ESSAY

FRIENDS OF THE COURT: EVALUATING THE SUPREME COURT'S AMICUS INVITATIONS

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Approximately once each Term, the Supreme Court invites the participation of an amicus curiae, typically because one party to a case chooses not to advance a particular argument or declines to participate at all.

These amicus invitations have largely escaped both public notice and academic debate. Yet they occur at the intersection of two important recent critiques of the Court: first, the increasing dominance of Supreme Court practice by a small, elite cadre of specialized lawyers; and second, the Court's status as perhaps the least transparent institution in American public life.

This Essay unfolds an important new account, both descriptive and normative, of a largely invisible practice. The findings are at once predictable and surprising: in recent years, amicus invitations have invariably gone to former law clerks of the Justices, but at the same time have increasingly been granted to first-time advocates. These findings, and others, suggest that both peril and promise inhere in the practice of amicus invitation: the practice threatens troubling distributional consequences and potential distortions of legal outcomes, but it also holds out the prospect of more democratically distributed advocacy. More broadly, examining the practice—both as it is currently constituted, and as it might be refined—sheds considerable light on the Court as an institution, a subset of the advocates who appear before it, and the ways institutional design choices can shape the development of the law.

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INTRODUCTION

On April 29, 2015, a young first-time advocate approached the Supreme Court lectern. This fact was not so remarkable; although first-timers are increasingly rare at the Supreme Court,[1] on this day alone three of the five attorneys who argued before the Court were doing so for the first time.[2] What *was* unusual was the mechanism by which this young lawyer, Wil-

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1 *See* Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014, 10:30 AM), http://www.reuters.com/investigates/special-report/scotus/ [https://perma.cc/N6YC-5ZV2]; Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1520–21 (2008).

2 Both lawyers in the other case argued that day, *Glossip v. Gross*, 135 S. Ct. 2726 (2015)—a significant challenge to Oklahoma's lethal injection protocol—were also arguing before the Court for the first time.

liam Peterson, came to his argument: a phone call from Justice Scalia, asking Peterson if he would accept an appointment to defend the judgment of the Fifth Circuit in a case the Court had just agreed to hear, and in which the federal government agreed with the petitioner that the Fifth Circuit had erred.[3]

Amicus invitations[4] of this sort—which generally arise when one party to a case declines either to participate at all, or to take a particular position, before the Court—come about once each Term.[5] Although they share a name with the more common, uninvited amicus filings the Court now receives in conjunction with the majority of the cases it considers on the merits,[6] they are quite distinct from those better-known unsolicited filings: they originate with the Court, they direct the recipient of the invitation to take a particular position,[7] and they are always paired with the right to present oral argument.[8]

The Court keeps no official records of such invitations,[9] and its rules do not reference them. Similarly, there is no official guidance on when the Court will invite such an amicus, whom it will invite, how it makes its selections, or the precise nature of the amicus's mandate.[10] Although these invitations

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3 Miriam Rozen, *Lawyer Picked to Defend Fifth Circuit Ruling at SCOTUS*, TEXAS LAWYER, Jan. 26, 2015; *see* Mata v. Lynch, 135 S. Ct. 2150 (2015).

4 The Court appears to use the terms "invitation" and "appointment" interchangeably in its orders and occasional other references to the practice, so I use both terms throughout this piece.

5 As the Appendix shows, there have been 58 amicus appointments since 1954 (and one much earlier appointment from 1926), for a rate of approximately one per year. There has, however, been a significant increase in frequency in recent years. *See infra* notes 88–90 and accompanying text.

6 *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1768 (2014) (detailing the "dramatic increase" in amicus filings in the Supreme Court); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 35 (2011) (noting that amicus briefs "are now filed in virtually every case" before the Supreme Court).

7 As we shall see, however, the precise role of the advocate vis-à-vis possible arguments and outcomes—put differently, the identity of the client—is in many ways indeterminate. *See infra* subpart III.B.

8 The Court has explained that it issues such invitations in order to permit it "to decide the case satisfied that the relevant issues have been fully aired." Clay v. United States, 537 U.S. 522, 526 n.2 (2003) (describing invitation of amicus David DeBruin to present argument in favor of the Seventh Circuit's judgment, which the United States had joined the petitioner in attacking); *see also* STEPHEN SHAPIRO ET AL., SUPREME COURT PRACTICE 760 (10th ed. 2013) [hereinafter STERN & GRESSMAN] (discussing the Court's appointment practices).

9 *See* Email from Supreme Court Public Information Office to author (Oct. 6, 2015,12:23 PM EDT) (on file with author).

10 By contrast, the Court provides at least some guidance to ordinary amicus filers. *See* SUP. CT. R. 37.

have gone largely unnoticed in the scholarship,[11] they occur at the intersection of two important recent critiques of the Court: first, the increasing dominance of Supreme Court practice by a small, elite cadre of specialized lawyers;[12] and second, the Court's status as perhaps the least transparent institution in American public life.[13]

This Essay investigates five primary questions (and several nested subsidiary questions) related to the practice of amicus invitations. First, as a descriptive matter, who are the advocates the Court invites to argue before it? It is well known (at least in Washington circles) that they are typically elite lawyers and often former Supreme Court law clerks, but this Essay attempts to answer the question in more granular detail: specifically, what sorts of backgrounds do these advocates share, what types of connections to the Court and to individual Justices is it possible to discern, and what patterns and trends emerge from examining the available data?

Second, how does the Court select these advocates from among the 250,000-plus members of the Supreme Court bar?[14] That is, what do we know or can we discover about the process by which these advocates are chosen?

Third, what are the implications of these invitations—for the invited attorneys, the cases in which they participate, the legal profession as a whole, and perhaps even the law more broadly? In terms both narrow and broad, what does the Court *get* from the attorneys it invites to argue before it, and what does it *give* in return?

