs has certainly increased in the recent Supreme Court terms, but the number of duplicative briefs, that is the number of briefs filed by similar organizations espousing identical positions, has not increased as dramatically.<sup>34</sup> This suggests that while briefers believe there is value in filing, they also understand that there are diminishing returns when a Court receives voluminous submissions regarding the exact

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28 Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 761 (2000).

29 Linda Sandstrom Simard, *An Empirical Study of Amici in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 689 (2008).

30 *See id.* at 701 (observing the “surge in amicus curiae activity in federal courts” and that “federal courts have generously allowed [amicus curiae] participation in all but a few instances”).

31 *Conversations of Felix Frankfurter*, Earl Warren Papers, LIBRARY OF CONGRESS, Oct. 28, 1949, quoted in Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 784 (1990) (describing Justice Frankfurter as not approving of the trend toward amicus brief filing).

32 *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

33 *Cf.* Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J. L. & PUB. POL’Y 17, 24 (2001) (describing a study that found an increase in success by state amici when joined other states’ briefs as opposed to filing their own).

34 *See id.* (noting the trend among states to join each other’s amicus briefs).

same argument.<sup>35</sup> In *Amicus Curiae: Friends of the Court or Nuisances?*,<sup>36</sup> Andrew Frey argues that amicus briefs can be helpful, but recognizes that voluminous submissions could overburden courts, reducing their impact. Frey also argues that amici have lost sight of the fact that the brief is a friend of the court, not a friend of the parties' brief.<sup>37</sup>

The current leader of the Court, Chief Justice John Roberts, would likely disagree, as he authored a number of amicus briefs during his career before joining the Court. The Chief Justice has cautioned that effective amicus briefs deal with the practical legal issues in a case, and that the Court has no use for "particularly abstract and philosophical" legal issues.<sup>38</sup> This is a perfectly defensible position. Supreme Court Justices review nearly 10,000 petitions for certiorari, hear argument in about eighty cases, issue more than 100 opinions (including concurrences and dissents), and handle procedural issues regarding stays.<sup>39</sup> In a case like the Affordable Care Act, where the Court had more than 100 briefs in addition to the briefs filed by the parties, the demands on each individual Justice and clerk are extraordinary.<sup>40</sup> Certainly amicus briefs can be helpful in guiding the Court toward particular legal principles, but simply repeating an argument 100 times is unlikely to have any greater effect than if the argument had been made elegantly once.<sup>41</sup>

Whatever the legal justification of amicus briefs at the Supreme Court, one thing is true: they are here and they are here to stay.

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<sup>35</sup> *Id.*

<sup>36</sup> Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 LITIG. 5, 67 (2006) (providing three reasons why amici briefs are particularly helpful but also recognizing the objection that "voluminous amicus submissions overburden the courts").

<sup>37</sup> *Id.* at 67 (arguing against the objection to amicus briefs which posits that "amici should be friend[s] of the court, not of the parties" (citation omitted) (internal quotation marks omitted)).

<sup>38</sup> See Michael C. Dorf, *Scholars' Amicus Brief Controversy Reflects the Evolving Relationship Between the Bench and the Legal Academy*, JUSTIA.COM (Nov. 21, 2010), <http://verdict.justia.com/2011/11/21/scholars-amicus-brief-controversy-reflects-the-evolving-relationship-between-the-bench-and-the-legal-academy> (quoting Chief Justice Roberts's statement at the Fourth Circuit Judicial Conference).

<sup>39</sup> See *Frequently Asked Questions*, SUPREME COURT.GOV, [www.supremecourt.gov/faq.aspx#faqgi9](http://www.supremecourt.gov/faq.aspx#faqgi9) (last visited Apr. 21, 2014).

<sup>40</sup> See *Docket of the Supreme Court of the United States for Nat'l Fed'n of Indep. Bus. v. Sebelius*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-393.htm> (last visited February 25, 2013) (listing all the amicus briefs filed in *National Federation of Independent Business v. Sebelius*).

<sup>41</sup> See Frey, *supra* note 36, at 68 ("[E]very sophisticated prospective amicus is well aware that mere repetition of technical legal argument is likely to prove a fruitless enterprise. The amicus brief must add something new and significant to the debate, or it is not worthwhile.").

### B. *The History of State-Filed Amicus Briefs*

Only recently have the states become particularly active in filing Supreme Court amicus briefs.<sup>42</sup> While the normative reasons for previous state non-involvement are unclear, there is no question states have ramped up their briefing efforts at the nation's highest court.<sup>43</sup> In the 2012 litigation over the Patient Protection and Affordable Care Act, multiple states filed amicus briefs (this is, of course, in addition to the numerous states that were parties to the litigation).<sup>44</sup> In the Supreme Court's recent affirmative action case, *Fisher v. University of Texas at Austin*, fifteen states submitted briefs as amici.<sup>45</sup>

In many respects, the states are the last government players to involve themselves with Supreme Court amici practice. Dating back as far as scholars have studied the institutional influence of briefs, the Solicitor General has enjoyed great success as both litigant and amici.<sup>46</sup> In some instances, including the Supreme Court's school desegregation, busing, and gun control cases, cities have filed briefs alongside states.

Given the increasing research on the effectiveness of amicus briefs, it is no surprise that states are becoming more involved. Scholars have routinely found that institutional filers, and those with the most experience before the Court are in a better position to influence the outcome of a case to which they are not a party.<sup>47</sup> This new research has helped to answer the question that is implicit in every act of filing an amicus brief: does this brief matter? By demonstrating that the Court is now more willing to cite and adopt argu-

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42 See Kearney & Merrill, *supra* note 28, at 809–10 (providing graphs showing the number of cases in which states filed amicus briefs supporting petitioners and supporting respondents).

43 See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 542–48 (1994) (describing the so-called Supreme Court Project, “the most important function” of which is “to encourage and coordinate state *amicus curiae*”).

44 See *supra* note 40.

45 States with similar policies and large public university systems have filed amicus briefs in the case. California and New York filed briefs, and thirteen states signed onto New York's brief. See *Docket of the Supreme Court of the United States for Fisher v. Univ. of Tex. at Austin*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm> (last visited February 25, 2013).

46 See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1324, 1353–55 (2010) (arguing that the U. S. Solicitor General is both filing more briefs and finding greater success than other institutional briefers).

47 See Kearney & Merrill, *supra* note 28, at 770, 700 n.89 (noting the success rates of institutional litigants and the Solicitor General over a select period of time).

ments from amici, prospective amicus briefers have been given the ammunition they need to ramp up their efforts.

