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ARTICLE: Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs

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SUMMARY:
... Precisely what influences the justices of the United States Supreme Court? Numerous scholars have pondered this question, addressing it from many different perspectives: the influence of law clerks, the preferences of Congress, and the role of public opinion. ... One clerk reported, "Amicus briefs from the solicitor general are "head and shoulders' above the rest, and are often considered more carefully than party briefs." ... Would prefer to see collaboration 90% Would NOT prefer to see collaboration/No preference 10% Clerks' preferences for collaboration in amicus brief filing were apparent after the initial interviews, prompting additional inquiry. ... Clerks repeatedly commented, "Providing social science data is one of the useful things that an amicus brief can do for the Court," or, in referring to a brief containing such data, "This is a classic example of a helpful brief." ... In light of the clerks' reported propensity to give closer attention - at least initially - to an amicus brief filed by a prominent Supreme Court practitioner or academic (88% for both cases), a potential amicus filer should seriously contemplate hiring a top advocate. However, given the enormous cost barrier (an estimated $ 50,000 for an amicus brief at a top Washington, D.C. law firm), potential amici need to carefully assess their objectives in filing a brief. ...

TEXT:
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Introduction

Precisely what influences the justices of the United States Supreme Court? Numerous scholars have pondered this question, addressing it from many different perspectives: the influence of law clerks, the preferences of Congress, and the role of public opinion. n1 To date, however, none have examined the influence of amicus curiae briefs ("amicus briefs") from the perspective of former Supreme Court law clerks. n2 This article draws upon a new data set featuring seventy interviews with former Supreme Court law clerks who served from 1966-2001. Their personal insights clarify the role of these unsolicited briefs - a judicial lobbying tool that organizations and individuals aspiring to influence the Court's decision-making process increasingly employ.

During the October 2003 term, the subject of amicus briefs received significant public attention. A record 107 briefs were filed in the University of Michigan affirmative action cases n3 Grutter v. Bollinger, n4 and Gratz v. Bollinger, n5 while an impressive 33 amicus briefs **[*34]** were filed in the high-profile Texas sodomy case, Lawrence v. Texas. n6 These cases were remarkable not only for the magnitude of amicus briefs they attracted, but also for the purported influence of particular

"friend-of-the-court" briefs on the Court. The vast array of organizations filing in the Michigan cases included the American Educational Research Association, the American Psychological Association, and the American Sociological Association, all of which presented "social science evidence bearing on the central constitutional questions of affirmative action" in their briefs. n7 The Sidley Austin Brown & Wood brief filed on behalf of retired uniformed and civilian military leaders (incorrectly dubbed the "Carter Phillips" brief by multiple justices during oral argument), was indisputably consequential, given that Justice Sandra Day O'Connor cited the brief by name in both her majority opinion and her verbal summary of the decision - a rare practice. n8 Likewise, court observers speculate that the essence of the majority opinion in Lawrence v. Texas was gleaned directly from the amicus briefs submitted by the American Civil Liberties Union ("ACLU"), the Cato Institute, and a coalition of history professors. n9

These developments are part of a broader trend of increased amicus brief submission over the course of the last half-century. A study conducted by Professors Joseph Kearney and Thomas Merrill found that, during the ten years between 1946 and 1955, approximately 531 amicus briefs were filed. In contrast, between the years of 1986 and 1995, 4907 briefs were filed - an increase of over eight hundred percent! n10 In order to shed more light upon some of the specific ways that amicus briefs may be helpful to the Court, I conducted a comprehensive study assessing the viewpoints of former clerks. In discussing the findings of these interviews, this article addresses four specific questions: When are amicus briefs most **[*35]** useful? Does the identity of the amicus filer or author matter? What is the impact of a collaborative amicus brief? Finally, what is the role of social science data?

I. Literature Review: Does the Court Utilize Amicus Briefs?

Kearney and Merrill have suggested that "attitudes within the legal community about the utility and impact of amicus briefs vary widely" and that the mere handful of existing quantitative studies seeking to discern the impact of the briefs on the Court "reach strikingly inconsistent conclusions." n11 Some scholars view the Court's liberal policy in granting motions for leave to file as tacit recognition of the utility of amicus briefs. According to political scientists Gregory A. Caldeira and John H. Wright, "that the Court seldom limits amicus participation, despite its extremely heavy workload, suggests the positive value of amicus briefs to the justices." n12 Karen O'Connor and Lee Epstein similarly hypothesized that institutional resource constraints would eventually force the Court to limit amicus brief filings. n13 While the Court has dramatically decreased the size of its docket over the course of the last two decades, the expectation that the Court would limit its acceptance of amicus briefs has never come to fruition.

One of the quantitative ways that researchers have attempted to gauge the Court's use of amicus briefs is by tracking the percentage of written opinions that actually cite them. In a study that examined the 1969-1981 terms, O'Connor and Epstein found that eighteen percent of decisions cited at least one amicus brief. n14 Kearney and Merrill conducted a similar study that examined the frequencies with which all majority, plurality, concurring, and dissenting opinions published between 1946 and 1995 quoted or cited amicus briefs, by decade. They observed an increasing propensity by the Court to both quote and reference amicus briefs in written decisions over the **[*36]** fifty-year period. They noted that, of all opinions published between 1986 and 1995, approximately fifteen percent cited at least one amicus brief by name, and thirty-seven percent referred to at least one amicus brief. n15

The authors of the aforementioned studies underscored the possibility that, even if a Court opinion does not directly quote or reference an amicus brief, the brief still may influence the final decision. n16 The potential underestimation of the impact of amicus briefs represents a significant shortcoming in the design of such frequency studies; interviews with clerks provide a vehicle for

ascertaining an enhanced understanding of the more subtle ways in which the Court relies upon amicus briefs beyond citations in written opinions.

If the collective findings and observations are indeed correct insofar as amicus briefs really are utilized by the Court, one must ask: how are amicus briefs used by the Court? A number of Court observers and scholars have written about the specific ways in which the justices use amicus briefs. Political scientist Samuel Krislov asserted that the amicus brief can assume a very important role "when there is evidence of some weakness in the legal talent arrayed by the principal party." n17 In such instances, an exceptionally strong amicus brief can virtually replace the merits brief, which customarily receives far more attention than the typical supporting amicus brief. n18 However, even in cases where the merits briefs are quite competent, an amicus brief can still "perform a valuable subsidiary role" n19 by channeling the Court's attention to the wider interests implicated by a case n20 and providing social science data that the Court may use to support its ruling. n21

[*37] In addition to straightforward legal assistance, some observers contend that the Court relies upon amicus briefs to collect information about organizations' policy preferences. According to Kearney and Merrill, "Political scientists have long perceived an analogy between interests groups lobbying legislatures and interest groups seeking to influence judicial decisions through the filing of amicus briefs." n22 As one such proponent, Lucius Barker, suggested, "The amicus brief, in a sense, also allows the Court to weigh "political' information in a judicial way." n23 Clearly the prospect of quantitatively testing the usefulness of amicus briefs for the value of their "political" information to the Court presents many obstacles; for this reason, interview questions focusing on what type of information the Court finds useful are instructive.

Some scholars have asserted that amicus briefs have very little affect on the outcome of cases. Political scientists Donald Songer and Reginald Sheehan conducted a study whereupon they matched 132 pairs of similar cases over three different time periods, the only variable being the presence of amicus support. According to them, "The differences in success rates of litigants who received amicus support and those who did not was trivial." n24 They noted that, even in cases where three or more amicus briefs were filed on behalf of a particular litigant, it did not increase the likelihood that the amici-supported side would win the case. n25 Interviews with former law clerks allow researchers to further probe the validity of the finding that amicus brief support only marginally improves a litigant's chance of success.

The late University of Chicago constitutional scholar, Philip Kurland, took an even stronger position as to the disutility of amicus briefs. According to him, amici "seldom offer insights or arguments not already available to those to whom they are submitted. More often than not, they are expressions of votes rather than reasons." n26 He claimed that the Court's current liberal policy in granting **[*38]** motions for leave to file amicus briefs "encourages what is, for the most part, a waste of time, effort, and money in a useless function." n27

Thus, while most of the aforementioned studies tend to support the contention that amicus briefs do in fact make some difference, they are not conclusive. Kurland's view of amicus briefs as being mostly ineffective gives further reason for doubt about the Supreme Court's stance toward and use of amicus briefs. What is more, the Court's internal operations have remained relatively shrouded from public view. For this reason, interviews with justices and their clerks can serve to assist the process of interpreting important quantitative findings relating to the Court's utilization of amicus briefs. n28

II. Overview of Clerk Interview Study and Methodology

This research focuses on former law clerks for two principal reasons. First, because clerks are generally afforded substantial initial discretion in reviewing all petitions and briefs filed with the Court, they assume an important institutional supporting role to the justices. Second, former clerks are relatively plentiful and available for interviews, thus providing a reliable data set.