Fourth, what can examining this process tell us about the Court as an institution? Is this a story of elite reproduction and insularity or a more complex narrative about potential disruption and diffusion? If the act of amicus invitation can only be evaluated in the context of "the standards of appropriate decisionmaking . . . within the particular institution,"[15]

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11 The one major exception is Brian P. Goldman's excellent student Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907 (2011). *See infra* notes 59-61 and accompanying text.

12 *See infra* notes 18–42 and accompanying text.

13 *See infra* notes 43–57 and accompanying text.

14 Lazarus, *supra* note 1, at 1491 (noting that the requirements for membership in the Supreme Court bar merely consist of "three years as a practicing lawyer admitted to any bar of any state, a certificate of good standing from that bar, sponsorship by two current members of the bar, and a $200 check payable to the Court").

15 Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1393 (2013).

what standards can we discern that might help us evaluate the Court's track record in this sphere?

Finally, if the practice is in certain respects troubling—and I argue here that it is—are there potential modifications the Court should consider?

There is no question that the practice identified here is a discrete one. How the Court decides who gets to brief and argue cases before it—in particular an aspect of a case no party wishes to pursue—isn't as pressing a concern as what cases the Court takes, or what rules it sets forth. But these invitations do not occur wholly independent of the Court's case selection and decisional processes. And, perhaps more important, institutional design choices of this sort can both reflect and instantiate important values, and the Court's behavior in this narrow sphere may shed light on the institution much more broadly.

This Essay begins by situating the Court's amicus invitations in the context of recent discourse on the rise and increasing prominence of the elite Supreme Court bar; it then surveys important recent critiques of the reflexive lack of transparency that in many ways characterizes the contemporary Supreme Court.

It then turns to a close examination of the process of amicus invitation, drawing on public reporting on the practice, briefs, oral argument transcripts and audio, and archival research. It next introduces the Essay's key descriptive findings, the results of a comprehensive review of every Supreme Court amicus appointment I could locate, beginning in 1926:[16] it

16 For this review, I ran a number of different Westlaw searches (including "invit! /s amic!" and "appoint /s amic!"), then excluded invitations to the Solicitor General and other government entities, as well as denials of requests to appoint amici. I then cross-checked those results against every relevant secondary source in which I found any discussion of the practice or particular invitations. *See, e.g.*, Goldman, *supra* note 11 (compiling and analyzing the Court's amicus invitations before 2011—though I include in my dataset several cases that Goldman excludes); STERN & GRESSMAN, *supra* note 8, at 760, 770-71 (describing such appointments and supplying examples).

It remains possible that cases in which the Court did not issue a formal order and cases before systematic records were kept—either at all or of such orders, see Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 590 (2014) (noting informality of record-keeping at the early Supreme Court)—were not captured by these searches. In addition, I have not included in the dataset cases in which an amicus was granted leave to participate in a case following a request by the amicus; this is because such participation is initiated by the outside party, rather than the Court itself. For examples of this sort of amicus participation, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) ("By special leave of Court, *Arthur J. Goldberg* argued the cause for the United Steelworkers of America, C.I.O., as *amicus curiae*."); Pac. Bell Tel. Co. v.

highlights demographic data and trends, then describes the backgrounds of the advocates and their relationships to the Justices. My findings are at once predictable and surprising: although demographic data suggest that invitee diversity lags behind diversity at the Court more broadly and trend lines suggest that recent amicus invitations invariably go to former law clerks of the Justices, the Justices *do* appear increasingly willing to depart from the norm of prior experience with Supreme Court advocacy; indeed, a majority of recent invitations have gone to attorneys with *no* previous Supreme Court arguments. This suggests, I argue, that the practice might hold out the promise of disrupting, at least to a degree, the increasing dominance of Supreme Court practice by a small group of expert practitioners.

After describing these findings, the Essay takes a step back and identifies a number of themes and dynamics that emerge from examining the data, including the nature of the role, the potential impact of the practice on both the legal profession and the path of the law, and the question of diversity. The Essay concludes with a discussion of the normative implications of the preceding discussion, identifying a series of recommendations for improving the process of amicus invitation.

I
FRAMING THE PRACTICE OF AMICUS INVITATION

This section briefly surveys the literature on two important dynamics at the contemporary Supreme Court, both of which provide context for the practice of amicus invitation: first, the increasing dominance of Supreme Court practice by a small, elite group of specialized lawyers;[17] and second, the persistence at the Court of a degree of non-transparency that would be unthinkable in any other organ of government. The section then describes the existing academic commentary on the practice of amicus appointment.

Linkline, 555 U.S. 1029, 1029 (2008) ("Motion of American Antitrust Institute for leave to participate in oral argument as *amicus curiae* and for divided argument granted . . . .").

17 I should note that the scholarly interest in the Supreme Court bar is a very recent development; as recently as 2008, Richard Lazarus wrote that, despite the significant attention paid to the substance of the Court's work, "wholly absent . . . from . . . media scrutiny and scholarly commentary is any recognition of the significance for the Supreme Court and the nation's laws, of the identity of the advocates" who both petition and appear before the Court. Lazarus, *supra* note 1, at 1488.

A. The Expert Bar

Over the past three decades, Supreme Court practice has become an increasingly specialized enterprise.[18] A Supreme Court argument is no longer an experience that top advocates enjoy once or twice in a career, but something a small group engages in on a routine basis. While in 1980, approximately 80% of Supreme Court advocates were arguing before the Court for the first time,[19] by 2002, that number was down to 55%,[20] and by 2007 it was just 43%.[21] During this same time frame, while the percentage of first-time advocates was nearly halved, the percentage of very experienced oral advocates—those with ten or more prior arguments—skyrocketed, increasing 14-fold from just 2% in 1980 to 28% in 2007.[22] Even in just the past two decades, the change has been striking: as a recent Reuters investigation revealed, over the last ten years, eight lawyers have presented nearly 20% of oral arguments before the Court, compared to thirty attorneys holding the same share in the preceding decade.[23]

The Supreme Court bar looked like this once before: following an 1812 rule change limiting oral argument before the Court to only two lawyers for each side,[24] "a few extraordinary attorneys dominated oral argument before the Court,"[25] including household names like Daniel Webster.[26] In the 1814 Term, just one of those advocates, Thomas Pinckney, appeared in over *half* of the cases decided by the Court.[27]

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18 I refer here to the private Supreme Court bar; Supreme Court practice on behalf of the federal government has long been highly specialized. *See* Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 486–89 (1995); Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 596–97 (1986).