### C. *The State Attorney General as Legal Advocate*

A state attorney general serves as that government's chief law enforcement officer.<sup>48</sup> Tasked with conducting investigations, bringing suits on behalf of the state, and defending the state against litigation, an attorney general plays an important role in a state's legal development.<sup>49</sup> While their work is primarily related to state legal issues, attorneys general often find themselves in federal court and occasionally the Supreme Court.<sup>50</sup> The influence of states on federal law was recently made clear in the litigation over the Affordable Care Act. Several states, including Florida and Virginia, sued the United States Department of Health and Human Services over key provisions of the statute.<sup>51</sup> Attorneys General Pam Bondi<sup>52</sup> and Ken Cuccinelli<sup>53</sup> became household names almost overnight as a result of their high profile lawsuits challenging the President's healthcare law.<sup>54</sup> While Florida and Virginia were parties to those particular cases, state attorneys general are filing amicus briefs in Supreme Court litigation at a rapidly increasing rate.<sup>55</sup> Whether they are driven by a sincere interest to

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48 See *Mission Statement, Pennsylvania Attorney General*, ATTORNEYGENERAL.GOV, <http://www.attorneygeneral.gov/theoffice.aspx?id=168> (last visited Nov. 8, 2012) (outlining the duties of the state Attorney General including acting as "the Commonwealth's chief law enforcement officer").

49 See *id.*

50 Cf. *id.* (listing one of the attorney general's duties as "represent[ing] the Commonwealth and its citizens in any action brought for violation of the Antitrust Laws of the United States and the Commonwealth").

51 See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2576 (2012) (listing all petitioners in the case); Florida v. Dep't of Health and Human Servs., 132 S.Ct. 2566, 2566 (2012) (combining this case with *Nat'l Fed'n of Indep. Bus. v. Sebelius* in challenging the Affordable Care Act).

52 Pam Bondi has been the Attorney General of Florida since January 4, 2011. See *Attorney General Pamela Bondi*, MYFLORIDALEGAL.COM, <http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb80055fb97/1515ce372e59d1e885256cc60071b1c4!OpenDocument> (last visited Nov. 8, 2012).

53 Ken Cuccinelli was the Attorney General of Virginia from January 16, 2010 to January 11, 2014. See VA. FOUND. FOR HUMANITIES, *Attorneys General of Virginia*, ENCYCLOPEDIA VA., [encyclopediavirginia.org/Attorneys\\_General\\_of\\_Virginia#its4](http://encyclopediavirginia.org/Attorneys_General_of_Virginia#its4) (last visited Apr. 28, 2014).

54 See Interview by Greta van Susteren with Pam Bondi and Ken Cuccinelli, Attorneys General of Fla. and Va. (June 8, 2012), available at *Attorneys General Pam Bondi and Ken Cuccinelli 'On the Record'*, FOXNEWSINSIDER.COM, <http://gretawire.foxnewsinsider.com/video/attorneys-general-pam-bondi-and-ken-cuccinelli-on-the-record/> (explaining their respective challenges to the President's healthcare law).

55 See Solimine, *supra* note 13, at 358 (noting that state attorneys general "seem to be filing [amicus] briefs in greater numbers and with more coordination in the past twenty

have their state's voice heard or, perhaps more cynically, politics, the recent terms of the Roberts Court have included more and more state amicus filings.<sup>56</sup>

## II. THE CURRENT STATE OF AMICUS BRIEF LITERATURE

The topic of Supreme Court amicus briefs has increasingly become a favorite among Supreme Court scholars.<sup>57</sup> Perhaps the academy has become just as interested in the interplay between states and the Court as the public.

In *Scholars' Briefs and the Vocation of a Law Professor*,<sup>58</sup> Richard Fallon argues that law professors must hold themselves to the highest of standards when deciding whether to sign on to amicus briefs filed at the Supreme Court.<sup>59</sup> Fallon contends that while professors possess significant expertise and are often able to offer the Court a more enlightened perspective than a traditional briefer, professors must ensure that their briefs do not "overstate the strength of the support for [a] conclusion . . ."<sup>60</sup> In short, Fallon is concerned that because the Court appreciates the experience and expertise of law professors, their briefs may be given even more weight than they sometimes deserve.<sup>61</sup> This is a valid concern and one that ties directly to the question of state-filed amicus briefs. Is it necessarily the case that a particular state's attorney general really does possess a more significant perspective on issues that may relate to that state? Are the arguments offered by state attorneys general so compelling that they should be used in conjunction with, or in extreme cases, instead of, arguments made by the actual parties to a litigation? These are questions routinely posed by the literature, and they are questions that this Comment will tackle later in the more evaluative sections.

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years"). Notably, this was the first article to directly analyze a number of the normative reasons states may have in deciding whether to file amicus briefs.

<sup>56</sup> See *infra* Conclusion.

<sup>57</sup> See generally ERIC N. WALTENBURG & BILL SWINFORD, *LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT* (1999) (discussing the rise in state-filed amicus briefs during the recent Court terms); PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008) (noting an increase in amicus briefs filed by states from 1950 to 1955).

<sup>58</sup> Richard H. Fallon, Jr., 4 J. LEGAL ANALYSIS 223 (2012).

<sup>59</sup> See *id.* at 226, 256, 265–66 (posting when scholars should sign amicus briefs and arguing that "[i]f emerging norms in the signing of scholars' briefs betray expectations of scholarly responsibility, trustworthiness, and confrontation that we [scholars] have sought to promote, or seek to capitalize upon, then we should hold ourselves to higher standards").

<sup>60</sup> *Id.* at 265.

<sup>61</sup> See *id.* at 226 n.5 (citing a study that showed that Supreme Court clerks give scholarly briefs closer attention and arguing that this might be because of perceived expertise).

Michael Solimine, in *State Amici, Collective Action, and the Development of Federalism Doctrine*,<sup>62</sup> analyzes the reasons for increased Supreme Court amicus brief filing by states' attorneys general and argues that the Court should give significant weight to state briefs that argue convincingly on behalf of state interests.<sup>63</sup> Solimine also notes that the Court should view skeptically those briefs filed by states that seemingly argue against the interest of the state (positing that such arguments may be grounded in politics rather than normative legal scholarship).<sup>64</sup>

A common question among Supreme Court scholars is whether the Court should rely on amicus briefs at all. While that debate rages on, it is clear that the Court can find the briefs helpful where they inform a legal argument the Court is already considering. Solimine points to the majority and dissenting opinions authored in *United States v. Comstock*<sup>65</sup> as an example of the Roberts Court's use of amicus briefs in federalism cases. In *Comstock*, Justice Stephen Breyer's majority opinion seems to inherently rely on a number of arguments raised by state attorneys general while Justice Clarence Thomas's dissenting opinion cites amici only to note that he will give their arguments no weight.<sup>66</sup> While he is unable to use legal formalism to explain why and when particular Justices rely on amicus briefs, Solimine does note that each Justice seems to evaluate the significance of amicus briefs on an individual basis.<sup>67</sup>

In perhaps the most comprehensive review of amicus brief impact at the Supreme Court, Joseph D. Kearny and Thomas W. Merrill found that large institutional organizations (their examples include the American Civil Liberties Union, the American Federation of Labor-Congress of Industrial Organizations, the states, and the Solicitor General) have considerably more success before the Court than

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62 Solimine, *supra* note 13.

