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# Allison Orr Larsen on Intensely Empirical Amicus Briefs and Amicus Opportunism at the Supreme Court

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# BISHOP MADISON

OCCASIONAL COMMENTARY ON POLITICAL ECONOMY IN A FREE SOCIETY

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## Allison Orr Larsen on Intensely Empirical Amicus Briefs and Amicus Opportunism at the Supreme Court

Recent years have seen an explosion in the number of briefs amicus curiae filed in the U.S. Supreme Court. Many such briefs make empirical claims based upon purported facts that do not appear in the record generated at the trial level. My colleague Allison Orr Larsen has studied the role of Supreme Court fact-finding, including the Court's willingness in some cases to rely upon untested factual assertions drawn from such amicus briefs. She offered the following observations about the role of amicus-based fact-finding (or lack thereof) as illustrated by two recent Supreme Court decisions: *Hobby Lobby v. Burwell* and *Riley v. California*.

"Over 60 amici curiae ('friends of the Court') filed briefs in the Supreme Court's controversial *Hobby Lobby* case this Term. In discussing and dismissing an argument made in one of them, Justice Alito said something that merits a pause. One amicus brief argued, in support of the government's position, that the penalty *Hobby Lobby* would have to pay for not covering its employees' health insurance would *actually be less than* the cost of providing health insurance in the first place. As a result, this brief said, *Hobby Lobby* could avoid the challenged mandate and still be better off than it was before the ACA and its implementing regulations. If this fact is true, it is quite significant to the Court's analysis. Much of Justice Alito's reasoning for why *Hobby Lobby's* religious beliefs were 'substantially burdened' by the contraception mandate depended on the 'economic consequences' that would follow if it did not comply with the law.

Justice Alito dismissed the amicus claim, however, because, he said, 'we do not generally entertain arguments that were not raised below and are not advanced to the Court by any party.' He added that this was particularly a bad place to credit the off the record factual assertion because the amici's argument was 'intensely empirical' (which, as all lawyers recognize, sounds a bit like 'there is too much math in here.')

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### BISHOP JAMES MADISON



Portrait of Bishop James Madison

### WHO WAS BISHOP MADISON ?

Bishop James Madison, the cousin of our nation's fourth President, was the President of the College of William and Mary from 1777 until his death in 1812. Prior to appointment

This descriptive statement by Justice Alito about Supreme Court practice is simply incorrect. As I have documented before, independent judicial research – research beyond the records and outside of the party briefs – is very common at the Supreme Court. *See* Larsen, [Confronting Supreme Court Fact Finding](#), 98 Va Law Rev 1255 (2012). In fact, Justice Alito himself was actually called out by Justice Scalia for his 'considerable independent research' on violent video games when the Court found such games protected by the First Amendment a few terms ago. Nor have the Justices been shy about citing 'intensely empirical' amicus briefs or even their own independently-discovered empirical studies in the past on subjects as varied as economics, medicine, psychology, and even terrorism-funding practices. In short, they do it all the time.

Amicus briefs in particular are a rich resource for the Justices to find factual support for their opinions. As I argue in a [forthcoming article, The Trouble with Amicus Facts](#), the Court is now inundated with eleventh-hour, untested, advocacy-motivated claims of factual expertise. And, contrary to Justice Alito's claim, the Justices *are* listening. In fact one does not have to look far back in time for a ready example. Mere days before the *Hobby Lobby* decision, a unanimous Court held in [Riley v. California](#) that the police may not generally search digital information on a cell phone incident to an arrest. In so doing, the Court rejected the government's claim that such a search was necessary to prevent the destruction of evidence. All the police need to do, the Court tells us, is to isolate the phone from radio waves in bags that are essentially made of aluminum foil. The authority the Court cites for this? An [amicus brief](#) filed by criminal law professors (good ones at that, some from my own institution).

Whether or not the facts in these amicus briefs are credible and regardless of whether it is a good idea or a bad idea to avoid fact-finding beyond what the parties provide, the larger point here is about inconsistency. As the Justices are flooded with factual information, and while the amicus business grows in size, this problem is only going to get more significant. We should expect some sort of procedural uniformity when the Court is pressed with and surrounded by factual claims from new places. This practice of 'amicus opportunism' – we credit them when we want to and dismiss them when we don't – is troubling to say the least."

POSTED BY ALAN MEESE AT 10:08 AM 

LABELS: ALLISON ORR LARSEN, AMICUS CURIAE BRIEFS, HOBBY LOBBY V. BURWELL, JUSTICE SAMUEL ALITO, RILEY V. CALIFORNIA, SUPREME COURT FACT-FINDING

as President, Madison served as a professor of natural philosophy and mathematics. During the Revolutionary War, Madison organized a militia company of students. William and Mary claims that Madison was the first professor of Political Economy in the United States. His lectures on the subject relied upon Adam Smith's *Wealth of Nations*, published in 1776. Along with Thomas Jefferson, Madison was instrumental in founding the School of Law at William and Mary, appointing George Wythe as William and Mary's first Professor of Law and Police.

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ABOUT ME

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I am the Ball Professor of Law at the William and Mary Law School, where I teach Antitrust, Economic Analysis of the Law, Corporate Law, Tort Law, and Constitutional Law

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