19 John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75 (2005).

20 *Id.* Richard Lazarus puts the 1980 figures slightly lower at 76%. Lazarus, *supra* note 1, at 1520.

21 Lazarus, *supra* note 1, at 1520.

22 *Id.*

23 Biskupic et al., *supra* note 1. Many of the most significant findings of this investigative report concern the Court's certiorari practice and the increasing success of expert Supreme Court practitioners in persuading the Justices to grant cert in their cases; to take one example, the report found that just sixty-six elite lawyers were responsible for 43% of granted cert petitions during the period of the study. *Id.*

24 David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. SUP. CT. HIST. 1, 4 (2005).

25 Lazarus, *supra* note 1, at 1489.

26 Frederick, *supra* note 24, at 4; *see also* KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 14 (1993).

27 Frederick, *supra* note 24, at 8.

That first elite Supreme Court bar was at least in part a function of geography: the challenges of long-distance travel restricted the pool of regular advocates to attorneys who resided in or near Washington, D.C.[28] But "as travel became easier, the Supreme Court Bar naturally and gradually lost its cohesiveness by the latter-half of the nineteenth century."[29] For the next century, Supreme Court practice was for the most part diffuse and decentralized, with most arguments presented by one-time Supreme Court advocates who followed a single case all the way up.[30] Indeed, in 1986 Justice Rehnquist was reported to have observed that "there is no . . . Supreme Court bar at the present time."[31]

Beginning in the 1980s, things began to change. In a series of articles on the emergence and implications of today's elite Supreme Court bar, Richard Lazarus traces the current state of affairs to Reagan Solicitor General Rex Lee's 1985 move from government to Sidley & Austin, where Lee quickly established a thriving Supreme Court practice.[32] As Lazarus recounts, a number of other top law firms quickly followed in Sidley's footsteps, hiring other experienced attorneys away from the Solicitor General's Office in order to create their own Supreme Court groups.[33]

These specialized Supreme Court practices quickly came to dominate the Court's docket. Lazarus focuses on the Court's certiorari jurisdiction, noting that with the shrinking of the Court's docket,[34] expert practitioners have come to file the majority of successful petitions for certiorari. While in 1980, ex-

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28 MCGUIRE, *supra* note 26, at 13.

29 Lazarus, *supra* note 1, at 1492; *see also* MCGUIRE, *supra* note 26, at 21 ("[T]he postbellum Court marked the end of the integrated Supreme Court bar.").

30 Lazarus, *supra* note 1, at 1492 ("Most lawyers with Supreme Court cases were newcomers, most likely arguing for the first time. But in no event was there a discrete, coherent group of private lawyers dominating the cases before the Court, capable of boasting a sustained, continuous Supreme Court practice.").

31 Lazarus, *supra* note 1, at 1497 (citing Tony Mauro, *Appealing Practice*, LEGAL TIMES, Oct. 9, 2007, at 14).

32 Lazarus, *supra* note 1, at 1498–99.

33 *Id.* Although Lazarus's primary focus is on law firms, he also notes two additional relevant sites of emerging expertise: new or newly invigorated state solicitor general's offices and the creation of Supreme Court clinics at a number of top law schools. *Id.* at 1501–02; *see also* Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 142–50 (2013); Symposium, *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545, 635–45 (2010).

34 *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228–34 (2012); J. Harvie Wilkinson III, *If it Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 67–68 (2010), http://www.yalelawjournal.org/pdf/840_egpccc2c.pdf [https://perma.cc/3ZW8-X72U];

pert Supreme Court practitioners—a group Lazarus defines as including any attorney who "either him- or herself presented at least five oral arguments before the Court or is affiliated with a law firm or other comparable organization with attorneys who have, in the aggregate, argued at least ten times before the Court"[35]—were responsible for less than 6% of successful cert petitions, in 2007 the number was nearly 54%.[36] And the expert bar is not only successful at obtaining Supreme Court review; rather, at the merits stage as well, "whether counsel in a Supreme Court case is an experienced Supreme Court advocate is a significant determinant in the outcome of the case, even holding everything else equal."[37]

Lazarus's work highlights the troubling implications of the emergence of this elite Supreme Court bar: in particular, the fact that the experience and talents of its members are disproportionately deployed in the service of business interests. There is considerable evidence that this asymmetry confers on business interests a decided "advocacy advantage: a Supreme Court docket and rulings on the merits more responsive to their economic concerns."[38]

Although Lazarus is careful to note that there is nothing *inherently* problematic about a specialized Supreme Court bar,[39] the troubling distributional consequences of the story he tells are impossible to miss. And the threats posed by the existence of this sort of elite bar may not be limited to the distortion of outcomes in particular cases. Rather, in the words of former appeals court judge Michael Luttig, the emergence of this "narrow group of elite justices and elite counsel talking to each other," may result in both a Court and a bar that are "detached and isolated from the real world, ultimately at the price of the healthy and proper development of the law."[40]

It is striking, then, that the Justices of the current Court appear entirely untroubled by these developments. To the contrary: the recent Reuters team investigating the Supreme Court

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David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 152–53 (2010).

35 Lazarus, *supra* note 1, at 1502.

36 *Id.* at 1516–17.

37 *Id.* at 1544; *see also* Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 192–94 (1995).

38 Lazarus, *supra* note 1, at 1554.

39 *Id.* ("As a general matter, the promotion of more effective advocacy both before and within the Court should be considered a positive development.").