63 *Id.* at 406.

64 *Id.* at 405-06.

65 130 S.Ct. 1949 (2010).

66 *See id.* at 1982 (Thomas, J., dissenting) (noting and arguing against the state amici theories).

67 *See* Solimine, *supra* note 13, at 374 ("[I]t seems likely that most, though not all, of the Justices follow a non-purely formalistic federalism jurisprudence compatible with giving weight to the sheer fact that SAGs have filed amicus briefs and with engaging the arguments advanced therein. At the very least, the case law displays a range of views on these issues, and a majority of Justices reject the purely formalistic view that such briefs should be given absolutely no weight.").

smaller, less frequent filers.<sup>68</sup> Much like others who have analyzed the incidence of filing, Kearney and Merrill found a significant increase during the fifty years of their study.<sup>69</sup> Specifically, there was a more than 800% increase in the number of filings from 1950 through 2000, which is even more striking considering the “number of cases that the Court has disposed of on the merits has not appreciably increased during this time (indeed it has fallen in recent years).”<sup>70</sup> Interestingly, briefs supporting respondents have enjoyed a higher success rate than those advocating the position of a petitioner.<sup>71</sup> Within a particular case, there was no measurable affect of having a great disparity in the number of briefs (a party is no more likely to prevail where ten briefs have been filed on her behalf versus two for her opponent). By contrast, “small disparities of one or two briefs for one side with no briefs on the other side may translate into higher success rates . . . .”<sup>72</sup>

Interestingly, at the time Kearney and Merrill published *The Influence of Amicus Curiae Briefs on the Supreme Court*, the case that was most heavily briefed by amici was *Webster v. Reproductive Health Services*,<sup>73</sup> an abortion case involving the State of Missouri’s request that the Court overrule its decision in *Roe v. Wade*.<sup>74</sup> Amici filed an astonishing seventy-eight briefs in *Webster*.<sup>75</sup> Twelve years after Kearney and Merrill published their piece, the record-holder for most amicus brief filings is the Court’s recent affirmative action case, *Fisher v. University of Texas at Austin*, which drew briefs from ninety-six amici.<sup>76</sup> The three cases that the Court combined when reviewing the Patient Protection and Affordable Care Act included 171 amicus filings.<sup>77</sup>

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68 See Kearney & Merrill, *supra* note 28, at 819 (“Although the ACLU and the AFL-CIO, two other filers of high-quality briefs, do not consistently beat benchmark rates of success, they have been successful more than the average amicus filer.”).

69 See *id.* at 750 (devoting Part I of their Article to “an overview of amicus curiae activity in the Supreme Court over the last fifty years, tracking the increase in amicus filings”).

70 *Id.* at 749.

71 *Id.*

72 *Id.*

73 492 U.S. 490 (1989).

74 *Id.* at 521; *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right of privacy extends to the decision about whether to continue with pregnancy).

75 Kearney & Merrill, *supra* note 28, at 755.

76 The majority of these briefs were, expectedly, filed by social and political organizations. Several states with large public university systems were also amici in the case. See generally *Proceedings and Orders*, SCOTUSBLOG, [www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin/](http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin/) (last viewed Apr. 21, 2014).

77 *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2566 (2012) (totaling thirty-one filed amicus briefs); *Florida v. Dep’t of Health and Human Serv.*, 132 S.Ct. 2566 (2012) (totaling 140 amicus briefs filed in the combined Florida cases, including briefs by every single state across the combined cases).

With respect to the most influential amicus brief author, the winner has been and continues to be the Solicitor General.<sup>78</sup> The fact that the Solicitor General is so successful makes sense for a number of reasons.<sup>79</sup> First, unlike a private organization that may be lobbied to brief in a particular case due to political reasons, the Solicitor General has the luxury of working closely with the President and the Justice Department to determine which cases are ripe for government involvement.<sup>80</sup> Additionally, the Solicitor General's office no doubt benefits from its frequent filer status.<sup>81</sup> Having routinely appeared before the Court as a party, the Solicitor General is much more familiar with the types of arguments that may sit with the Court than a private organization that is before the Court for the first or second time.<sup>82</sup> To that end, at least at this point, the Solicitor General also has a great advantage over state attorneys general with respect to its frequent filer status. We can expect the trend to continue as the Roberts Court includes two former Solicitors General,<sup>83</sup> a former Assistant to the Solicitor General,<sup>84</sup> and a former candidate for the position of Solicitor General.<sup>85</sup>

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*See Docket of the Supreme Court of the United States*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/docket/PPAACA.aspx> (last visited Dec. 3, 2012).

78 *See* Kearney & Merrill, *supra* note 28, at 773 (reporting that a study conducted between 1952 and 1982 “found that the Solicitor General’s amicus filings supported the winning side approximately 75% of the time overall”).

79 *Id.*

80 *See id.* at 816 (“Since the executive branch is critical to the implementation of the Court’s policy preferences, it is not surprising to find that the Court apparently pays careful attention to the positions of the Solicitor General.”).

81 *Id.*

82 *See id.* at 814 (reporting that one author “argued that the success rate of the Solicitor General is almost entirely attributable to the greater experience of the lawyers in the Solicitor General’s office relative to their opponents in most cases”).

83 John Roberts was Principal Deputy Solicitor General from 1989 to 1993 and Acting Solicitor General for a period during the George H.W. Bush presidency. *See John G. Roberts, Jr., Chief Justice of the United States, Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 18, 2012). Elena Kagan served as Solicitor General from 2009 until 2010. *See Elena Kagan, Associate Justice, Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 18, 2012).

84 Samuel Alito served as Assistant to the Solicitor General from 1981 until 1985. *See Samuel Alito, Jr., Associate Justice, Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 18, 2012).

85 Antonin Scalia was interviewed for the position of Solicitor General. *See* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 73–74(2009) (describing Justice Scalia’s aspiration to become Solicitor General, his interview for the position, and his disappointment when Rex Lee was chosen).