There are, however, several methodological disadvantages to interviewing clerks that should be noted. First and foremost, the views of clerks represent an imperfect proxy for perceptions of the actual decision makers, the justices. While the views of some clerks may closely reflect the attitudes of the justices for whom they worked, that is not necessarily the case. Second, many former clerks eventually enter appellate practice and author amicus briefs themselves. n29 Presumably their experience as practitioners affects their recollections on the usefulness of amicus briefs when they clerked. For this reason, all interviewees were urged to answer questions as they would have when they clerked. Finally, although **[*39]** the concentration of clerks in the sample represents the more recent past (the median clerk served during the October 1993 Term), their memories may be inaccurate. While there is much to learn about the Court's use of amicus briefs from clerk accounts, it is important to consider these potential shortcomings when assessing the interview responses.

The clerk sample included one clerk from 1966, eight clerks from the 1970s, sixteen clerks from the 1980s, thirty clerks from the 1990s, and fifteen clerks from the 2000 and 2001 terms. Interviewees included at least three former clerks from the chambers of each of the current justices, as well as clerks from the Brennan, Stewart, White, Marshall, Burger, Blackmun and Powell chambers. Given the unavailability of any central listing of former clerks, it was not possible to use a random sample. Instead, I constructed a database of clerk contacts obtained by personal referrals and by conducting searches of law firms, law school faculties, the National Law Journal and The Legal Times. All interviews were conducted between November 2002 and January 2003.

In an effort to obtain the most illuminating information on the Court's use of amicus briefs all interviews were conducted on the condition of anonymity and each former clerk was assigned a number between 1 and 70. In the forthcoming discussion, all quotations are credited to only a "C" followed by the clerk's assigned number. n30 In order to solicit more candid comments, I took notes during my interviews, rather than tape-record. I maintained as much consistency throughout the interview process as possible, attempting to ask all interview questions in the same manner and resisting from prompting answers.

I used the information obtained from my clerk interviews principally in a qualitative way. For each question, I attempted to identify the most significant trends in clerk responses and summarize the representative viewpoints. n31 Although I occasionally have cited percentages and frequencies where they are especially telling, by and **[*40]** large, the most valuable insights into the Court's use of amicus briefs in this type of study lie in the quotations themselves. n32

Part Three addresses the process of amicus review within the Court and discusses the most prominent clerk views on whether there are specific kinds of cases or areas of law where amicus briefs are most helpful. Given the sharp increase of amicus filings in recent decades, and varying accounts of amicus brief quality, one might doubt that justices and clerks would confer equal attention to each brief filed. Thus, Part Three subsequently discusses how each clerk divides his or her attention among the various briefs that are filed in a particular case. Part Four focuses on the identity of amicus filers and whether the amicus briefs submitted by particular organizations or specific types of authors are uniformly afforded closer attention during the process of amicus brief review. Part Five examines specific amicus briefing strategies. To what extent does the Court value

collaborative filing? What is the value of social science data in amicus briefs? Finally, Part Six provides a set of general recommendations to potential amicus filers seeking to maximize the Court's consideration of their briefs. While adherence to these suggestions cannot ensure that the Court will extend consideration to any given amicus brief, it may help to avoid immediate jettison by the clerks. A final note: interview responses largely did not correlate with chamber affiliation. n33 These results suggest that clerks hold a more consistent view of the utility of amicus brief than one might expect. For this reason, justices' names were omitted from clerk responses where the revelation of identity adds little insight into the Court's use of amicus briefs. n34

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III. Clerks' Process for Reviewing Amicus Briefs

A. When Are Amicus Briefs Most Useful To The Court?

The survey began with an inquiry into whether there were particular areas of law or specific kinds of cases where clerks found amicus briefs to be especially helpful. The majority of clerks (56%) explained that amicus briefs were most helpful in cases involving highly technical and specialized areas of law, as well as complex statutory and regulatory cases. Some of the most frequently mentioned types of cases were those involving tax, patent, and trademark law, as well as cases relating to the Employment Retirement Income Security Act ("ERISA"). n35 Other noteworthy areas of law included: railroad preemption, water rights, marine labor, immigration and Native American law. One clerk explained that, generally speaking, there existed a positive correlation between legal obscurity of subject matter and helpfulness of amicus briefs. (C59).

According to one clerk, amicus briefs in technical tax and ERISA cases were most instructive because, "We didn't know anything about that and there were billions of dollars at stake. It was helpful to know where people in industries like insurance and annuities line up on the issue." (C3). Another clerk explained that in areas of law such as patent, bankruptcy and tax, there is a steep learning curve and a well-developed bar of lawyers who specialize. (C57). Given that decisions in these cases can potentially affect entire industries, it is not surprising that clerks reported that the Court seeks the input of specialized experts to ascertain what the actual effect of a particular rule will be. Others agreed that the most useful amicus briefs are those filed in technical cases by industry experts having a familiarity with the specialized legal issues at stake primarily because the clerks - and to some extent, the justices themselves - tend to be generalists. (C44). Similarly, sixteen percent of clerks also reported that amicus briefs are especially helpful in cases involving medical and scientific issues. One such clerk claimed that for "questions involving specialized expertise of science and medicine, groups such as the AMA can use their expertise in a way that parties cannot." (C61).

[*42] Clerks citing the serviceability of amicus briefs in technical, statutory, regulatory and medical cases alike frequently noted that it was largely the non-legal information presented in these briefs that made them useful. Seventeen percent of the clerks volunteered that this type of information was most helpful. Several clerks emphasized the fact that there are no better experts in strict legal analysis than the justices themselves. According to one, "Amicus briefs that present doctrinal analyses are not helpful; the Court is well equipped for this, and has the necessary resources." (C39). Similarly, 14% of clerks went out of their way to note that amicus briefs were least helpful in constitutional law cases, despite the fact that these cases attracted the most amicus briefs. One clerk advocating this view explained that "amicus briefs filed in "hot button' cases . . . do not have nearly as much impact as in cases on an obscure topic. For example, the Casey amicus briefs did not make one bit of difference." n36 (C59). It was clear that the clerks' consideration of amicus briefs was primarily based on the usefulness of information presented, and that the most useful information was frequently factual and non-legal in nature.

Conforming to the views of legal scholars and Court observers, twenty-three percent of clerks offered that amicus briefs were extremely valuable in cases lacking quality legal representation. Generally, the clerks relied heavily on the merits briefs when they prepared for cases or wrote bench memoranda. In cases where the merits briefs were deficient, however, clerks would resort to the typically subordinate amicus briefs for assistance. According to one clerk, amicus briefs were most helpful in "cases where a side happened to be represented by a poor lawyer, such as a local trial lawyer who should have given the case to someone else [after certiorari was granted]." (C70). Another explained, "Amicus briefs help when the quality of party lawyering is not so great and the amicus filer can brief the case better on both the law and its applications." (C7). While several clerks reported that bad legal representation was often an issue in criminal cases and cases emanating from the states, others insisted that bad lawyering was not limited to any particular legal area per se.

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TABLE 1. Are there particular types of cases or areas of law where amicus briefs are especially helpful? What kinds of cases/areas of law? (70 respondents) n37

Highly technical cases; statutory cases; obscure areas of law 56%
Amicus briefs in cases with bad legal representation/merits briefs 23%
Industry related amicus briefs 19%
Amicus briefs with a medical or scientific focus 23%
Amicus briefs are NOT helpful in constitutional law cases 14%
Amicus briefs are helpful in constitutional cases 7%

B. Is Every Amicus Brief Read?

Nearly all clerks (83%) skimmed or looked over every amicus brief filed. However, those clerks reported spending additional time to carefully reading only those briefs that appeared to contribute new and useful information or arguments. One clerk described his personal system of screening amicus briefs as "separating the wheat from the chaff." (C31). Since clerks generally relied foremost on the merits briefs in order to prepare for cases, amicus filers needed to complement the information supplied by the parties in order to earn anything beyond cursory consideration. According to one clerk:

A clerk would at least skim all of the amicus briefs. Beyond that, it would depend on the quality of the brief and the contribution made to the party information. If you figured out that a crazy person wrote a particular brief, you would not review it again. Good briefs you would maybe read several times. (C4).

The clerks became quite adept at screening for good amicus briefs, and could tell very quickly if an amicus brief would be **[*44]** serviceable. According to one, "Every amicus brief was looked at, but not every amicus brief was read thoroughly. You could tell from the "get-go' if it would be useful." (C17). Corroborating this position, another clerk revealed, "After six months I could read amicus briefs in sixty seconds; I could make judgments as to their usefulness and dispose of them. Others were read more seriously." (C22).

To facilitate their screening, clerks relied upon a number of identifying features, such as the summary of arguments, table of contents and section headings - all required features of any amicus brief filed with the Supreme Court - to determine whether the brief could contribute anything novel. One clerk claimed he could assess the quality of an amicus brief by its printing. He

explained that only a few reputable shops regularly do print jobs for the most experienced Supreme Court filers. Thus, if the font of a brief was "off," this affected his perception of the brief from the outset. (C35).

Sixteen percent of the clerks noted who filed a brief - the organization filing and/or the firm representing and the specific attorney authoring - when making their determinations of whether it merited a closer read. One clerk, whose justice happened to give his clerks significant discretion to choose which amicus briefs they wanted to read, noted, "Justice _____& csq;s clerks could choose. I would look at the summary of arguments for something new. I would also look at who the amici were and whether I expected them to bring something new. If a high quality firm had filed the brief, I would read it." (C43). During their terms, clerks developed expectations of quality from certain repeat, regular Supreme Court advocates. One clerk explained that looking at the attorney and law firm names on an amicus brief "decreased the informational cost of determining what would help." (C39). Once a clerk determined that an amicus brief was either poorly written or duplicative, 30% testified to scanning the remainder very quickly, or simply moving on to the next brief.