40 Biskupic et al., *supra* note 1.

bar interviewed eight of the nine sitting Justices, and the views they expressed ranged from sanguine to genuinely enthusiastic about the shrinking and increasingly elite Supreme Court bar. According to the report's authors, "[t]o the [Justices], having experienced lawyers handling cases helps the court and comes without any significant cost. Effective representation, not broad diversity among counsel, best serves the interests of justice."[41]

Indeed, when asked, during a recent public appearance, about the transformation of the Supreme Court bar, Justice Kagan responded:

> I think the advocates who appear before us do a fantastic job. I mean there's been—one of the things that has happened over the last twenty years or so at the Supreme Court is the development of a kind of "Supreme Court bar"—people who are repeat players, and who have been there before, and who know what the whole enterprise is about, know the way we think, know the kinds of questions we ask, know the kinds of things that matter to us as we reach a decision. And I think it's an unqualified good for the Court. . . . [I]n general the level of advocacy is so excellent that sometimes when you see the opposite—when you see the people who you know might be good lawyers but in a different venue and sort of don't get the kinds of questions that we ask, the kinds of issues that interest us and concern us and make us rule one way or the other way—it can be very frustrating.[42]

B. Transparency

The Supreme Court is one of the least transparent institutions in American public life. Many aspects of Supreme Court opacity are widely known and entirely uncontroversial: the Court's deliberations about pending cases, for example, necessarily occur free from any sort of public scrutiny. Other strains of Supreme Court non-transparency, like the Court's prohibition on cameras in the courtroom, are subject to ongoing debate and periodic demands for greater openness.[43] But still

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41 *Id.*

42 *A Conversation with Elena Kagan*, THE UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY PODCAST (Feb. 2, 2015), http://www.law.uchicago.edu/audio/conversation-elena-kagan [https://perma.cc/8GQF-UR7U].

43 *See, e.g.*, Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 BYU L. REV. 1837, 1842–45 (2012) ("The majority of Americans think that the press should be able to broadcast audio and video of activities at the Supreme Court."); ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 317 (2015) ("[I]t is inexplicable and inexcusable that Supreme Court proceedings are not broadcast live.").

other strains of non-transparency at the Court appear uncontroversial not because there is consensus that they are necessary or appropriate, but because the public is for the most part unaware that they even exist.[44] The Court's amicus invitations fall squarely in the third category.

While the Supreme Court has never been an especially transparent institution,[45] its opacity has come to appear increasingly anachronistic in recent years. As waves of reform have opened the workings of other branches of government to at least a degree of public scrutiny,[46] the Court has remained

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44 In a very loose sense, this phenomenon bears a certain resemblance to David Pozen's conception of "deep secrets" (popularized by Donald Rumsfeld as "unknown unknowns")—things "we do not know we do not know." *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260 (2010).

45 Peter G. Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225, 225–26 (1967).

46 These reform efforts have resulted in several major pieces of federal legislation (with state analogues, some of which reach more broadly than their federal counterparts, see Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 642–43 (2010)) designed generally to promote greater transparency in government. Chief among these federal enactments is the notice-and-comment process set forth in the Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), which mandates public notice of proposed rules, provides a mechanism for public comment, and requires agencies to provide explanations for final rules. In addition, the Freedom of Information Act, first enacted in 1966, provides for broad public access, subject to a number of exceptions, to the records of federal agencies. 5 U.S.C. § 552 (2006) (codified as amended by the Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735 (2007)). The Government in the Sunshine Act imposes public meeting and other transparency obligations on government. Pub. L. 94-409, 90 Stat. 1241 (1976). Other federal laws aimed at increasing transparency include the Federal Advisory Committee Act, 5 U.S.C. app. 2 (1972), which "aims to keep Congress and the public informed about the number, purpose, membership, and activities of groups established or utilized to offer advice or recommendations to the President or to officers or employees of the federal government," Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 452 (1997), and, more recently, the Federal Funding Accountability and Transparency Act, which mandates collection and dissemination of information on government contracts, loans, and grants, Pub. L. No. 109-282, § 2, 120 Stat. 1186, 1187 (codified as amended at 31 U.S.C. § 6101 (2006)). Beyond these legislative enactments, a number of executive-branch initiatives in recent years promise increased openness and transparency, event absent legislative mandates. These include a presidential memorandum directing federal agencies to take steps to increase transparency, see *Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies* (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment [https://perma.cc/S74B-NA86]; a follow-on series of "Open Government" plans promulgated by federal agencies, THE WHITE HOUSE, THE OBAMA ADMINISTRATION'S COMMITMENT TO OPEN GOVERNMENT: STATUS REPORT 1 (2011), http://www.whitehouse.gov/sites/default/files/opengov_report.pdf, [https://perma.cc/47UR-PFJF]; and the launch of "Data.gov," "the landmark Obama initiative that requires agencies to place online 'high-value' datasets of their choice," Jennifer

firmly committed, both in its practice and in statements by the Justices,[47] to conducting much of its business in secret[48]—including aspects of its business around which there is arguably no genuine or compelling need for secrecy.

In recent years, scholars have increasingly turned their attention to aspects of Supreme Court practice that appear driven by habits or reflexes of secrecy and are unrelated to—perhaps even antithetical to—imperatives of rigor and integrity in the Court's decisional processes. An important new addition to the discourse on transparency and the Court is Richard Lazarus's *The (Non)Finality of Supreme Court Opinions*[49]—a ground-breaking examination of the Court's practice of revising its slip opinions well after their initial release. As Lazarus's piece demonstrates, the consequences of the Court's non-transparent revision process have in some cases been significant. In one example, a revision to the initial language in a concurrence by Justice Rehnquist subsequently became important language in the majority opinion in *United States v. Lopez*, which effectively upended much of the Court's Commerce Clause jurisprudence.[50] In another example, doctrinally significant language from Justice O'Connor's concurrence in *Lawrence v. Texas* was subsequently excised from the opinion, but not before it had been cited extensively by scholars and lower courts.[51] In addition to the implications of these specific examples, Lazarus argues that the practice risks creating confusion about the state of the law, particularly during the period between the Court's release of its initial slip opinions and the

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Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 81 (2012).

47 *See, e.g.*, Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955) ("The secrecy that envelops the Court's work is not due to love of secrecy or want of responsible regard for the claims of a democratic society to know how it is governed. That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court.").