While this is the first comment to directly compare briefs filed by states attorneys general with those filed by private organizations, it is certainly not the first to analyze briefs filed by states. In *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*,<sup>86</sup> Thomas R. Morris examined state-filed amicus briefs during the 1970s and 1980s and found that states enjoyed greater success where they were joined by at least nine other states in amicus briefing.<sup>87</sup> Sean Nicholson-Crotty has recently found that the increase in state amicus briefing coincided with the Civil Rights Movement of the 1950s and 1960s due to an increasing docket of cases relating to federalism and states' rights issues.<sup>88</sup>

Those who study the Supreme Court agree on a few aspects of current amicus brief practices. First, it is widely accepted that the number of briefs filed in individual cases, and in general, has steadily increased during the Warren, Burger, Rehnquist, and Roberts Courts.<sup>89</sup> Second, there is little argument that amicus briefs have morphed from being purely helpful documents meant to inform the Court from a neutral perspective to tools used by interest groups and advocates to influence the outcome of cases. Finally, it is reasonable to assume that absent new Supreme Court rules regarding amicus brief filing, both of the prevailing trends are likely to continue.

### III. STATE-FILED AMICUS BRIEFS DURING THE ROBERTS COURT<sup>90</sup>

Much like its predecessors, the Roberts Court has an essentially open door when it comes to amicus brief filings. In the 2011–2012 term alone, more than 300 amicus briefs were filed. (This number is staggering because the Court only heard eighty-three cases on the merits.)<sup>91</sup> This Part will analyze both the frequency with which states have filed amicus briefs during the Roberts Court as well as the effectiveness of those briefs. Citations and the adoption of arguments are used to determine whether a brief was effective. This Part will also

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<sup>86</sup> Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298 (1987).

<sup>87</sup> *Id.* at 304–05.

<sup>88</sup> Sean Nicholson-Crotty, *State Merit Amicus Participation and Federalism Outcomes in the U.S. Supreme Court*, 37 PUBLIUS: J. FEDERALISM 599, 600 (2007).

<sup>89</sup> *Id.*

<sup>90</sup> My analysis of the Roberts Court includes the terms 2009–2010, 2010–2011, 2011–2012, and a portion of 2012–2013. My rationale is that this time period includes all of the current Justices (with the small caveat that 2009 included all but one of the current Justices).

<sup>91</sup> This number was calculated after a thorough Westlaw search of the briefs filed at the Court during the 2011–2012 term.

argue that the coming terms provide even more opportunity for states to effectively argue, even in cases to which they are not a party.

A. *The Trend Toward More State Amicus Filings*

Any analysis of the effect state-filed amicus briefs can have must begin with an understanding of why attorneys general file the briefs in the first place. There are a number of factors that influence a state's decision to file. The three most compelling for this analysis are 1) a genuine interest to affect the law of federalism; 2) a desire to affect the outcomes of cases even where the state is not directly involved in the case or controversy or is unable or unwilling to bear the expense of litigating as a party; or 3) politics. Each of these reasons has merit, and they should not be viewed with a positive or negative connotation.

1. *State-Filed Briefs in the Affordable Care Act Cases*

There is no doubt attorneys general file amicus briefs to affect the law of federalism.<sup>92</sup> The Patient Protection and Affordable Care Act cases are good illustrations of the point. Florida and Virginia were parties to the litigation, but numerous other states submitted amicus briefs.<sup>93</sup> Many of those states argued that a government mandate that citizens of their states be covered by health insurance infringed upon their state's rights in one manner or another.<sup>94</sup> Intertwined with the arguments about commerce were arguments at the core of American federalism. And there is no question a number of states that argued against the government's new healthcare law did so because they saw it as an affront to their understanding of the proper relationship between the federal government and the governments of the states.<sup>95</sup>

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<sup>92</sup> See generally, Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99, 113–16 (2005) (discussing routine filings by state attorneys general in antitrust “federalism” cases).

<sup>93</sup> Brief for the States of California, Connecticut, et al. as Amici Curiae in Support of Respondents on Severability, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400), 2012 WL 293712.

<sup>94</sup> See generally Brief of the State of Oklahoma as Amicus Curiae in Support of Respondents (Addressing Minimum-Coverage Provision), Dep't of Health & Human Servs. v. Florida, *sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) (No. 11-398), 2012 WL 454629.

<sup>95</sup> See *Supreme Court of the United States*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm> (last visited Feb. 25, 2013).

Similarly, while many states filed lawsuits against the federal government after the passage of the Affordable Care Act, many did not.<sup>96</sup> Many of the states that chose not to file suits decided instead to file amicus briefs. While those states may have had objections as strong as Florida and Virginia, perhaps it was less burdensome to file an amicus brief than to start a completely new litigation. Indeed, the cost of filing a lawsuit against the federal government in a case as large and complex as the healthcare case would be quite high. While hiring counsel to construct a proper and thorough amicus brief is costly, that cost pales in comparison to the cost of bringing the suit initially. It is entirely plausible that many states elected to submit amicus briefs instead of taking on the additional expense of filing a lawsuit of their own.

It is also not unreasonable to argue that some state amicus briefing is the result of state and federal politics.<sup>97</sup> Most attorneys general are elected.<sup>98</sup> At some point, these individuals will face the voters and will have to articulate that they have done something that is in the best interest of the state. While scholars in the academy view the Supreme Court with a certain amount of esteem (or at least respect), the Court is a favorite target of politicians. Indeed, being able to say “we submitted a brief in support of an issue of great importance to our state at the Supreme Court” no doubt gives an attorney general a certain amount of credence as a serious lawyer (at least in the eyes of some voters).<sup>99</sup>

## 2. *Subjective but Relevant Analysis of State Amicus Filings*

At the outset it must be noted that any analysis of brief “effectiveness” at the Supreme Court will be, to some extent, subjective. The

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<sup>96</sup> While a number of states including Florida, Virginia, and Texas were frequent filers in both litigation and amicus briefs, a number of states were relatively silent with respect to filing lawsuits and amicus briefs.

<sup>97</sup> See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 722–23 (2011) (describing elected attorneys general as having great “incentives to take actions that will respond to the interests of their constituents”).

<sup>98</sup> State Attorneys General are elected in forty-three states. Governors appoint the Attorney General in five states, the legislature appoints in one, and the State Supreme Court of Tennessee appoints its Attorney General. See *The Attorneys General*, NAT’L ASS’N OF ATTORNEYS GEN., <http://www.naag.org/current-attorneys-general.php> (last visited Dec. 23, 2012).