Though not explicitly asked how their justices reviewed amicus briefs, many clerks nonetheless volunteered that information. The clerks commenting on this subject noted that they generally gave more attention to amicus briefs than their justices, often identifying particular briefs for review:

Justice _____ did not read all of the amicus briefs because they were very duplicative. It was a waste of **[*45]** time for justices to read all of them. Clerks pointed Justice _____ to the amicus briefs they found to be particularly useful as part of their memo, and included a discussion of the brief. It would be crazy to read them all. (C3).

Before argument the clerk assigned to the case would help the justice to prepare. He would go through the briefs, and identify amicus briefs for the justice. But the justice was not dependent on the clerk by any means. (C6).

A clerk reads all of the amicus briefs, and tells his justice not to read the briefs that just repeat arguments, because the justice cannot read all of them. As long as there are new arguments presented, a justice will read the amicus briefs. (C50).

Clerks repeatedly emphasized that most amicus briefs filed with the Court are not helpful and tend to be duplicative, poorly written, or merely lobbying documents not grounded in sound argument. Screening amicus briefs is a task that requires finding the "diamonds in the rough" rather than simply weeding out the bad ones. Given this process, it is reasonable from an efficiency standpoint that a justice would utilize his clerks to help identify the best amicus briefs. Clerk comments suggest that, while most justices will not read the majority of amicus briefs, many will read the exceptional, superior amicus brief.

A few clerks noted that, in cases where fewer amicus briefs are filed, there is a greater probability that each will be given more attention. As one clerk noted, "Sometimes there were one or two amicus briefs, sometimes there were dozens; you would give more attention to the briefs if there were fewer." (C18). Another clerk generalized, "If there are only a few amicus briefs, there is a better chance you will be read." (C61). Significantly, the cases with the most amicus briefs each term uniformly tend to be high-profile constitutional cases with broad public interest. As previously discussed, however, the widely held presumption among clerks is that briefs in such cases are the least useful type of amicus brief filed.

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TABLE 2. Is every amicus brief filed with the Court read? If not, why not? (Assume permission for leave to file has been granted.) (70 respondents)

At least skim/look over every amicus brief 83%
Will look at who files amicus brief 16%
Can tell quickly if brief is useful 30%

IV. Does the Identity of an Amicus Filer Matter?

A. Are the Briefs of Any Particular Groups Considered More Carefully?

Researchers have observed the success of certain institutional litigants in past studies. Most noteworthy is the historical success of the solicitor general as an amicus filer. Karen O'Connor found that employment race discrimination litigants supported by the solicitor general between 1970 and 1981 won 81.6% of the time. n38 O'Connor implied that some of this success may be attributable to the solicitor general's prized role as the most frequent litigator before the Court, participating in over half of all cases in any given term. n39 Similarly, the historic presence of the ACLU, NAACP, American Jewish Congress, and various labor organizations as frequent and prominent amicus filers has been noted. n40 Kearney and Merrill's recent amicus brief study followed the success of four organizational litigants - the solicitor general, the states, the ACLU and the AFL-CIO. According to them, "the national offices of both the ACLU and the AFL-CIO are widely regarded by knowledgeable Supreme Court observers as consistently producing briefs of superior quality." n41

The clerks reported that amicus briefs from the Office of the Solicitor General were given a higher level of consideration than those of any other advocate. Approximately 70% of the seventy clerks interviewed emphatically cited the solicitor general as the most important filer. According to one particular clerk, "Amicus briefs from the solicitor several are always read closely." (C21). Multiple **[*47]** similar responses from clerks in all chambers and across all decades were offered with regards to the solicitor general, including phrases such as "always considered" and "most important without a doubt." (E.g. C14, C18, C38, C39, C62). Clerks repeatedly noted that the solicitor general was the only regular amicus filer always given special consideration. (C32). One clerk reported, "Amicus briefs from the solicitor general are "head and shoulders' above the rest, and are often considered more carefully than party briefs." (C39). Since merits briefs generally receive more attention than amicus briefs, the solicitor general's amicus briefs are thus highly significant.

Clerks offered several explanations for why the solicitor general receives extraordinary attention. First and foremost, the Office of the Solicitor General has a well-deserved reputation for excellent written and oral advocacy. As one clerk commented, "The solicitor general has instant credibility and a reputation for good legal work with respect to case holdings and case logic." (C65). Another explained, "You may not agree with the solicitor general's argument, but the amicus brief will always be well researched." (C60).

The solicitor general's impartial analyses further distinguish his filings. According to one clerk, "Amicus briefs from the solicitor general are of excellent quality; they provide an extremely reliable, objective assessment." (C26). Thus, if the amicus briefs from the solicitor general are as outstanding as the interviewees suggest, it is not surprising that clerks appear to develop a quick appreciation for the consistent standard of excellence characterizing his briefs.

A final explanation offered for why the solicitor general's amicus briefs are read more carefully than any other filing entity is the Court's general concern for the interests of the United States as

an institution. According to one clerk, "The solicitor general is always considered very carefully. He often gets argument time, like a party. If a normal amicus brief raises a new argument, the Court is not obligated to respond. But the Court is compelled to address the United States." (C44). While the Supreme Court Rules say nothing about the Court's obligation to respond to arguments raised by the United States, the Court's concern for the interest of the United States is evidenced by its rule that the government need not seek the permission of the litigants in order to file an amicus brief. n42

[*48] Following the solicitor general, amicus briefs filed by states were the next most frequently cited government entity as being important enough to always warrant close consideration. While a number of clerks claimed that amicus briefs from states were always carefully considered (21%), most clerks cited briefs from the solicitor general first, followed by briefs from states. Unlike amicus briefs from the solicitor general, briefs from states or coalitions of states were not generally regarded for their outstanding legal expertise. Rather, it is the Court's concern for the states as an integral component of the American system of government that seems to account for the consideration it confers to states' amicus briefs. The following excerpts from clerk responses convey this point of view:

Amicus briefs from states are becoming increasingly common. They have somewhat of a privileged position, even though the quality of briefs filed varies. (C31).

Groups of states are also considered strongly, especially by justices with strong allegiances to states rights theories. (C52).

As a class, states are poorly represented before the Court. However, there is an institutional interest in taking state concerns seriously because of federalism concerns. (C35).

One of the dominant themes to emerge from the interviews is that close consideration of amicus briefs is highly dependent on quality. However, amicus briefs from states represent a rare exception to this apparent maxim insofar as the Court generally lends relatively extensive attention to these briefs, irrespective of their frequent inferiority. n43

[*49] After amicus briefs from the solicitor general and the states, clerks reported giving deference to briefs filed by other government entities. (C38). The Court's institutional concern for governmental interests extends to federal agencies, cities, and municipalities, and, to a lesser extent, Congress. Clerks specifically cited three organizations, The National League of Cities, the State and Local Legal Center, and the Criminal Justice Legal Foundation for their excellent amicus briefs. n44

After government entities, public interest groups comprised the most popular category of responses. First and foremost among those cited was the ACLU, noted by thirty-three percent of clerks. Clerks gave the ACLU's amicus briefs more consideration principally on account of their consistent superiority. As one clerk put it, certain groups that are habitually better filers - such as the ACLU - always make the "first cut" of amicus review. (C50). Another clerk commented, "The ACLU has quality people, and experience writing briefs; you know that they will raise good arguments." (C4). While a few clerks noted an ideological preference for ACLU briefs, most clerks' comments related to the excellence of the staff attorneys and their ability to raise the most salient legal arguments.

Clerks' plaudits of ACLU amicus briefs were remarkably similar across all chambers. Certainly for the category of public interest group amici, one might expect that chambers would have favored filers, and that such preferences would be linked to common perceptions of chamber ideology. When it came to the amicus briefs of the ACLU, however, this was not the case. Interestingly, even

some clerks do not realize the extent to which ACLU amicus briefs are uniformly respected by the justices. For example, a clerk for Justice Ginsburg explained that she "always reads the briefs from the ACLU, because she wants to know what arguments they have raised." The clerk continued on to note that, "this is probably different in the Scalia or Thomas chambers." (C3). However, multiple clerks from both Justice Scalia's and Justice Thomas's chambers listed the ACLU as an organization that always receives closer attention. One possible explanation is that the clerks have significant discretion in choosing **[*50]** which amicus briefs they read, and that the briefs that interest the clerks may not necessarily correspond to the briefs that interest their justices. It is more likely, however, that clerks and justices use amicus briefs to prepare for cases by seeking out the best arguments presented by the opposing side, and that the ACLU is uniformly perceived to be outstanding. According to one of Justice Scalia's clerks, "Justice Scalia does respect the views of the ACLU; he views himself as being intellectually honest, and likes to consider other viewpoints." (C45). The suggestion that one would be challenged by ACLU viewpoints necessarily implies that they are generally thoughtful and of high quality.

Consistent with the theory that the justices will often rely upon the best briefs - regardless of ideological preference - another clerk reported that he considered most carefully the amicus briefs from those organizations he most respected, including the ACLU, the NAACP Legal Defense Fund, Inc., and the Brennan Center for Justice. However, he added that he also "considered carefully some conservative counterparts thought to be standard bearers for arguments of that side, since they would raise the most difficult arguments." (C70).