48 Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 4 (2011) ("[T]he Court operates outside of the public eye and under a cloak of secrecy."). For a discussion of the law clerk code of conduct, which imposes confidentiality obligations on law clerks, see ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 16–17 (2006). Ward and Weiden cite the 1989 code of conduct, available in Justice Blackmun's papers; no later version of the code is publicly available.

49 Lazarus, *supra* note 16.

50 Lazarus, *supra* note 16, at 595–96 (discussing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 313 (1981) (Rehnquist, J., concurring)).

51 *Id.* at 599–601.

final published opinions (a period that at present averages about five years), and may undermine confidence in the integrity of the Court's written opinions.[52]

Other scholars have advanced proposals for injecting a degree of openness into the Court's workings. Kathryn Watts, for example, proposes applying core administrative-law principles to the Court's certiorari process. She offers a two-fold proposal for improving accountability and promoting public participation in the Court's exercise of its certiorari jurisdiction: first, a requirement that the Justices disclose their votes on cert petitions;[53] and second, "through greater invited and uninvited amicus curiae participation" at the cert stage.[54] Carolyn Shapiro suggests that the Court consider "publicly shar[ing] more information about the reasons it does or does not grant cert in particular cases."[55] One recent proposal, by Michael Abramowicz & Thomas Colby, goes much further, suggesting that the Justices solicit feedback from the public on draft opinions before those opinions become final, enabling the Court to harness the "wisdom of crowds" and avoid the errors a secret drafting process is bound at times to produce.[56] And a recent piece by William Baude highlights the relative lack of rigor and transparency in what Baude terms the Court's "shadow docket," by which he means primarily orders granting or denying requests for stays or injunctions, and summary reversals; Baude argues that in these cases the Court should adopt some of the procedural regularity and reason-giving that characterize its ordinary consideration of merits cases.[57]

As this body of scholarship makes clear, the Court's appointment practices are embedded within an institutional con-

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52 *Id.* at 611–12.

53 Watts, *supra* note 48, at 57 ("[V]ote-disclosure requirements offer a promising mechanism to increase transparency and improve public monitoring of the Court."); *see also* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1645–48 (2000) (raising questions about the desirability of a Supreme Court with essentially unconstrained power to set its own agenda).

54 Watts, *supra* note 48, at 62. Less relevant to this project, she also suggests that lower courts reinvigorate the practice of "certification" of particular questions to the Supreme Court. *Id.* at 67–68; *see also* Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1319–25 (2010) (arguing for a revival of certification by the courts of appeals).

55 Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 125 (2009).

56 Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 966–67 (2009).

57 William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1–5, 9–15 (2014).

text characterized by a reflexive lack of transparency—entirely necessary in certain spheres, but far less so in others.

C. The Existing Commentary

Given the manifest interest in both Supreme Court advocacy and transparency at the Court, the practice of amicus invitation has been the subject of surprisingly little scholarly attention.[58] The few scholars who have addressed the topic have focused on its substantive permissibility, on either constitutional or policy grounds. But no one has yet trained a lens on either the process of amicus selection or its results.

In the most comprehensive treatment of the practice to date, Brian P. Goldman offers a useful taxonomy of the types of amicus appointments the Court makes, concluding that they can be divided into four broad categories: (1) "cases in which the respondent confessed error and reversed its prior position on the merits," (2) "cases in which the judgment below rested on grounds raised sua sponte by the lower court, which neither party supported," (3) "cases in which it was not the decision below that was unrepresented, but instead a specific position the Court wanted argued," and (4) "cases in which the respondent simply failed to enter a proper appearance before the Court."[59] Goldman further divides these categories into several sub-categories, offering general objections to some such invitations, and defenses of others. In broad terms, he argues that invitations to address jurisdictional questions are necessary and appropriate; conversely, he labels unjustified or imprudent any instance in which the Court injects into the proceedings non-jurisdictional arguments the parties have chosen not to present, or where by appointing an amicus the Court revives a case that would otherwise have been mooted.[60] He contends that where the Court uses an amicus to "reach[ ] out to make pronouncements of law and set nationwide precedent on questions that are not properly before it," the practice may actually "undermine[ ] the perceived neutrality and legitimacy upon which [the Court's] authority depends."[61]

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58 Henry Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 692 n.149 (2012) (calling the writing on the subject "sparse").

59 Goldman, *supra* note 11, at 918.

60 *Id.* at 969–70.

61 *Id.* at 912.

Henry Monaghan similarly suggests in passing that some amicus appointments may raise genuine Article III concerns,[62] though he quickly concludes that "the practice is now too deeply ingrained to be overthrown."[63] Still, his discomfort is evident: "Insofar as the Court has expanded its ability to have the final say on any constitutional question capable of judicial resolution, the result seems to be consistent with its current place in our constitutional order . . . . [T]he Court seeks to establish an unfettered prerogative over what issues to decide . . . ."[64]

Amanda Frost argues that the practice of amicus invitation, though in tension with a broad (if undertheorized) consensus against judicial "issue creation," is in fact under some circumstances an appropriate mechanism judges use to engage not just in dispute resolution, but also in law pronouncement.[65] And Neal Devins and Saikrishna Prakash, although deeply critical of judicial requests for legal views from either parties to a case or arms of the federal government, in passing exempt amicus invitations, explaining that "[w]hen one or both parties are unwilling to [argue legal issues that the court identifies as relevant], a court may request amici to file briefs. In such circumstances, appointment of amici (a request for legal advice) helps ensure an adversarial presentation of all legal issues the court deems pertinent."[66]

This Essay examines amicus invitations from an entirely different perspective. Rather than focus on the jurisdictional or quasi-jurisdictional questions that attend the Court's practice, I have canvassed every existing amicus invitation, with a primary focus on the advocates themselves. Together, the data provide rich new material for identifying and assessing important dynamics on the contemporary Supreme Court.