<sup>99</sup> See, e.g., Margaret Baker, Letter to the Editor, *Why Voters Like Ken Cuccinelli*, WASH. POST (Oct. 26, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/10/25/AR2009102502315\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/10/25/AR2009102502315_pf.html) (explaining how Ken Cuccinelli attracts voter support with his “command of the facts, straight answers and willingness to listen to the other point of view”).

simple exercise of determining how to define “effective” calls on the author’s preconceived notions of what it means for a Justice to effectively rely on a source or argument. Some scholars have gauged effectiveness simply by noting the number of citations,<sup>100</sup> the argument being that more citations means the Justice or Court found that particular source more persuasive. By contrast, those same authors would argue that the absence of a citation indicates the Court may not see a particular brief as effective.<sup>101</sup> While the number of citations is helpful, this Comment will look past that method for two reasons. First, a Lexis or Westlaw search that leads to a pure number of citations does not in any way help to decide whether those citations were approving or not. Many of the recent citations to amicus briefs (for example in the healthcare cases) are only in passing. Indeed, Justices Antonin Scalia and Clarence Thomas have taken to citing amicus briefs for the purpose of countering their arguments.<sup>102</sup> A simple search of the number of citations would not move this Comment toward accomplishing its goal.

Another method used by scholars has been to copy the overlap between the language used in opinions and that used in briefs. One researcher uses “WCopyfind, a free, Windows-based software program that allows users to assess the amount of overlap (think plagiarism) between two or more documents.”<sup>103</sup> While effective, this method does not explain enough. After the search we know whether the Court adopted some of the rhetoric in the brief, but we know nothing about why or whether that particular brief helped to sway the Court as a whole, or whether it just found the language useful for writing purposes. The analysis that follows will attempt to bridge the gap between the two methods by answering the following questions: why have states found it more and more attractive to file amicus briefs, even in cases that do not directly implicate federalism issues (there are myriad reasons why a state would file a brief in a federalism case); and why has the Court begun to look at these briefs more and more approvingly?

The analysis proceeded as follows: first, a set of cases was compiled using the docket function on the Supreme Court website. The cases are all from the 2008–2013 terms and include those that were set for oral argument and decided by written opinion. Cases where

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<sup>100</sup> Kearney & Merrill, *supra* note 28, at 791.

<sup>101</sup> *Id.* at 812.

<sup>102</sup> *See supra* note 66.

<sup>103</sup> RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* 98 (2012).

oral argument was not heard or where written opinions were not issued were not reviewed. Next, a Westlaw search was run on each case. Using the “filings” tab of Westlaw, the amicus briefs filed in each case were counted and organized into two categories—those filed by state attorneys general and those filed by what I have deemed private organizations. Then, the reported opinions (of the Court, concurrence and dissent) were reviewed for any citations or mentions to amicus briefs filed either by states or private organizations. Finally the results were compiled to determine whether the Roberts Court cites states as much, more often or less often than private organizations, and whether the arguments made by states make their way into opinions more or less frequently than those made by private organizations.<sup>104</sup>

*B. The Roberts Court’s Increased Use of State-Filed Amicus Briefs*

The results of the analysis are interesting, if not somewhat expected. First, as expected, the number of pure citations to state-filed amicus briefs has increased during the four plus years of this study.<sup>105</sup> Also as expected, citations appear more prominently and more frequently in cases that have strong implications for state rights, the Commerce Clause, and federalism.<sup>106</sup> States have an interest in maintaining their sovereignty vis-à-vis the federal government and other states.<sup>107</sup> For that reason, it is unsurprising that a state attorney general would file a brief in a case that implicates issues of significant importance to state rights. States are also active in interstate commerce. For that reason, we expect, and the research has shown, that

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<sup>104</sup> This process is by its very nature imperfect. I have identified a number of ways that the analysis could be strengthened and discuss a few of my ideas in the later subpart on future research. See *infra* Part V.

<sup>105</sup> Even taking into account the admittedly high number of briefs filed in the Affordable Care Act and affirmative action cases, the number of briefs has continued to increase. With a Court that hears approximately eighty cases per term across the study, an average of five amicus briefs were filed per case, and nearly 40% of those briefs were filed by states. By contrast, state amicus briefs made up only 28% of the amicus category in 2000. See, e.g., Kearney & Merrill, *supra* note 28, at 757–61, 802 (noting that the Supreme Court’s docket at the end of the twentieth century included only about 28% amicus briefs, with state-filed briefs totaling fewer than a quarter of those briefs).

<sup>106</sup> See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 431 (2002) (listing Supreme Court cases that involve federalism issues and issues likely to be briefed by state attorneys general).

<sup>107</sup> See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 166–68 (2010) (using the Dormant Commerce Clause power as an example of the type of government authority that could cause states to brief the Court on the detrimental effect on their interests).

states will file briefs in cases that have implications for the relations between states as they pertain to the Commerce Clause.<sup>108</sup> Texas<sup>109</sup> and Virginia are among the states that have most often filed amicus briefs. Similarly, the number of times unique language from a brief appears in an opinion has increased. Certainly the number of appearances of amicus brief language has increased over the last fifty years, but even within this limited study, the number of times the Court adopts the language of state amici has increased. Another interesting question is whether some Justices are more likely than others to cite state-filed amici. No one Justice seems more or less inclined to cite a state attorney general's brief more than others, and almost all have relied on state briefs at one point or another during the Court's most recent four sessions. It is worth noting that Justices Thomas and Scalia more frequently cite state briefs in order to disagree with their arguments than do their colleagues on the Court. The final question this Comment seeks to answer in this part of the analysis is whether state briefs were more likely to influence the outcome of a case than those filed by private organizations. The answer to this question is tricky because states often appear on the same side of the "V" as private organizations, and where both are cited or at least noted, there is no way to conclusively argue that one was more persuasive than the other. The results do demonstrate that compared to the Solicitor General, states are not as successful at influencing the outcome of cases.

That the Court has relied more heavily on these briefs is in line with the research. The more challenging question is why has the Court seen fit to rely on amici. Scholars have identified a number of

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<sup>108</sup> The major cases of *Gonzales v. Raich*, 545 U.S. 1 (2005) and *United States v. Morrison*, 529 U.S. 598 (2000) are prime examples of states filing briefs in cases that implicate interstate commerce. In *Raich*, a case to which California was a party, six state attorneys general filed briefs in support of a challenge to California's medical marijuana statute. Alabama led the charge in that briefing, and was joined by five other states. See Brief for the States of Alabama, Louisiana, and Mississippi as Amici Curiae Supporting Respondents at 1, *Gonzales v. Raich*, 45 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336486 (briefing the support of Alabama, Louisiana and Mississippi in *Raich*); see also Brief for the States of California, Maryland, and Washington as Amici Curiae Supporting Angel McClary Raich, et al. at 1, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336549 (briefing on behalf of California, Maryland and Washington in support of the California medical marijuana statute). In *Morrison*, Justice David Souter's dissent cited an amicus brief filed by thirty-six states. *Morrison*, 529 U.S. at 654 (Souter, J., dissenting).