In addition to the ACLU, clerks consistently cited other public interest groups whose amicus briefs always receive closer attention, including the NAACP Legal Defense Fund (11%), the AFL-CIO (7%), and the Chamber of Commerce (7%). n45 With the exception of the Chamber of Commerce, the liberal orientation of these groups is noteworthy. According to one clerk who served in the early 1980s, "The conservative equivalents [that are active Supreme Court amicus litigators and filers today] were just getting started then." (C15). The increasing tendency for conservative interest groups to file amicus briefs is a recent phenomenon n46 and the delayed emergence of these organizations as amici likely accounts for the ideological imbalance reflected in the research.

As discussed previously, professional associations comprised another oft-cited but separate category of organizations whose amicus briefs receive extra consideration. Sixteen percent of clerks **[*51]** specifically cited the briefs of the American Medical Association, the American Psychological Association, and American Bar Association as consistently trustworthy. According to one clerk, "Professional groups are considered to be more reliable than ideological groups." (C58).

Thirteen percent of clerks asserted that they never gave additional consideration to particular groups from the outset. Some maintained that consideration was always case specific; the decision to lend additional attention to an amicus brief depended on the legal issue at hand or the particular attorney authoring the brief. (C11). Other clerks claimed to judge only the content of each amicus brief filed, and not the name. According to one, "A good brief could come from anywhere." (C29). Other clerks echoed the view that unknown groups had the same opportunity as reputed organizations to earn a close reading. One revealed, "Sometimes the best brief would be from an individual law professor who had a great angle, or from a group that you had not heard of before." (C70). Thus, while most clerks (87%) were inclined to give certain groups closer attention on account of their identity, there were a number of veritable equal opportunists in the sample.

TABLE 3. Are the briefs of any particular groups always considered more carefully than others? Can you name specific groups? (70 respondents)

Solicitor General (United States) 70%
States/Local Governments 21%
ACLU 33%
Professional Associations 16%
NAACP 11%
AFL-CIO 7%
Chamber of Commerce 7%
Criminal Justice Legal Foundation 4%
Washington Legal Foundation 4%
Brennan Center 3%
Lambda Legal 3%
No extra consideration to any particular groups 13%

[*52]

B. Does the Author of an Amicus Brief Make a Difference?

In his book, The Supreme Court Bar: Legal Elites in the Washington Community, political scientist Kevin McGuire explored the privileged role of the "inner circle" - the most active members of the Supreme Court Bar. n47 He asserted that lawyers in the "inner circle," on account of their active Supreme Court practice and extensive experience, "are mindful of how to structure their arguments so as to satisfy the justices' concerns and expectations." n48 The "inner circle" is comprised of a select but somewhat loosely defined group of practitioners, associated with high-profile private firms, public interest organizations, and law school faculties. n49 A 1997 article for the National Law Journal cited the increasing propensity of litigants to turn to the most elite members of the Supreme Court Bar for representation. n50 These findings prompt one to consider the effect having the name of a prominent reputed attorney or academic on the cover of an amicus brief. Do these types of individuals, by virtue of their identities, have any intrinsic advantage as amicus filers?

1. Prominent Academics

The overwhelming majority of clerks (88%) indicated that they would be inclined to give an amicus brief filed by an academic closer attention - at least initially. Several clerks reported that they always took an interest in amicus briefs filed by academics. According to one, "It is good to get a diversity of academic briefs. It is interesting to get different perspectives, even if some of the academic filers are not as famous." (C27). In most cases, however, clerks' affirmations of academic amicus filers were usually qualified in some way; many claimed only to give extra attention to well-known academics or professors they happened to know personally. (C38). Clerks repeatedly asserted that name recognition alone would not necessarily warrant closer consideration of an amicus brief. For example, two clerks specifically noted that an amicus brief authored by Harvard Law Professor Laurence Tribe would be given more **[*53]** deference than a brief authored by Harvard Law Professor Alan Dershowitz. (C9, C51). Other clerks recounted a wariness of amicus briefs filed by large groups of law professors. According to one, "Many law professors are just causing trouble, and just file amicus briefs as a vanity project." (C36). Another ventured, "Amicus briefs from large groups of professors can have an impact, but those are generally overdone." (C63).

The clerks identified several specific individuals whose amicus briefs consistently received more attention. Professor Tribe was cited more often than any other academic or attorney. Many clerks simply listed him as first among those filers whose briefs always received extra attention because of their quality. One explained, "You came to recognize briefs filed by Tribe as being

good." (C62). Other clerks emphasized that although they did not always agree with him, they were curious to read his briefs. Said one such clerk, "You just wanted to see what he has to say, but he is not always helpful." (C39). Another clerk suggested that the justices paid close attention to Tribe's briefs because they "were looking to take Larry Tribe down a peg." (C15). While perhaps unorthodox, such justifications for noting Tribe's amicus briefs further show that clerks carefully scrutinize his filings.

Other academics mentioned as respected amicus filers included University of Texas Law School Professor Charles Alan Wright, Harvard Law School Professors Charles Fried and Arthur Miller, and Duke Law School Professor Walter Dellinger. It is noteworthy that some of the clerks listing Fried and Dellinger included them by virtue of their status as former solicitors general, not merely because they were respected academics. n51 Unlike with the mention of Tribe's name, however, clerks generally did not offer additional editorial comments about these academics. One clerk did explain why he always read Wright's briefs:

I always read Charlie Wright for civil procedure cases. Justice ____&uscore;__ was a civ-pro freak. He had met him and always read his stuff. As a clerk, I wanted Justice _____ to know that I had at least read his amicus **[*54]** brief. It would be a brief that [his justice] would at least take a look at. (C3).

This comment reveals that, while clerks undoubtedly pay attention to the amicus briefs which personally interest them, their reading preferences also reflect those of their justices.

Some clerks noted that they would only consider an amicus brief from an academic if the professor was a recognized expert in his or her field, and if that expertise was relevant to the legal issue at hand. These noted academic specialists included: Michael McConnell for the First Amendment (University of Utah); Charles Nesson for Evidence (Harvard); Laurence Lessig for Intellectual Property (Stanford); Paul Mishkin for Federalism (California, Boalt Hall); Richard Epstein for Takings (Chicago). (C46, C52, C64). Clerks preferred specialists' amicus briefs because the briefs focused on reaching the correct legal ruling rather than advocating a self-serving outcome. According to one clerk, "It is best when a prominent academic takes a disinterested view, and the brief is academically oriented." (C44). The comments from this subgroup of clerks reinforce the Part One discussion detailing the kinds of cases and areas of law where amici briefs are most helpful. Recall that most clerks found amicus briefs to be particularly useful in cases relating to more obscure or specialized areas of law which, comparatively speaking, the Court is not as well-equipped to analyze.

TABLE 4. If an amicus brief is authored by a prominent academic, will it be considered more carefully? (68 respondents)

YES, considered more carefully. 88%
NO, not considered more carefully. 12%

2. Reputed Attorneys

Coincidentally, the percentage of clerks claiming to lend additional consideration to an amicus brief authored by a reputed attorney was exactly equivalent to the percentage claiming to note a brief authored by an academic (88%). According to one such clerk, "If a famous lawyer filed, you would pay attention and take a closer look." (C45). Most specified that only established members of the **[*55]** "Supreme Court Bar" - the "inner circle," as McGuire described it - would always

receive closer consideration. One clerk suggested, "Depending on whom you ask, there will be 10-25 lawyers in this category read more carefully." (C19). First and foremost cited in this group were former solicitors general, including Seth Waxman, Walter Dellinger, Drew Days, Kenneth Starr, Charles Fried, Rex Lee, Robert Bork, Erwin Griswold, and Archibald Cox. Although many clerks cited only particular members of this list, two clerks suggested that a brief filed by any former solicitor general in the private bar would be read carefully. (C21, C63).

Beyond former solicitors general, clerks reported that the amicus briefs authored by certain, established Supreme Court advocates in private practice would be given more consideration than the typical amicus brief. Among the names listed were Carter Phillips (Sidley Austin Brown & Wood); Ted Olson (formerly of Gibson, Dunn & Crutcher before assuming the position of solicitor general in 2001); John Roberts (Hogan & Hartson); Jeff Sutton (Jones Day); Michael Gottesman (formerly of Bredhoff Kaiser); Joe Onek (formerly of Onek, Klein & Farr); and Maureen Mahoney (Latham & Watkins). In addition, clerks noted several prominent attorneys affiliated with public interest organizations, including Kent Scheidegger, Larry Gold, Jack Greenberg, and Anthony Amsterdam.

A few clerks insisted that famous authorship of an amicus brief would earn closer consideration only initially; any deliberation beyond an initial pause could only be earned by merit of content. Again, clerks seemed reluctant to waste valuable time reading amicus briefs that would not be useful for case preparation, regardless of how famous the author was:

A famous name creates a certain level of expectation; it is a natural human quality to look at the source. However, I would still look into the work product to determine if it would be useful. (C2).

Yes, but I would take two minutes [to read the brief if it were filed by a famous lawyer or prominent academic] instead of one minute. Beyond that, greater consideration would be based on substance. (C22).