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62 Monaghan, *supra* note 58, at 707 ("Injecting issues does . . . present additional Article III problems, since the Court is now fashioning rules concerning matters beyond those provided by the litigants. Appointing additional litigants—amici to 'support or defend the judgment below'—certainly takes yet another step beyond, at least in the cases when no actual litigant wants to support the judgment, as opposed to instances in which the litigant cannot proceed.").

63 *Id.*

64 *Id.* at 730.

65 Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 465–67, 516–17 (2009).

66 Neal Devins & Saikrishna Prakash, Essay, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 889 (2013).

II
FINDINGS

The preceding sections provide context for the Supreme Court's amicus invitation process. I turn now to a description of the results of that process. I begin with an overview, then present some of the key results of my examination of every recorded amicus appointment of which I could locate any record.

A. Overview

Approximately once each Term—with a notable increase in frequency in recent years[67]—the Court appoints an amicus curiae when one party to a case declines to participate at all, or to advance a particular argument, in a case pending before the Court.[68] As the Court has explained, it typically makes such an appointment in order to permit it "to decide the case satisfied that the relevant issues have been fully aired."[69] Beyond such general statements in its opinions, however, the Court provides no information to the public or the Supreme Court bar about the circumstances under which it will appoint an amicus or how it decides whom to appoint. Nor do its rules reference such appointments. Stern and Gressman provide only a general description of the practice, writing, "The Court on occasion may appoint or invite an attorney to brief and argue a case

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67 *See* Appendix.

68 In addition to these amicus appointments, the Court makes use of outside attorneys in several other capacities. First, it appoints "Special Masters" to function as judicial adjuncts in original actions filed in the Court. *See* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 641–58 (2002). Second, on a number of occasions, it has appointed outside counsel when an unrepresented *in forma pauperis* (IFP) party who successfully petitions the Court for certiorari requests such an appointment (or when the Court chooses to make such an appointment even absent a request). Perhaps the most famous such appointment was the Court's selection of Abe Fortas to represent Clarence Gideon in the case that became *Gideon v. Wainwright*. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 49, 54 (1989); *see also* Fellers v. United States, 540 U.S. 519, 520 (2004) ("Seth P. Waxman, by appointment of the Court, 538 U.S. 997, argued the cause for petitioner."); United States v. Olano, 113 S. Ct. 1770, 1774 (1993) ("Carter G. Phillips, Washington D.C., appointed by this Court, argued for respondent."). It appears, however, that with the rise of the specialized Supreme Court bar and the attendant close monitoring of the Court's docket, any IFP party who manages to persuade the Court to grant cert will immediately receive offers of pro bono representation, so that such appointments very rarely arise today.

69 Clay v. United States, 537 U.S. 522, 526 n.2 (2003).

pending before it as amicus curiae 'in support of the petitioner' or 'in support of the judgment below.'"[70]

The first amicus appointment of which there is any record arose in connection with the Court's consideration of the 1926 presidential power case *Myers v. United States*.[71] *Myers* involved a statute that required the President to obtain Senate consent before removing a postmaster.[72] The President, after concluding that the statute was unconstitutional, removed a postmaster without first seeking Senate consent;[73] the postmaster challenged his removal, and the executive branch argued against the statute's constitutionality.[74] Myers' counsel, William King, defended the statute's constitutionality, but after King twice failed to appear at the Court for oral argument, the Court appointed Pennsylvania Senator George Pepper to defend the statute as amicus curiae.[75]

The Court ultimately sided with the President, concluding that the power to remove executive officers was his alone.[76] But it ended its opinion with an expression of appreciation to Pepper for his advocacy of the opposing position:

> Before closing this opinion we wish to express the obligation of the court to Mr. Pepper for his able brief and argument as a friend of the court. Undertaken at our request, our obligation is none the less if we find ourselves obliged to take a view adverse to his. The strong presentation of arguments against the conclusion of the Court is of the utmost value in enabling the Court to satisfy itself that it has fully considered all that can be said.[77]

After its amicus appointment in *Myers*, the Court went several decades without another appointment—along the way

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70 STERN & GRESSMAN, *supra* note 8, at 760. The authors continue: "Since the Court accepts a case for oral argument because it presents issues of importance to the public, and not merely to the parties, it wants the benefit of argument by skilled counsel on both sides, and not merely one side, before it reaches its decision." *Id.*

71 272 U.S. 52 (1926).

72 *Id.* at 106–07.

73 *Id.* at 107–08.

74 Myers v. United States, 58 Ct. Cl. 199, 203 (Ct. Cl. 1923).

75 *Myers*, 272 U.S. at 176; *see also* Saikrishna Prakash, *The Story of* Myers *and Its Wayward Successors: Going Postal on the Removal Power*, *in* PRESIDENTIAL POWER STORIES 165, 169–77 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (describing the litigation). Pepper filed a brief, Brief for the Appellant Filed by George Wharton Pepper, Amicus Curiae, Myers v. United States, 272 U.S. 52 (1924) (No. 77), reprinted in S. Doc. No. 69-174, at 109, 113 (1926), and also presented oral argument before the Court. Prakash, *supra* note 75, at 172–73, 176; *see also President's Rights Before High Court*, N.Y. TIMES, Feb. 3, 1925, at 2.

76 *Myers*, 272 U.S. at 176.

77 *Id.* at 176–77.

ruling on cases in which the decision *not* to appoint an amicus was striking. In the 1939 case *United States v. Miller*,[78] the most important decision on the Second Amendment until 2008,[79] the Court did not appoint an amicus, although the attorney for defendants Miller and Layton (whose firearms indictments had been quashed below based on the Second Amendment) did not file a brief or appear for oral arguments, and had informed the Court in advance that he would not.[80] Still, the Court did not appoint an amicus to defend the judgment below or to develop the Second Amendment claim—and accordingly heard argument from only the government.[81] And in the 1942 case *Young v. United States*, the Court decided the merits of a challenge to a physician's conviction, although the government agreed that the conviction should be reversed and no amicus argued in defense of the conviction; indeed, the Court took pains to explain that a confession of error "does not relieve this Court of the performance of the judicial function."[82]

After *Myers*, the Court's next amicus appointment came in 1954, when the Court invited Harvard Law School Dean Erwin Griswold to argue in support of a Third Circuit judgment affirming the dismissal of a divorce action and upholding the domicile requirement of a Virgin Islands divorce statute.[83] The spouses in the case, though nominally adversaries, agreed that the domicile requirement was unlawful, and so the Court appointed Griswold to defend it.[84] The papers in the case, *Gran-*

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78 307 U.S. 174 (1939).