<sup>109</sup> Newly elected Senator Ted Cruz served as Solicitor General of Texas during some of the time studied. Perhaps the briefs were more effective because they were authored by a former clerk to the Chief Justice (Rehnquist) and a frequent litigant; Cruz has argued before the Court nine times. See *Biography*, TED CRUZ REPUBLICAN FOR U.S. SENATE, <http://www.tedcruz.org/bio/> (last visited Dec. 28, 2012).

reasons that the Court now relies more heavily on amici, but I have isolated the three that seem most plausible.<sup>110</sup> First, the Court may rely more heavily on state-filed briefs because the attorneys general are seen as experts on the legal issues affecting their states, and collective statements of a large number of attorneys general may weigh in favor of a closer analysis of their arguments. Second, the Court may be more concerned with the broader implications of its rulings now that there are more perspectives in the room. Finally, that the Court is relying more on state-filed briefs may be a self-fulfilling prophecy. That is, state attorneys general are more successful because they are more frequent litigants.

*1. State Attorneys General May Provide Needed Expertise*

State attorneys general provide the Court with the benefit of expertise about the way legal issues affect their states specifically. Justices of the Supreme Court are certainly experts on the law, but they cannot be expected to be experts on all aspects of the law. Indeed, part of the reason lawyers brief the Court at all is that the lawyers are expected to enlighten the Court about the intricate legal issues involved in a particular case. In the late 1970s and 1980s, the United States experienced a period of expansive deregulation. As a result, states gained an interest in crafting policies that took advantage of the new regulatory picture.<sup>111</sup>

As the enforcers of their states' laws, attorneys general have a vested interest in having their voices heard. If one accepts the proposition that attorneys general are in a better position to understand how a particular Court decision could affect their ability to enforce their laws, it logically follows that the Court would be interested in hearing that opinion. I do not argue that the Court should necessarily defer to the opinions of a state attorney general; rather, the Court should consider the position of a government official in a more appropriate position to espouse a belief about how a decision could affect her state.

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<sup>110</sup> The only real way to know why the Court has embraced amicus briefing by states is to speak with the Court. A few Justices have spoken about their reliance on briefs, but the research for this Comment uncovered no specific discussion of why states appear to be more favored by the current Court.

<sup>111</sup> See Clayton & McGuire, *supra* note 33, at 30 ("Administrative devolution and regulatory retrenchment during the 1970s and 1980s altered fundamentally the political context of state legal work and elevated the importance of state attorneys general as national policymakers.").

This argument logically flows when discussing states as parties, but does it naturally follow that the Court should likewise concern itself with the arguments of states when they are not parties to the litigation? I answer yes. It may be that the attorney general has an understanding of how a case (specifically one that does not affect federalism) affects her state where the impact is less clear. For example, an attorney general who believes a case about international tariffs could affect her state is in a position to inform the Court of the case's non-obvious implications. Certainly amicus briefing is an appropriate method to share that expertise.

2. *The Court Seems Concerned About the Broader Implications of Its Rulings.*

Decisions of the Supreme Court are technically decisions binding on the parties of a given case. But, it also follows that the Court's decisions affect the interpretations of lower federal courts, Congress, and state supreme courts. The Court may be more cognizant now that its decisions have potentially grand implications on states. As discussed below, seven of the nine current Justices have a significant government background, and several have worked in state government. It stands to reason that the current Court may be more sensitive to the potential effects its decisions have on states. This may explain the current Court's willingness to cite, quote from, and adopt arguments from state-filed amicus briefs.

3. *Increased State Effectiveness is a Self-Fulfilling Prophecy*

State attorneys general have become so sophisticated that they created their own Supreme Court practice organization. The Supreme Court Project is a section of the National Association of Attorneys General (NAAG) tasked with preparing parties and amicus briefs before the Court.<sup>112</sup> The organization acts almost as a Court lobbying arm of the national organization.<sup>113</sup> Much like private organizations' Supreme Court practice groups, the NAAG's Supreme Court Project provides an opportunity for greater practice and expertise.<sup>114</sup> And, as the research has noted, greater practice before the

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112 *See id.* ("New institutional structures, such as NAAG's Supreme Court Project, have improved the quality of state advocacy and provided a new sense of common interest among the states.").

113 *Id.*

114 *See id.* ("NAAG's coalition strategy appears to have been effective at improving state levels of success during the mid- and late 1980s.").

Court often leads to greater success, which leads to greater opportunities to present arguments.

#### 4. *Implications for Supreme Court Practice*

The results of this study pose an interesting practical question: if Justices are swayed by arguments espoused by amicus brief writers, why is this the case? What factors influence a Justice's decision to rely on amici, and more specifically, in a case where there are dozens of amicus briefs filed, how does a Justice determine whether any of the briefs are worth serious consideration? These are questions that a second phase of this research would ideally follow. In the interim, Linda Simard's *An Empirical Study of Amici in Federal Court: A Fine Balance of Access, Efficiency and Adversarialism*<sup>115</sup> provides a number of hints. The two more important factors that seem to affect whether a Justice will read a brief more carefully are whether the organization has experience before the court and whether the attorney who signed the brief has experience before the Court.<sup>116</sup> In an interview with Justice Ruth Bader Ginsburg, Simard found that "the experience of the attorney (particularly experience before the Supreme Court) would be a likely barometer of the quality of the arguments set forth in the brief."<sup>117</sup> Justice Ginsburg went on to note that "her clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full."<sup>118</sup> Not surprisingly, attorneys with more experience before the Court would have a higher chance of seeing their briefs in the priority pile.<sup>119</sup> For this reason, perhaps state attorneys general should regularly file briefs in cases that may affect their states for the purpose of becoming more experienced with the Court. Of course, there is a fine line between filing frequently and reasonably and filing excessively.

As the Court continues to signal its openness to the arguments made by states in amicus briefs, we can expect the number of briefs

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115 See generally Simard, *supra* note 29, at 685 n.69 (2008) (including interviews with three United States Supreme Court Justices on the role of amicus curiae briefs at the Court).

116 See *id.* at 688 ("All three of the Supreme Court Justices who responded to the survey indicated that these factors (particularly experience) are moderately influential in the decisionmaking process.").