[*56] Yes, you would have an initial presumption that a brief filed by an eminent Supreme Court advocate would be good, but that carries no weight once you start reading. You get no additional credit just because you are Carter Phillips. (C67).

A lesser number of clerks (12%) claimed that authorship by a famous attorney or academic had no impact whatsoever on their consideration of a brief. One such clerk speculated that "the more prominent the lawyer whose name appears on the brief, the less likely he had a role in the draft." (C6). Another asserted that consideration is "generally not based on name alone." (C7). He continued, "The amicus brief of a famous practitioner may get weight, but only based on lawyering skills." This was clearly the minority view, however, as nearly all the clerks admitted to giving a prominent attorney the benefit of the doubt - at least initially.

TABLE 5. If an amicus brief is authored by a reputed attorney, will it be considered more carefully? (68 respondents)

YES, considered more carefully	88%
NO, not considered more carefully	12%

V. Clerk Perceptions of Amicus Filing Strategies

A. Is There Any Advantage to Collaboration?

Caldeira and Wright have examined the propensity - or lack thereof - for amici to collaborate on joint briefs. n52 According to them, "Seldom do more than two organizations of the same type cooperate on a single brief, with the notable exception of states, counties, and individuals." n53 In light of the striking increase in the number of amicus briefs filed with the Court, but the relatively constant average number of organizations collaborating on joint briefs, they proposed:

[*57]

That organizations apparently find it advantageous to file individual briefs, and thus more briefs, than to team up on single briefs, implies that it is the number of briefs, not the number of organizations listed on each brief that impressed the justices - or that, at the least, those who make decisions about filing believe it does. n54

Whatever the reason for this apparent tendency, it is constructive to learn more about the Court's views on collaboration. Thus, clerks were asked whether they would prefer to see amici collaborate on briefs or file separately.

Almost 90% of clerks expressed a preference for collaboration, at least in certain circumstances. Most clerks explained that they would prefer to see more collaboration because there would be fewer total amicus briefs to read. While collaboration would obviously serve to reduce clerk workload, clerks emphasized that this would be a beneficial result for the amici because clerks could dedicate more time to each individual brief. One clerk suggested, "If forty different groups file, it is overwhelming for the justice and clerks to read all of the briefs. Collaboration enhances the prospect that an amicus will be considered." (C11).

Many clerks expressed support for the idea of collaboration among amici to the extent that it would reduce repetitive filing. One clerk warned that "one of the risks of filing amicus briefs is repetition; this really diminishes the impact of filing." (C20). Not only do repetitive amicus briefs annoy clerks, they can cause clerks to miss the original and useful information that a brief may contain. One clerk explained, "If eighty percent of a brief is repetitive, then I will start skimming and the twenty percent that is new could get lost." (C70). For this reason, several clerks urged organizations with similar perspectives or interests to collaborate, but for groups with unique arguments or perspectives to file separately. According to one: "If the group is just saying the same thing, then collaboration is in everyone's interest, because "me too' briefs are not useful. But if the amicus has a unique, idiosyncratic perspective, it should file separately." (C44). As this clerk suggests, too much coordination could result in the dilution of valuable perspectives. One of the **[*58]** foremost reasons why amicus briefs are valuable to the Court is that they can and do offer arguments and information that help decide cases. Thus, that clerks wish for potential amici holding genuinely independent views to file separate briefs - even at the expense of having more briefs to read - indicates the important role that amicus briefs assume in the Court's decision making process.

Clerks cited several additional reasons in justifying their preference for collaboration. A few clerks claimed that collaboration enhances the value of an amicus brief. According to one, "It would help for amici to collaborate; the more groups that come together on a brief, the more impressive it is that they hold the same view." (C28). Other clerks asserted that collaboration improves the actual quality of a brief, because "groups can bounce ideas off of each other." (C50). This view suggests that collaboration can produce a more thoughtful amicus brief. Alternatively, another clerk

offered that if amici with similar views were to collaborate and pool resources, they could afford to hire a top Supreme Court attorney to prepare an outstanding brief:

Amici should collaborate. Amicus briefs can be effective if they make a very good point, but it is very costly to do this. It would be better to band together, get a good lawyer, and pack a punch. This would have more of an impact than several separate, mediocre briefs. (C47).

According to Caldeira and Wright, the production of a single amicus brief cost between $ 15,000 and $ 20,000 in 1988. n55 A representative from the firm Sidley Austin Brown & Wood estimated that an amicus brief would run approximately $ 50,000 today. While this represents a formidable amount, it might be within reach if similarly-minded groups were to file together. Furthermore, if a filing organization's primary goal is to influence the thinking of the Court, this is a strategy worthy of serious consideration. An amicus brief written by a top Supreme Court firm would surely catch the attention of most clerks, and there is evidence that a collaborative **[*59]** amici effort, in and of itself, would strike at least some clerks as being more serious, perhaps meriting closer examination.

Several clerks offered that coordination is a particularly effective means of collaboration. Rather than simply signing on to one brief together, occasionally groups coordinate their filings, each tackling a different argument in its own brief. One clerk explained:

Sometimes there is obvious coordination among different groups. For example, an amicus will say, "There are five different arguments for "X' but we are going to only talk about one." Partially, this is a response to the page limit and is like getting a 100 page brief (five briefs that are each twenty pages long). I love this! The briefs were of higher quality when they focused on a narrow piece. It is more efficient, and I can move on if I am already convinced of a particular argument. Coordination focuses the inquiry in a helpful way. The downside is that you get more paper. But, often it is a choice between five inadequate briefs and five briefs that do a good job on the issue. (C3).

There are several advantages to coordination. Supreme Court Rule 33(g) stipulates that an amicus brief must not exceed thirty pages; given that the page limit for a principal party's merits brief is considerably longer (fifty pages), it is unlikely that an amicus brief could be equally comprehensive. Thus, an amicus brief focusing on one particular aspect of a case is often more effective than one furnishing a generalized presentation of background facts. Moreover, a coordinated effort permits each amicus participant to address the specific issues most relevant to its organizational purpose. Coordination appears to be preferable to duplicative filing in the view of the Court, even if the clerk workload is not necessarily reduced. n56 (C6).

A minority of clerks (10%) expressed concern at the notion that organizations should collaborate on briefs, or claimed that they had no preference. This small subset feared that the process of **[*60]** collaboration would diminish, rather than improve, the quality of amicus briefs. According to one, "The burden of going through the amicus brief stack is not that great; when amici collaborate, they can end up stripping the brief down." (C30). This "stripping down" of briefs constitutes the unavoidable cost of compromise among organizations over points of disagreement. According to one clerk, "If amici could collaborate and do a good job, that would be helpful. However, the problem is that you often get a more generic product in order for groups to agree, and this is not helpful." (C55). The implicit significance of these comments is that this subset of clerks would always prefer to read more amicus briefs rather than risk the muting effects of collaboration. Once again, such remarks suggest the genuine importance of amicus briefs to clerks.

TABLE 6. Would you rather see amici collaborate on briefs, or file separately? (70 respondents)

Would prefer to see collaboration	90%
Would NOT prefer to see collaboration/No preference	10%

Clerks' preferences for collaboration in amicus brief filing were apparent after the initial interviews, prompting additional inquiry. Does a collaborative amicus brief typically capture a clerk's attention by virtue of that characteristic? And, if so, do clerks tend to value collaboration because of the effort involved, or merely because the net result is fewer amicus briefs to read? In order to explore the topic of amicus brief collaboration in greater depth, clerks were asked to consider their inclination to give a hypothetical amicus brief submitted by five or six organizations special consideration.

Given that so many clerks expressed a preference for amici collaboration, it seemed likely that clerks would similarly be inclined to give such briefs more attention. However, this was not necessarily the case. While views on this question were quite mixed, a plurality of clerks (50%) asserted that the sheer number of amici joining on a brief is not a significant factor for consideration. One clerk summarized this widely held view, explaining, "There is no extra consideration for numbers alone." (C15). This view seems to confirm the conjecture set forth by Dickinson Law School Professor **[*61]** Robert E. Rains, who once remarked, "One could hardly expect the least democratic branch of government to be swayed by a head count." n57 Thus, if Rains is correct according to the accounts of these clerks insofar as the justices do not take an interest in the actual number of organizations participating in a collaborative filing, then precisely which attributes do they consider?

Rather than the number of groups that file together, clerks assessed the composition of a joint filing. Many clerks noted the identities of the organizations filing together in determining whether a collaborative amicus brief merits closer consideration. According to one such clerk, "If a number of respected organizations came together, the brief would be given more consideration; a brief of five small or unknown organizations would probably not carry added weight." (C18). Another explained, "A flag would be based on the names, not the number of organizations." (C27).

That the majority of clerks would not give any special attention to a multi-group brief by virtue of the collaborative effort alone is not as surprising a result as it may initially appear. Clerks desired collaboration because it reduced the number of duplicative amicus briefs, making the task of identifying the rare useful brief somewhat easier. However, this preference does not suggest that clerks would necessarily spend more time reading a poorly written or unhelpful amicus brief, merely because it was filed by six organizations instead of one. While some clerks claimed that collaboration enhances brief quality, this view was not unanimous. Unlike other cues, such as prominent authorship, collaboration does not appear to be a strong signal for expected utility.

