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Legal Scholarship Highlight: The Amicus Machine

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Guest

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Legal scholarship highlight: The Amicus Machine

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We are living in the age of the Supreme Court amicus. Last term, amici curiae, or “friends of the court,” filed 863 briefs at the court – an average of 13 per case argued – and the justices cited these briefs in 54 percent of the cases they decided. This is the new normal. Over the past six terms, as Anthony Franze and R. Reed Anderson have [shown](#), approximately 800 amicus briefs were filed in 93-98 percent of all cases, with marquee end-of-June cases attracting briefs in the triple digits. That is over an 800-percent increase in submissions from the 1950s and a 95-percent increase from 1995. Although nobody can say for sure whether these briefs actually change case outcomes, it is clear that the justices are citing them regularly and that there are more and more “friendly” briefs from which to choose. The amicus growth spurt is significant and shows no sign of slowing down.

The real surprise, however, is the story behind the scenes – a story that amplifies fundamental changes in both lawyering before the Supreme Court and, more significantly, Supreme Court decision-making. We tell this story in our forthcoming Virginia Law Review article, [“The Amicus Machine.”](#) After interviewing over two dozen Supreme Court advocates, we offer a new description of the origin of many amicus briefs today. The prevalent account portrays motivated interest groups urging their policy positions on the justices in much the same way they lobby Congress. But even though the rise of amicus filings is partially linked to interest-group activity, the most notable aspect of the growth and, in particular, the influence of amicus filings is the dramatic spike in activity by the so-called Supreme Court bar. Today, elite, top-notch lawyers help shape the court’s docket by asking other elite lawyers to file amicus briefs supporting their petitions for certiorari. When the court takes a case, these same lawyers strategize about which voices they want the court to hear, and they assign the chosen groups to other Supreme Court specialists, who craft amicus briefs designed to bolster their chances of victory.

The end result is orchestrated and intentional. Skilled advocates find the arguments that matter, the clients that matter, and the lawyers that matter – and then they match them up and package them for the justices. A successful venture at the Supreme Court, in other words, requires a sophisticated amicus strategy. Specifically, as experienced Supreme Court practitioner Pam Karlan helpfully puts it, a good Supreme Court advocate needs both an “amicus wrangler” (someone to recruit the right amici) and an “amicus whisperer” (someone to coordinate the message). Take, for example, [King v. Burwell](#), last year’s high-stakes decision about the Affordable Care Act. Breaking from tradition, the government used an outside member of the private Supreme Court bar to recruit and coordinate amicus briefs in support of its case. These amicus efforts (which journalist Linda Greenhouse says [“were no accident”](#)) made a real difference: Chief Justice John Roberts cited two pro-government briefs in his opinion for the court, including one (filed on behalf of economists) on which he appeared to place substantial reliance.

Examples like this abound. Many will recall the amicus briefs filed on behalf of military leaders and corporations in the 2003 affirmative action case [Grutter v. Bollinger](#). Justice Sandra Day O’Connor cited these briefs in her opinion for the court, referenced them in her oral bench statement when the decision was announced, and referred to one of them several times during the oral argument as the “Carter Phillips brief,” apparently alluding to the lawyer who helped draft it. Similarly and more recently, five justices repeatedly asked the advocates in [Hollingsworth v. Perry](#), one of the court’s same-sex marriage cases, about standing arguments pressed by “the Dellinger brief” – referring to Walter Dellinger, another prominent Supreme Court expert.

These briefs were not organically developed by concerned interest groups who saw the case as an opportunity to press their policy positions. They were instead the product of targeted recruitment and design by Supreme Court experts. The fingerprints of experts like these can also be seen on other influential amicus briefs, such as the brief cited in the court’s opinion in [Riley v. California](#), the 2014 cell phone search case, and the brief discussed at oral argument in [Fisher v. University of Texas](#), the court’s most recent affirmative action case.

Coordinated amicus briefs are not entirely new, but the forces that now make them routine are new, and the cumulative effect of these forces – what we call the “amicus machine” – has so far gone unrecognized. Several modern dynamics keep the machine running. First, as Harvard law professor Richard Lazarus has [documented](#) and explained effectively, the rise of the Supreme Court bar over the last several decades has completely changed the nature of Supreme Court advocacy. As the repeat players before the court who comprise the Supreme Court bar solicit briefs from and write briefs for their cohorts, they both enhance their reputations and increase the ranks of other lawyers who help perpetuate the amicus machine.

Second, the court’s new hunger for information outside the record and the unprecedented rise in briefs conveying that information also fuel the amicus machine. Competing expert briefs on factual issues are now mainstream; the conventional wisdom suggests that you cannot win a big case without them. In fact University of Virginia law professor Dick Howard calls the modern array of expert amici an [“arms race”](#) between Supreme Court parties. Sophisticated players know they need a strategy to ensure that their chosen expert voices, as opposed to the many competing ones, are appropriately highlighted.

Finally, the modern Supreme Court itself embraces the work of the amicus machine. In their 2014 [special report](#) on the Supreme Court bar, Joan Biskupic and her colleagues at Reuters interviewed seven justices, and they learned that the justices prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy. The justices look to these specialists' briefs both for legal theories and for factual evidence, and they cite them at an increasingly high rate. In recent years, the court has also seemed to prefer deciding cases in a way that facilitates the declaration of broad legal rules rather than resolving narrow disputes. Because Supreme Court specialists are experts in identifying ways in which a case is a good or bad vehicle for establishing broad legal principles, the amicus machine helps the court identify which cases to hear and how to rule on those cases.

One's initial reaction to this amicus machine might well be skepticism. Why should a main informational resource for the justices be filtered through an elite club of specialists? Several scholars and journalists have warned about the power of the Supreme Court bar and the possibility of the court's docket being captured by an insular, pro-business cadre.

While these worries are significant, our article defends the amicus machine by highlighting several benefits it confers that are often overlooked. Specifically, we note three. First, the machine disperses the credibility interests long held by the solicitor general to a broader group of attorneys outside that office, thus increasing the number of specialists with reputation interests at stake who will avoid submitting unreliable factual information to the court. Second, the machine helps the justices' law clerks to identify cases that are worthy of the court's attention, an important function now that circuit splits are less common and reasons for certiorari more nuanced. And finally, the development of the machine complements an evolution in the court's focus from resolving disputes to enunciating broad legal principles. Supreme Court specialists who understand the types of legal arguments and factual presentations that will be most useful to the justices best serve the objectives of the modern court.

To be sure, the amicus machine has downsides. It is clubby. It is elite. There is a risk that people who can afford the best advocates will get the ear of the justices, and the democracy-enhancing ideal of the amicus will be lost. But, we argue, it is a mistake to focus only on the costs and to overlook the benefits. We push back on claims that the Supreme Court bar is monolithically pro-business and that the specialist lawyers who populate it effectively dictate much of the court's docket. In an era of infinite information and virtually limitless briefs, coordination efforts by Supreme Court experts are a controlling force on a potentially unruly system. At the end of the day, the amicus machine may be a virtue, and not a vice, of current Supreme Court practice.

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