117 *Id.*

118 *Id.*

119 *Id.*

filed to increase.<sup>120</sup> One might argue that if several states have the same position on a single case, it would make sense for the states to join in a single amicus brief. A recent study demonstrated that where multiple organizations had a similar political position on a case, the organizations were much more likely to file separate briefs than to sign onto one brief.<sup>121</sup>

### 5. *Implications for Supreme Court Opinions*

It is also unsurprising that arguments made by states have made their way into recent Supreme Court opinions. Of those who have been asked, all Supreme Court Justices have noted that they favor amicus briefs offered by the government at all levels (including states).<sup>122</sup> There are many implications of the Court now using arguments first put forth by states. For example, such reliance may signal to other states that amicus briefs are not only appreciated but also welcomed. We may see a serious increase in the number of briefs filed and in the types of cases states see as ripe for amicus participation.<sup>123</sup>

## IV. AMICUS BRIEFS FILED BY PRIVATE ORGANIZATIONS DURING THE ROBERTS COURT

In order to fully understand the significance of the Court citing arguments from state-filed amicus briefs, those citations must be placed in context. To do that, this Comment compares the way the Roberts Court has used state-filed amicus briefs with those filed on behalf of private organizations.

Some of the first amicus briefs that were filed to advocate instead of inform were filed at the time when amicus brief filing started its steady increase.<sup>124</sup> During the 1950s and 1960s, groups with strong

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120 See *id.* at 697 (noting that amicus briefs filed by governmental entities were favored by all levels of the federal judiciary).

121 See Caldeira & Wright, *supra* note 31, at 800 (“[T]he filing by groups of separate and numerous briefs strongly indicates that those who run organizations believe that multiple briefs make a difference.”).

122 See Simard, *supra* note 29, at 697 (“Amicus curiae briefs offered by government entities were favored at all levels of the federal bench.”).

123 For a long time, states only filed amicus briefs in cases that were specifically relevant to the question of federalism or state sovereignty. Today, while states still file amicus briefs in cases that may directly affect their state rights, they are also active in Commerce Clause, education, and tax cases.

124 See Caldeira & Wright, *supra* note 31, at 794 (noting the increase in public interest law firms and citizen groups participating as amici).

feelings about the Civil Rights Movement began filing briefs before the nation's highest court.<sup>125</sup> The National Association for the Advancement of Colored People (NAACP) filed numerous briefs in the twenty years between 1950 and 1970.<sup>126</sup> The Southern Poverty Law Center filed briefs, as did a number of religious organizations, universities, legal scholarship organizations, and professional associations.<sup>127</sup> To move back to a constant point of comparison in this Comment, in Affordable Care Act cases, more than half of the amicus briefs filed were on behalf of physicians' organizations, trade unions, and ideological political organizations.<sup>128</sup> Indeed, non-governmental agents have made their voices heard in the form of Supreme Court amicus briefs.

Does this mean the Court has shown more deference to privately filed briefs? The results do not necessarily suggest that to be the case. First, just as the number of state amicus brief filings has risen steadily over the past four terms, the number of briefs filed by private organizations has increased.<sup>129</sup> Some of the most frequent filers include the American Civil Liberties Union, the CATO Institute, Chamber of Commerce, and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).<sup>130</sup> Justices Ruth Bader Ginsburg

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125 Brief on Behalf of American Civil Liberties Union, American Ethical Union, American Jewish Committee, Anti-Defamation League of B'nai B'rith, Japanese American Citizens League, & Unitarian Fellowship for Social Justice as Amici Curiae, *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1953) (No. 1), 1952 WL 47256.

126 The NAACP was also a party to a number of disputes during the Civil Rights Movement. See *NAACP Legal History*, NAACP.ORG, <http://www.naacp.org/pages/naacp-legal-history> (last visited Feb. 27, 2014).

127 See, e.g., *Who We Are*, S. POVERTY LAW CTR., <http://www.splcenter.org/who-we-are> (last visited Feb. 27, 2014) (asserting that since the organization's founding it has "won numerous landmark legal victories on behalf of the exploited, the powerless and the forgotten"). Interestingly, states did not file as many briefs during this time, even though many of the issues implicated federalism and states rights.

128 See *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2566 (noting that "private individuals and organization of independent businesses, brought action" in the Affordable Care Act cases).

129 Much like states, private organizations are also diversifying their amicus participation. For example, the NAACP has filed briefs in tax and commerce cases in the recent terms instead of only filing briefs in cases dealing with race and gender. See, e.g., *Amicus Briefs*, NAACP.ORG, <http://www.naacp.org/pages/amicus-briefs> (last visited Mar. 3, 2014) (listing the cases in which the NAACP has filed amicus briefs).

130 Interestingly, these organizations are also more likely than other, less frequent filers to sign onto briefs authored by other organizations. This can be found via a basic search on Westlaw. Search results for "interests of amic!" on WestlawNext, <https://a.next.westlaw.com> (from home page, select "All Content" tab under "Browse"; then follow "Briefs" hyperlink; then follow "U.S. Supreme Court" hyperlink under the "Federal" tab; then search "interests of amic!").

and Stephen Breyer are more likely to adopt language of privately filed amici, and are more likely to cite their briefs.<sup>131</sup>

The results here are also in line with what other scholars have found. In her conversations with Supreme Court Justices, Linda Simard found that while government amici filings were deemed “favored,” those filed by special interest groups, or what I have called private organizations are only “moderately helpful.”<sup>132</sup> Why the disparity? Why does the Roberts Court seem to favor briefs on behalf of the government over those from private organizations? Only the Justices can answer that question, but a quick review of their previous professional experience may be helpful.<sup>133</sup> The following two tables note some of the Justices’ notable non-judicial government experience and experience working with private organizations before joining the bench.<sup>134</sup> Almost all have significant government experience:

Justices with Significant Government Experience	
Roberts	Deputy/Acting Solicitor General
Scalia	Solicitor General Prospect
Thomas	Assistant Missouri Attorney General
Breyer	Special Assistant United States Attorney General
Alito	Assistant to the Solicitor General
Sotomayor	Assistant District Attorney
Kagan	Solicitor General

Justices with Significant Private Sector Experience	
Kennedy	Law Professor
Ginsburg	ACLU General Counsel

Perhaps the current Court is more comfortable with briefs filed on behalf of the government because the vast majority of its mem-

131 See Simard, *supra* note 29, at 688 (explaining Justice Ginsburg’s preference for briefs written by attorneys with significant experience before the court); *id.* at 681 (describing Justice Breyer’s belief that an amicus brief is “a valuable tool in educating judges, particularly on technical matters”).

132 *Id.* at 698 (noting that amicus briefs filed by interest groups were not as helpful as government briefs, but still moderately helpful).

133 See generally *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 21, 2014); Beth Summers, *A Behind-the-Scenes Look at Supreme Court Justice Antonin Scalia*, PBS, Dec. 18, 2009, <http://www.pbs.org/newshour/rundown/supreme-court/> (“Something that surprised me was [Justice Scalia’s] lingering disappointment over not being named U.S. Solicitor General in 1981.”).