79 *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

80 Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3. N.Y.U. J.L. & LIBERTY 48, 60, 66–67 (2008).

81 Indeed, Justice Scalia's majority opinion in *Heller* placed some reliance on the one-sidedness of the *Miller* argument. *See Heller*, 554 U.S. at 623 ("The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment)."). For more detail on the procedural history of *Miller*, see Frye, *supra* note 80, at 67 (noting that in the Supreme Court, "no one represented Miller or Layton"); *cf.* Maryland v. Dyson 527 U.S. 465, 468 (1999) (Breyer, J., dissenting) ("[B]ecause respondent's counsel is not a member of this Court's bar and did not wish to become one, respondent has not filed a brief in opposition to the petition for certiorari. I believe we should not summarily reverse in a criminal case, irrespective of the merits, where the respondent is represented by a counsel unable to file a response, without first inviting an attorney to file a brief as *amicus curiae* in response to the petition for certiorari.").

82 315 U.S. 257, 258 (1942).

83 348 U.S. 885 (1954) (appointment memo); Granville-Smith v. Granville-Smith, 214 F.2d 820, 820 (3d Cir. 1954).

84 *See* Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1955) ("In view of the lack of genuine adversary proceedings at any stage in this litigation, the outcome of which could have far-reaching consequences on domestic relations

ville-Smith v. Granville-Smith, are sparse, but it appears that there was some hesitation about appointing an amicus; a November 1954 memo from Justice Frankfurter to Chief Justice Warren called the Chief Justice's attention to "a good illustration of the duty of a court to have the benefit of informed argument, particularly in matters that touch closely the institution of the family."[85] It then offered a lengthy excerpt from an English case involving an invited amicus, *Galloway v. Galloway*.[86] Evidently this memo had the intended effect; four days later the Court took the case and invited Dean Griswold "to appear and present oral argument as *amicus curiae* in support of the judgment below."[87]

After *Granville-Smith*, the Court settled into the practice of fairly regular amicus appointments, though it has gone some long stretches without appointing any amici (for example, there were no appointments between 1957 and 1968).[88] In addition, the Roberts Court has made an unusually high number of appointments—19 between 2008 and 2015, for a rate of more than two appointments per year.[89] It is probably too soon to say whether a new norm of more frequent amicus invitation has been established, but the post-2008 data are certainly suggestive of such a turn. In addition to the increasing frequency, the Court's first healthcare case, the 2012 case *NFIB v. Sebelius*,[90] featured *two* separate appointed amici,[91] something that had never previously occurred.

Amicus appointments have figured in some significant cases, in addition to *Myers* and *NFIB*. *Bob Jones University v. United States*[92] featured the amicus appointment of prominent attorney William Coleman, who defended the IRS' revocation of

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throughout the United States, the Court invited specially qualified counsel 'to appear and present oral argument, as *amicus curiae*, in support of the judgment below.'") (quoting 348 U.S. at 885).

85 Memorandum from Chief Justice Frankfurter to Justice Warren (Nov. 18, 1954) (on file with author).

86 Galloway v. Galloway [1954] P. 312 at 321 (Eng.). The actual opinion continues, in a portion not excerpted by Frankfurter, "In the result we have had the advantage of a full and careful argument of both sides of the question . . . and I would express my indebtedness to counsel for the help they have given us." *Id.* at 321–22.

87 348 U.S. at 885–86. The order also denied the parties' request to submit the case without oral argument.

88 *See* Appendix.

89 *See* Appendix.

90 132 S. Ct. 2566 (2012).

91 132 S. Ct. 609 (2011) (Robert A. Long); 132 S. Ct. 608 (2011) (H. Bartow Farr).

92 456 U.S. 922 (1982) (appointment memo); 461 U.S. 574 (1983) (the case itself).

Bob Jones' tax-exempt status when DOJ declined to offer a defense. In *Dickerson v. United States*, amicus Paul Cassell defended 18 U.S.C. § 5301 when the federal government joined defendant Dickerson in attacking its constitutionality.[93] And when the Court considered the constitutionality of the Defense of Marriage Act (DOMA) in *United States v. Windsor*, appointed amicus Vicki Jackson presented the Court with an argument that it lacked jurisdiction to decide the case.[94]

In addition to the involvement of amici in significant cases, a number of prominent attorneys first argued before the Court as appointed amici. The most striking such example is now-Chief Justice John Roberts, who was appointed to defend the judgment below in *United States v. Halper* [95] while he was still in private practice at Hogan & Hartson.[96] And a number of other appointed amici have gone on to the federal bench, including Fifth Circuit Judge Rhesa Barksdale,[97] Second Circuit Judge Barrington Parker, Jr.,[98] Sixth Circuit Judge Jeffrey Sutton,[99] Federal Circuit Judge Richard Taranto,[100] and former Utah District Court Judge Paul Cassell.[101]

B. Process

How exactly do these amicus appointments come about? There is no official guidance from the Court, but public reporting about such appointments and the papers of the Justices provide some clues. What emerges from these sources is a strong sense that the process is ad hoc and relationship-driven; that a degree of familiarity with the Court—not necessarily experience arguing before the Court, but familiarity with its operations, most frequently as a result of a recent clerk-

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93 530 U.S. 428, 441–42 (2000).

94 133 S. Ct. 2675, 2685 (2013).

95 488 U.S. 906 (1988).