A sizable minority of clerks (30%) took the opposing view, claiming that they would tend to give additional attention to an amicus brief filed by multiple organizations. These comments reflected the view that collaboration has the effect of creating better amicus briefs. According to one clerk, "Collaboration would show a broader consensus and get more attention." (C7). Another clerk affirmed that "a collaborative brief would be one of the ones at the top of the pile, if you knew the groups." (C32). While this statement indicates a clear preference for collaborative briefs, it shows that **[*62]** the particular identity of the filing groups is still an important factor for consideration.

Several clerks held that some collaborative efforts bear more significance than others. For example, clerks asserted that the actual number of joint filers would be important for an amicus brief filed by the states. One clerk offered, "An amicus brief from six states will not tell you much; it

prompts you to wonder, "What about the other forty-four?'" (C66). Consideration for the depth of representation among a particular class of filers was not confined to the category of state amicus briefs. Industry briefs represent another example where a collaborative brief would have a greater impact than multiple, separate filings. In the view of one clerk:

A collaborative brief would show more intensity of preference and clarity of views. . . . It would probably not be read because of the number of amici joining the brief; rather, it would show that the industry and groups have a strong uniformity of preference. An industry amicus brief would make a difference and be more powerful. (C38).

Another clerk held a similar view of collaborative filing, claiming that the demonstration of a broad consensus would get more attention than a scattered approach. He asserted, "If all civil rights groups joined together, they would get more attention than if they each filed separately." (C35). That said, even among the minority of clerks who claimed that more careful review would be given to a brief that was filed collaboratively, many acknowledged only a marginal advantage.

[*63]

TABLE 7. Suppose 5-6 organizations collaborate and submit a single amicus brief: Would the brief receive additional attention on account of the collaborative effort, all things equal? (66 respondents)

NO, would not give such briefs a closer look based on this attribute alone. 50%
YES, would give such briefs a closer look based on this attribute alone. 30%
Depends on the case/organizations 20%
OTHER 5%

While views were somewhat mixed as to whether an amicus brief would be given more consideration by virtue of a collaborative effort, clerks were more far more confident to say that a collaborative brief filed by organizations not traditionally viewed as ideological allies would merit more attention. Once again, this question was added to the interview set during the early stages of inquiry. Of the sixty-two clerks who considered this hypothetical situation, 86% reported that an amicus brief filed by ideologically opposed groups would be noteworthy. Clerks from this group explained that unexpected collaboration would indicate that the concern at hand represented something greater than a mere ideological affiliation. According to one clerk, "If different groups - non traditional allies - file jointly, this is impressive. For example, if an educational and environmental group filed together, this showed the depth of the effect." (C42). Another speculated, "It would get attention - at least initially - and maybe convince you that they have a good legal argument." (C44).

Clerks cited numerous odd pairings of filers. Some emphasized that an amicus brief filed by groups who hold opposing interests could be as insightful and effective as a brief from groups that are not traditionally viewed as being ideological allies. For example, one clerk suggested that a brief filed by the content owners and the manufacturers in a copyright case would be very impressive. (C28). Another cited a hypothetical amicus brief filed by the Chamber of Commerce and AFL-CIO. (C30). Any instance of groups with opposing interests coming together for a collaborative amicus brief would be considered "a big deal" and the brief "would definitely be **[*64]** given more weight." (C39). One might expect that this type of amicus brief would be quite rare, and a handful of clerks noted that they did not recall it ever happening. However, the infrequency of this type of filing likely makes it all the more eye-catching when it does occur.

Many clerks said that they would read a brief filed by unexpected allies simply because they would be interested to see what it said. One clerk explained that he would give such a brief, "a marginal increase in attention; however, it would just be on account of curiosity and would not likely make an impact." (C31). Other clerks explained that such a brief would pique their interest and be promoted to the top of the amicus brief pile. Curiosity might influence the order in which these clerks read the briefs, but after the first few pages, considerations of actual quality would quickly prevail.

The thirteen percent of clerks who indicated that they would not give any additional attention to a collaborative amicus brief filed by non-traditional allies asserted varying reasons for their position. One clerk claimed, "This would not make a difference at the Supreme Court level; what other parties think is the right position or argument does not really matter to the Court." (C19). Two other clerks explained that unexpected alliances are not as surprising an occurrence as one might expect, because the temporary partnership is actually based on a shared common interest. According to one who held this view, "Strange bedfellows are fairly narrowly confined to certain kinds of cases, such as First Amendment cases; thus, it would not be surprising for ideologically diverse groups to come together." (C24). It remains unclear whether the clerks who claimed to give more attention to a brief filed by usual ideological foes would necessarily disagree with this observation; however, the fundamental difference between these groups is that the majority of clerks find the attainment of commonality in the face of generalized ideological differences to be so extraordinary that it merits closer consideration.

[*65]

TABLE 8. Again consider a hypothetical collaborative amicus brief that 5-6 organizations join: If some of the groups are not considered to be traditional ideological allies, would the amicus brief receive any additional attention? (63 respondents)

YES, would give such briefs a closer look based on this attribute alone. 86%
NO, would not give such briefs a closer look based on this attribute alone. 13%
OTHER 1%

B. What is the Impact of Social Science Data?

Much has been written about the value of social science data to Supreme Court adjudication, and there exists a wide range of opinions on the subject. It was not until the emergence of the legal realist movement during the late 1930s that sociological data made a serious entree into the Court's deliberation process. n58 Professor of Law Michael Rustad and Professor of Sociology Thomas Koenig reported that general post-depression sensitivity for concerns of equality combined with the national transition into the New Deal era eventually led to the Court's gradual embrace of social science data. n59 Once again, the historically flexible amicus brief provided the perfect instrument with which to inject consideration of sociological fact into the Court's adjudication process. The willingness of the Court to receive "extra-legal facts" prompted public interest organizations to increase their use of the amicus brief, and the provision of social science information represents one of its most important services. n60

Rustad and Koenig endorsed the concept of the Court's reliance upon social science information via amicus briefs, but objected to its current use. They contended, "The desire to win the case encourages the amici to distort or ignore any damaging social science findings." n61 Similarly, Reagan Simpson underscored the indispensable function of the amicus brief to inform the Court when **[*66]** issues of social significance are at stake. However, in this vein, Simpson

warned potential amici filers of the potential hazards of conveying social science information that is outside the record:

When amicus briefs present facts beyond the record that did not undergo the rigors of examination and cross-examination at trial, it is important for those facts or data to be well documented and well scrutinized. . . . Given the limited ability that judges have to evaluate such evidence, and the likelihood of judicial skepticism about such data, the author of an amicus brief should cite social-science data carefully and sparingly. n62

In light of the mixed views of the utility of social science data in amicus briefs, the clerks' views on the subject provide further insight.

Sixty-eight of the seventy clerks interviewed were asked whether they were inclined to give more or less consideration to an amicus brief containing social science data. Approximately 54% of the clerks claimed that they would be more inclined to give an amicus brief presenting social science data closer consideration. Twenty-five percent indicated that they would give such a brief less consideration, and 16% refused to generalize, asserting that it would depend on the particular case.

Most who responded that they would be inclined to give social science-oriented amicus briefs closer consideration gave nearly identical explanations in justifying their positions. Clerks repeatedly explained that such briefs are useful because they frequently add to the merits briefs in a way that the average amicus brief does not. According to one:

As a rule, the farthest thing from a party argument is what is most helpful. For example, hard facts or social science data. Briefs that offer this information would be on the more helpful end of the spectrum. Often you wish you knew more facts than you get from a party brief. (C20).

[*67] Clerks repeatedly commented, "Providing social science data is one of the useful things that an amicus brief can do for the Court," or, in referring to a brief containing such data, "This is a classic example of a helpful brief." (C63, C10). Due to the page restriction, parties often do not have space to include social science studies in their merits brief. Moreover, a credible public interest or research organization is much better positioned to provide social science findings than a typical litigant. (C20).

Clerks also appreciated amicus briefs containing social science data because they provided insight into the practical consequences of Court decisions. One asserted, "I am very interested in social science information and look for briefs with this; I think the real world ramifications of the Court's decisions should be taken into account." (C64). Another clerk echoed this view, explaining, "Any data showing real world impact is important because it shows affects that go beyond the interests of the parties. This matters to some justices." (C70).

Clerks who were hesitant to give additional attention to amicus briefs presenting social science data (24%) articulated varying reasons for their viewpoints. Several clerks reported this data to be unreliable and easy to manufacture. Affirming the concerns expressed by Rustad and Koenig, one clerk explained: "Any social science data is taken with ten grains of salt. Justices believe it to be very manipulable. Unless the information is extraordinary and submitted by a known impartial source, it is not given a huge amount of weight." (C28).

As predicted by several of the aforementioned scholars, clerks in this subset were especially wary of social science data that was not part of the lower court record. A few clerks generalized that, like publication in a peer review journal, the inclusion of social science information in the record serves as a benchmark of legitimacy. This view was evident in the remarks of a clerk who

invoked a familiar adage to explicate his general attitude toward amicus briefs that contained social science data:

There are lies, damn lies, and statistics. If a brief relies too much on statistics, I would be skeptical. The inclusion of too much social science data is a cause for concern. You want to be sure that you get an adequate test of the information through the **[*68]** adversarial process via the lower courts' findings of fact. (C21).