134 See *Biographies of Current Justices of the Supreme Court*, *supra* note 133.

bers' pre-judicial experience came from government. To that end, a well-crafted brief from a state attorney general seems to have an advantage over a similar brief filed from a private organization.<sup>135</sup>

## V. OPPORTUNITIES FOR FUTURE ANALYSIS

In some respects, this Comment is only one in a long line of scholarship to analyze the trend toward increasing amicus brief participation at the Supreme Court.<sup>136</sup> Now that there is little disagreement about the fact that more and more amicus briefs will be filed at the Supreme Court, future research should continue to analyze the question of whether more briefs means more citations, and whether an increase in the volume of amicus briefs means the Court will devote more and more time to evaluating those arguments. The most ideal study would include conversations with Justices and clerks.<sup>137</sup> Absent an ideal world, an approach might include a broader analysis of the Roberts Court. While this Comment only looks at years 2008–2013, one could begin with 2006 when Chief Justice Roberts joined the court. An even more expansive review might compare the Roberts Court with the Rehnquist Court.

Two additional questions worth researching are whether the interests of the parties are diminished by state amicus briefs, and whether the states' interests are best served by submitting them. So much of the literature (this Comment included) focuses on the effect briefs have on the Court, but little if any research tackles the question of how briefs affect the arguments litigants are making. While litigants are often content to have amici brief in support, one could imagine a scenario where a Court adopts an argument from amici and finds in favor of a litigant, but seemingly ignores much of the rationale the litigant put forward. Certainly this situation would be possible even absent amicus briefing, but it would be a worthy study to determine whether such an effect might be possible. The question of whether states are best served by filing amicus briefs should also be examined. Attorneys General Cucinelli and Bondi were both liti-

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135 Absent a Justice's own admission, this is of course proves difficult to analyze empirically. In the review of the recent Roberts Court terms, however, there was a demonstrable difference in the frequency with which briefs filed by state attorneys general were cited for both specific language and legal propositions.

136 The distinction here is that this Comment both analyzes the normative reasons for the increase and discusses whether the increase has had any measurable effect on the Court as an institution or on the Justices as individuals.

137 See, e.g., Simard, *supra* note 29, at 684–710 (studying the position of Supreme Court Justices on amicus briefs through surveys).

gants and amici in the Affordable Care Act litigation. But how should an attorney general make the decision about filing a lawsuit versus filing an amicus brief? When should an attorney general decide that the state's interest, while important, does not merit suit but does merit the considerable time, expense, and resource of amicus briefing?

Finally, there is substantial room for research about potential Court rules regarding amicus briefing. The Court has strict guidelines about cert petition submission, brief filing, oral argument, and practice before the Court. Perhaps it is time for the Court to adopt policies about the number of briefs that may be submitted on behalf of a litigant, the types of organizations that may brief, or the number of organizations of a specific type that may brief a case. In a 2005 article in the *Case Western Reserve Law Review*, John Harrington argued that federal courts of appeals should adopt changes to their rules limiting the number of "undesirable amicus curiae" briefs.<sup>138</sup> Perhaps the Supreme Court should consider similar rules. As Judge Richard Posner notes,

[t]he reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.<sup>139</sup>

Whether the Supreme Court should adopt the type of stringent rules of the Seventh Circuit is a question for the Court. The question for scholars, though, is whether the continued increase in the number of amicus briefs is having a desirable effect on the Court. After all, it might be argued that if the Justices are going to read through as many thousands of pages of legal briefing that were filed in the Affordable Care Act cases, they might as well do so by reading merits briefs in additional cases.<sup>140</sup>

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138 See John Harrington, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 667 (2005).

139 *Id.* at 670-71 (citing *Voices for Choice v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)).

140 See, e.g., Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 158-59 (1960) (discussing the Supreme Court's limited mandatory jurisdiction and potentially shrinking docket). Scholars have also written about the decreasing Supreme Court docket, and the Chief Justice was asked about whether he was concerned about the Court's shrinking workload during his confirmation hearings. See generally Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); *Transcript: Day Three of the Roberts*

## CONCLUSION

The number of amicus briefs filed at the United States Supreme Court has risen steadily since the middle of the twentieth century. The reasons for increased filing are many including the politicization of the attorney general, a sense that the Court may adopt the position or reasoning of amici, and an increase in Supreme Court specialists.<sup>141</sup> As the number of briefs filed has increased, so have the number of amicus brief citations in Court opinions. The Roberts Court seems particularly open to amicus briefing, perhaps because a number of Justices, including the Chief Justice, have either served as Solicitor General or in the Solicitor General's office. While the Solicitor General has enjoyed considerable success at the Court, state attorneys general are becoming key players in Supreme Court amicus briefing. A number of scholars have argued that the Solicitor General's great success at the Court has much to do with the office's continued filing and work with the Court. In much the same way, groups like the American Civil Liberties Union, National Association for the Advancement of Colored People, and Chamber of Commerce have no doubt benefited from their "frequent filer" status. Perhaps the states have learned the lesson. It might be that the increased filing by state attorneys general is a signal that they are ready to step up to the plate—they understand that increased familiarity with the Court can pay dividends in the long term. Whatever the reason, state attorneys general are filing amicus briefs before the Supreme Court in record numbers, and all indications are that this trend will continue. As the number of briefs continues to rise, so too must our study of their effectiveness. While a cynic may say that politics may motivate some states to file amicus briefs, every filer is hopeful that her brief will have some effect. To that end, it is important that the academy continue to monitor the effectiveness of briefs as the volume continues to increase.

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*Confirmation Hearings*, WASH. POST (Sept. 14, 2005, 1:45 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html>.

141 Some law firms, such as Mayer Brown LLP (which sponsors the Supreme Court litigation website Appellate.Net), Akin Gump LLP, Williams & Connolly LLP, Bancroft PLLC and Gibson Dunn & Crutcher, even have dedicated Supreme Court Practices. See, e.g., *Supreme Court and Appellate*, AKIN GUMP, <http://www.akingump.com/en/experience/practices/litigation/supreme-court-appellate.html> (last visited Apr. 1, 2014) (describing the Firm's appellate practice); *Appellate and Constitutional Law*, GIBSON DUNN, [http://www.gibsondunn.com/practices/pages/ac1\\_detail.aspx](http://www.gibsondunn.com/practices/pages/ac1_detail.aspx) (last visited Apr. 1, 2014) (describing the Firm's experience in the Supreme Court); *Supreme Court and Appellate*, WILLIAMS & CONNOLLY LLP, <http://www.wc.com/practice-profile-514.html> (last visited Apr. 1, 2014) (listing cases the Firm has litigated in the Supreme Court).