In contrast to the majority of clerks who said that the inclusion of social science data in an amicus brief would catch their attention because of its contribution of new information to the case, the comments of this minority group of clerks suggest that the incorporation of social science information typically served as a signal of disutility.

In addition to their concerns over the reliability of social science data, clerks in this group also claimed that it was irrelevant to deciding cases. One such clerk explained, "I do not recall social science data being important; my justice had no interest in this, and was concerned only with the legal arguments." (C11). Thus, contrary to the assertions of the many clerks who claimed that it was important for the Court to consider the extralegal implications of its decisions, others asserted that this was not an integral Court function. The topic of social science in amicus briefs represents one of the rare exceptions to the general finding that there seem to be very few differences with regard to the use of amicus briefs from chamber to chamber. The tendency for clerks to be less inclined to give close consideration to an amicus brief containing social science data appears to be a function of the governing jurisprudence of their particular chambers. Nearly all of the clerks interviewed in the Scalia and Thomas chambers reported that they were less likely to pay close attention to social science briefs. Given that only ten clerks from Justice Scalia's and Justice Thomas' chambers were interviewed---a sample too small to purport to represent the actual clerk population - the significance of this observation should not be overstated. This may, however, be an area worthy of future study.

Approximately 16% of clerks claimed to be ambivalent to amicus briefs presenting social science data. Their receptiveness to arguments based on social science data varied from case to case, and depended on both the source of the data and its relevance to the salient issues in the case. One such clerk noted that social science data was generally not helpful in cases requiring statutory interpretation, but that it could be useful in cases where an "aspect of individual behavior or a social or economic effect was at issue." (C27). Clerks holding this view represented a mix of chambers and terms.

[*69]

TABLE 9. Are you more or less likely to consider amicus briefs that contain social science data? (68 respondents)

Would give such an amicus brief MORE attention	54%
Would give such an amicus brief LESS attention	25%
Refused to generalize (no more or less likely)	16%

VII. Recommendations to Amicus Filers

The following set of recommendations is designed for the benefit of amicus brief filers and is based on the most prevalent responses to the interview questions. Clearly, adherence to these suggestions provides no guarantee to an amicus filer that the Court will devote a sustained level of attention to a given amicus brief. However, based on the research, a commitment to these guidelines should increase the likelihood that the Court will receive such an amicus brief more favorably than a brief that wholly disregards them.

1. Don't Repeat!

Potential amicus filers should, to the greatest extent possible, avoid repeating the information presented in the merits brief of the party it supports and in the other amicus briefs. Clerks cited verbatim iteration to be the fatal flaw of an amicus brief. A serviceable brief must be additive to the party discussion, and contribute to the Court's knowledge base in some significant way. As a general rule, the amicus brief must address an important factual or legal aspect of the case that has been neglected in order to be valuable to the Court. Amicus briefs that repeat party positions for the purpose of taking a "strength in numbers" approach should be avoided at all costs.

Given the coincidence of filing dates for the principal parties and the amici, the successful provision of effective, supplementary information necessitates a high level of coordination. It is incumbent upon a potential amicus filer to contact the party that it seeks to support as early as possible, so that a determination can be made as to how it can best assist the party, in cooperation with the other amici. Although there does not appear to be a direct benefit from collaborating with other like-minded filers (50% of clerks **[*70]** claimed not to give a brief additional consideration on account of this attribute alone), collaboration should be considered in cases where filers hold identical viewpoints, as clerks noted that each individual brief is given more individual attention when there are fewer to read.

Amici can provide information while avoiding duplication in a variety of ways. Based on the expertise of the particular organization, an amicus brief can present technical, industry, historical, or social science information; it can expand arguments presented by a party, discuss wide-ranging effects of a particular decision, or present important data. The key to avoiding a repetitious filing is discretion. The best amicus briefs will assess the merits brief of the principal party - drafts are generally available upon request - since this is the filing most important to the Court. If there are particular weaknesses in the party brief, the most competent amici will attempt to address and compensate for these vulnerabilities. If the merits brief is generally strong, then the best amicus filers will employ their unique expertise and perspectives to furnish information that will enhance the Court's understanding of the issues.

2. Keep It Short

One of the foremost attributes common to the ideal amicus brief is brevity. Many briefs that stretch to fill thirty pages inevitably present information that is inessential. For example, amici should avoid summarizing case history that has already been sufficiently outlined, and "only address the underlying facts insofar as necessary." (C14). While a principal party has little choice but to "cover all of its bases" and address all arguments that could potentially catch the Court's attention in order to win its case, an amicus filer has the luxury to focus on only those arguments or that information corresponding to its specific organizational interests. If this objective can be achieved in ten pages, then it is counterproductive to obfuscate the important information the amicus seeks to convey by submitting additional pages.

3. It Must Be Well Written

Given the reported high volume of unhelpful amicus briefs, combined with the understanding that virtually all clerks employ a skimming process in order to quickly determine which briefs will be most valuable, it is imperative that an amicus brief be well written if it **[*71]** is to receive sustained attention. Perhaps most important, the table of contents and summary of arguments must clearly state what the brief adds to the Court's deliberation of the merits. A brief that does not showcase the way in which it makes an incremental contribution to a case risks immediate disregard by the clerks who review it. Furthermore, the manifestation of a "real, substantial interest in a case by a group, that shows how the case is important for the group and groups like it," is a necessary component of a successful amicus brief. (C59). Insofar as the Court is concerned with the ramifications of its decisions, it must be convinced that any urgency expressed by an amicus filer is genuine.

In a well-written amicus brief, it will be obvious that the arguments have been carefully considered and articulated. Furthermore, the brief should focus on the legal issues properly raised in a case and address the questions presented. The best briefs utilize relevant and appropriate examples of precedent, and seek to apply that precedent as a justice would. (C29).

4. The Name Matters

In light of the clerks' reported propensity to give closer attention - at least initially - to an amicus brief filed by a prominent Supreme Court practitioner or academic (88% for both cases), a potential amicus filer should seriously contemplate hiring a top advocate. However, given the enormous cost barrier (an estimated $ 50,000 for an amicus brief at a top Washington, D.C. law firm), potential amici need to carefully assess their objectives in filing a brief. If the foremost goal of the filing effort is to influence the decision-making process of the Court, then an amicus filer would do well to retain a top practitioner to prepare its brief. This may necessitate pooling resources with other, like-minded organizations, or limiting the entity's amicus participation to only those cases where its interests are most significantly affected by the outcome. On the other hand, for those amici with an alternative primary objective, such as raising the organization's public profile though filing, it may not be worth the expenditure of hiring a top practitioner. These amici should understand, however, that inferior filings are most susceptible to clerks' immediate disregard.

Given that clerks appear to be more willing to give closer initial consideration to frequent and prominent filers, small, lesser-known amici would likely benefit from joining larger, like-minded **[*72]** organizations in collaborative briefs. The establishment of a continuing association with "repeat filers" may enhance the legitimacy of the relatively unknown entity in the long run. However, filers that truly have a unique and valuable contribution would do best to file an independent amicus brief.

VII. Conclusion

Interviews with former clerks enhance our understanding of the Court's use of the amicus brief - the nuances of which cannot be captured in the data that purely quantitative studies produce. Of the seventy clerks interviewed, only one indicated that amicus briefs were never useful. To those who argue that the filing of amicus briefs is a "waste of time, effort, and money" n63 - the results of this study suggest otherwise. This said, it is also patently clear that many briefs do not help the Court whatsoever in its adjudication process. While exceptional briefs submitted by particular filers will be noted, in general, a clerk's review of amicus briefs necessitates a screening process that

expediently and effectively separates "the wheat from the chaff." Although this process may be cumbersome, useful amicus briefs are filed often enough that it proves worthwhile.

There is significant evidence to support the hypothesis that the Court's open acceptance policy is a reflection of the net usefulness of the amicus brief. As one clerk noted, "Ninety percent of the time amicus briefs do not help very much, but you never know where that ten percent is." (C3). The imposition of stricter standards for the acceptance of amicus briefs at the Supreme Court level could produce a chilling effect and discourage filing. Given the escalating costs of amicus brief preparation, any uncertainty of Court acceptance would undoubtedly dissuade some would-be amici from filing. Based on the collective comments provided by the clerks interviewed, the prospect of the Court potentially losing a valuable - if only occasionally valuable - informational resource is a risk that would exceed the costs imposed by the process of review.

[*73]

Appendix

TABLE 1. Are there particular types of cases or areas of law where amicus briefs are especially helpful? For which types of cases/areas of law? (70 respondents)

Highly technical cases; statutory cases; obscure areas of law 56%
Amicus briefs in cases with bad legal representation/merits briefs 23%
Industry related amicus briefs 19%
Amicus briefs with a medical or scientific focus 23%
Amicus briefs are NOT helpful in constitutional law cases 14%
Amicus briefs are helpful in constitutional cases 7%

TABLE 2. Is every amicus brief filed with the Court read? If not, why not? (Assume permission for leave to file has been granted.) (70 respondents)

At least skim/look over every amicus brief 83%
Will look at who files amicus brief 16%
Can tell quickly if brief is useful 30%

TABLE 3. Are the briefs of any particular groups always considered more carefully than others? Can you name specific groups? (70 respondents)

Solicitor General (United States) 70%
States/Local Governments 21%
ACLU 33%
Professional Associations 16%
NAACP 11%
AFL-CIO 7%
Chamber of Commerce 7%
Criminal Justice Legal Foundation 4%
Washington Legal Foundation 4% **[*74]**
Brennan Center 3%
Lambda Legal 3%
No extra consideration to any particular groups 13%

TABLE 4. If an amicus brief is authored by a prominent academic, will it be considered more carefully? (68 respondents)

YES, considered more carefully. 88%
NO, not considered more carefully. 12%

TABLE 5. If an amicus brief is authored by a reputed attorney, will it be considered more carefully? (68 respondents)

YES, considered more carefully 88%
NO, not considered more carefully 12%

TABLE 6. Would you rather see amici collaborate on briefs, or file separately? (70 respondents)

Would prefer to see collaboration 90%
Would NOT prefer to see collaboration/No preference 10%

TABLE 7. Suppose 5-6 organizations collaborate and submit a single amicus brief: Would the brief receive additional attention on account of the collaborative effort, all things equal? (66 respondents)

NO, would not give such briefs a closer look based on this attribute alone. 50%
YES, would give such briefs a closer look based on this attribute alone. 30%
Depends on the case/organizations 20%
OTHER 5%

[*75]

TABLE 8. Again consider a hypothetical collaborative amicus brief that 5-6 organizations join: If some of the groups are not considered to be traditional ideological allies, would the amicus brief receive any additional attention? (63 respondents)

YES, would give such briefs a closer look based on this attribute alone. 86%
NO, would not give such briefs a closer look based on this attribute alone. 13%
OTHER 1%

TABLE 9. Are you more or less likely to consider amicus briefs that contain social science data? (68 respondents)

Would give such an amicus brief MORE attention 54%
Would give such an amicus brief LESS attention 25%
Refused to generalize (no more or less likely) 16%

FOOTNOTES:

n1. See Kevin T. McGuire, Lobbyists, Revolving Doors, and the U.S. Supreme Court, *16 J.L. & Pol. 113, 114 (2000);* Thomas G. Hansford & David F. Damore, Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making, 28 Am. Pol. Q. 490 (2000); William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 Am. Pol. Sci. Rev. 87 (1993).

n2. Henceforth, amicus curiae briefs will be referred to as "amicus briefs"; filers of amicus briefs will be referred to as "amicus filers" or "amici."

n3. Tony Mauro, Court Affirms Continued Need for Preferences, N.Y. L.J., June 23, 2003, at 1 [hereinafter Mauro, Court Affirms].

n4. *123 S. Ct. 2325 (2003).*

n5. *123 S. Ct. 2411 (2003).*

n6. *123 S. Ct. 2472 (2003).* For list of amicus briefs, see Docket for 02-102, at http://www.supremecourtus.gov/docket/02-102.htm.

n7. Media Briefing on Legal Frameworks, Critical Research Findings in Univ. of Michigan Affirmative Action Cases Before Supreme Court, U.S. Newswire, Mar. 13, 2003, available at *2003 WL 3729005.*

n8. *Grutter v. Bollinger, 123 S. Ct. at 2340.* Sidley partner Virginia Seitz, not managing partner Carter Phillips, was the actual counsel of record on the retired military personnel amicus brief. See Tony Mauro, Getting Personal, Am. Law, May 2003, at 33; Mauro, Court Affirms, supra note 3.

n9. Rick Perlstein, What Gay Studies Taught the Court, Wash. Post, July 13, 2003, at B3.

n10. Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, *148 U. Pa. L. Rev. 743, 752 (2000).*

n11. *Id. at 745, 769.*

n12. Gregory A. Caldeira & John H. Wright, Amici Curiae before the Supreme Court: Who Participates, When, and How Much?, 52 J. Pol. 782, 786 (1990).

n13. Karen O'Connor & Lee Epstein, Court Rules and Workload: A Case Study of Rules Governing Amicus Participation, 8 Just. Sys. J. 35, 40 (1983).

n14. Id. at 42-43.

n15. Kearney & Merrill, supra note 10, at 757-758.

n16. O'Connor & Epstein, supra note 13, at 42.

n17. Samuel Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, *72 Yale L.J. 694, 711 (1963).*

n18. Supreme Court Rule 24 outlines the requirements for "Briefs on the Merits" filed by petitioners and appellants. Henceforth, these briefs submitted by the litigating parties will be referred to as "merits briefs."

n19. Krislov, supra note 17, at 711.

n20. Lucius J. Barker, Third Parties in Litigation: A Systematic View of the Judicial Function, 29 J. Pol. 41, 56 (1967).

n21. Id. Barker discusses Chief Justice Warren's reliance upon social science data to support is decision in *Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).* Id.

n22. Kearney & Merrill, supra note 10, at 783.

n23. Barker, supra note 20, at 60.

n24. Donald R. Songer & Reginald Sheehan, Interest Group Success in the Courts: Amicus Participation in the Supreme Court, 46 Pol. Res. Q. 339, 350 (1993).

n25. Id. at 351.

n26. Philip B. Kurland and Dennis J. Hutchinson, With Friends Like These . . . , A.B.A. J., Aug. 1984, at 16.

n27. Philip B. Kurland, The Business of the Supreme Court, O.T. 1982, *50 U. Chi. L. Rev. 628, 647 (1983).*

n28. See Lee Epstein, Interviewing U.S. Supreme Court Justices and Interest Group Attorneys, 73 Judicature 196, 198 (1989) (discussing the use of elite interviews as an effective tool for judicial research).

n29. See Karen O'Connor & John R. Hermann, The Clerk Connection: Appearances Before the Supreme Court by Former Law Clerks, 78 Judicature 247, 249 (1995) (supplying data on the participation of former clerks as advocates before the Supreme Court).

n30. See H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1991) (providing significant guidance as to the logistics of presenting interview findings anonymously).

n31. Note that all forthcoming references to "clerks" include only those interviewed by the author for this research.

n32. Note that interview questions focus on the law clerk's use of amicus curiae briefs at the plenary stage of review.

n33. While the interviewee pool was too small to definitively conclude that no such relationship exists, a more comprehensive survey with a greater sample size might yield patterns undetected in this study.

n34. The inclusion of references to specific justices detracts from what is intended to be an institutional examination. However, while generally there appears to be no relationship between clerk responses and chamber affiliation, rare instances occur where such patterns are discernible. For these extraordinary cases, clerk references to justice identities are included, as revelations in such instances enhance understanding into the Court's use of amicus briefs.

n35. Many clerks mentioned more than one type of amicus curiae brief as being useful. Thus, percentages for this question reflect the number of clerks out of 70 for each of the most frequently cited amicus brief types and do not add up to 100%.

n36. *Planned Parenthood v. Casey, 505 U.S. 833 (1992).*

n37. Tables included in the text are also collected in the Appendix.

n38. Karen O'Connor, The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation, 66 Judicature 256, 261 (1983).

n39. Id. at 257.

n40. Krislov, supra note 17, at 710.

n41. Kearney & Merrill, supra note 10, at 802.

n42. Sup. Ct. R. 37.4 ("No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.").

n43. The varying quality of state attorneys general as advocates before the Supreme Court is widely recognized, and their increased participation as amicus filers has been documented extensively. See, e.g., Kearney & Merrill, supra note 10, at 802.

n44. Also in the category of amicus briefs affecting government interests, two clerks noted that the briefs of foreign governments were also given attention. However, this response was raised with considerably less frequency than were the other filing governmental entities and representative organizations discussed heretofore discussed, perhaps as a result of varying views on the relevance of such briefs to the adjudication of cases within the U.S. courts.

n45. It is important to note that clerks did not all necessarily list these groups together; rather, citations have been aggregated for purposes of discussion.

n46. Karen O'Connor & Lee Epstein, The Rise of Conservative Interest Group Litigation, 45 J. Pol. 479, 480-482 (1993).

n47. Kevin T. McGuire, The Supreme Court Bar: Legal Elites in the Washington Community (1993).

n48. Id. at 75.

n49. See generally id. (discussing the various elite members of the "inner circle" of the Supreme Court Bar and their attributes throughout).

n50. Marcia Coyle, High Court Bar's "Inner Circle": Insider Know-How Provides an Edge - at a Price, Nat'l L.J., Mar. 3, 1997 at A1.

n51. Charles Fried was U.S. Solicitor General from 1985 to 1989. Walter E. Dellinger served as Acting Solicitor General from 1996 to 1997.

n52. Caldeira & Wright, supra note 12.

n53. Id. at 798.

n54. Id. at 799-800.

n55. Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1112 (1988).

n56. See Stephen M. Shapiro, Amicus Briefs in the Supreme Court, 10 Litig. 21, 24 (1984) (explaining the merits of amici coordination).

n57. Robert E. Rains, Fair Weather Friend of the Court: On Writing an Amicus Brief, Trial, Aug. 1990, at 57-58.

n58. Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, *72 N.C. L. Rev. 91, 107-09 (1993).*

n59. *Id. at 108-09.*

n60. *Id. at 109-10.*

n61. *Id. at 100.*

n62. Reagan Wm. Simpson, The Amicus Brief: How to Write It and Use It Effectively 34-35 (1998).

n63. Kurland, supra note 27, at 647.