96 *See* John G. Roberts, Senate Judiciary Questionnaire, at 34 (listing *Halper* first among Supreme Court arguments); *see also* Tony Mauro, *Supreme Court Justices Turn to Ex-Clerks for Unusual Role; Former Clerks Tapped to Make the Arguments Others Have Abandoned*, NAT'L L.J., April 14, 2008, http://www.nationallawjournal.com/id=900005561335/Supreme-Court-Justices-Turn-to-ExClerks-for-Unusual-Role?slreturn=20160630140803 [https://perma.cc/3RWW-NTLX] ("When Roberts, following up on Alito's invitation, called to tell Jorgensen the Court had approved his appointment, Roberts noted that he himself had snagged his first argument in similar fashion.").

97 Thigpen v. Roberts, 464 U.S. 1006 (1983) (appointment memo).

98 New York v. Harris, 492 U.S. 934 (1989) (appointment memo).

99 Hohn v. United States, 522 U.S. 944 (1997) (appointment memo).

100 Great-West Life & Annuity Insurance Co. v. Knudson, 532 U.S. 917 (2001) (appointment memo).

101 Dickerson v. United States, 528 U.S. 1045 (1999) (appointment memo).

ship—has become a near-absolute pre-requisite; and that little systematic care or attention is typically given to these appointments, despite their significance to the cases in question, the careers of the selected attorneys, and sometimes to the path of the law.

A series of 1982 memos from Chief Justice Burger succinctly captures these dynamics. The case at issue was *Verlinden B.V. v. Central Bank of Nigeria*, which presented the question of whether the jurisdictional grant in the Foreign Sovereign Immunities Act was consistent with Article III.[102] The Court granted certiorari in January 1982,[103] but months later, in early October, the Clerk of the Court notified the Chief Justice that he had received word that counsel for the respondent "ha[d] been instructed by his client not to proceed further in this case and hence no brief w[ould] be forthcoming."[104] On October 28, 1982, the Chief Justice sent a note to the conference referencing the Clerk's memo, and elaborating: "I assume we want to appoint an amicus to argue for the respondent here. I'll try to muster up some names from among the Washington Bar. I have a former Clerk who was Assistant Legal Adviser at State and now with Covington and Burling. I question whether any of the 'Big Guns', e.g., Griswold, et al. are anxious to work for nothing on a case like this."[105] In a separate memo circulated later that day, following another update from the Clerk, the Chief Justice proposed what he seemed to view as a clean resolution: "It now develops that we may have a 'natural' for appointment as amicus. A former Harlan Clerk, Stephen N. Shulman[,] . . . has already filed an amicus brief . . . and perhaps we can 'anoint' him."[106] On November 1, the Court issued an order inviting Shulman to argue the case as amicus curiae,[107] which he did in January 1983.[108]

The available papers on *Bob Jones University v. United States*, which involved the permissibility of the IRS's decision to revoke the tax-exempt status of several universities with ra-

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102 461 U.S. 480, 482 (1983).

103 454 U.S. 1140 (1982).

104 Memorandum from the Supreme Court Clerk to the Chief Justice (Oct. 8, 1982) (on file with author).

105 Memorandum to the Conference from Chambers of Chief Justice Burger (Oct. 28, 1982) (on file with author).

106 Memorandum from Chambers of Chief Justice Burger (Oct. 28, 1982) (on file with author) [hereinafter Memorandum from Chief Justice Burger on Oct. 28, 1982].

107 459 U.S. 964 (1982) (appointment memo).

108 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 482 (1983).

cially discriminatory policies,[109] are also intriguing, though less revealing than *Verlinden*. The original IRS rule change occurred in 1971,[110] and in 1975 the IRS formally revoked Bob Jones University's tax-exempt status.[111] Throughout the lower-court litigation, the federal government defended the IRS' interpretation of the tax code. By the time the case was before the Supreme Court, however, there had been a change in administrations, and the Solicitor General's merits brief sided with the university, concluding that the statute did *not* permit the IRS interpretation that had led to the revocation.[112] Accordingly, the Court decided to appoint an amicus to defend the IRS and the judgment of the Fourth Circuit.

Although I found no explicit request to this effect in the Justices' *Bob Jones* files, at some point Chief Justice Burger evidently asked the Conference for possible names, and on April 8, 1982, Justice Marshall sent a memo in response. It read: "I have been doing some more thinking about the appointment of counsel in the above cases. I have ended up by suggesting that we appoint William T. Coleman. It would appear to me that he has all of the qualifications."[113] Coleman, a prominent DC attorney who had been the first African American law clerk on the Supreme Court,[114] had, among other things, spent time early in his career working with Marshall at the NAACP LDF, appearing with Marshall on one of the NAACP's briefs in *Brown v. Board of Education*.[115]

The day after Marshall's memo, Chief Justice Burger circulated a memo to the Conference listing six suggestions he had apparently received: it contained, in addition to Coleman, the names of Erwin Griswold, Lloyd Cutler, Bernard G. Segal, Philip Tone, and Robert Landis.[116] It then noted, "We can dis-

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109 461 U.S. 574, 577–79 (1983).

110 *See* IRS Rev. Rule 71-447, 1971-2 C.B. 230.

111 Olatunde Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence* 127, 141 *in* STATUTORY INTERPRETATION STORIES (Eskridge et al. eds., 2011).

112 Brief for the United States at 11–12, Bob Jones University v. United States, 461 U.S. 574 (1983) (Nos. 81-1 and 81-3).

113 Memorandum to the Chief Justice, cc to the Conference, from Justice Marshall (April 8, 1982) (on file with author).

114 Stuart Taylor, Jr., *Man in the News; No Stranger to the High Court*, N.Y. TIMES, Apr. 20, 1982, at D21.

115 Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, Brown v. Bd. of Educ., 349 U.S. 294 (1955), http://www.loc.gov/exhibits/brown/brown-brown.html [https://perma.cc/HEM6-ZCVH].

116 Memorandum to the Conference from Chief Justice Burger (April 9, 1982) (on file with author). The version of the memo in the Warren file has a "No" written next to the names of both Griswold and Cutler.

cuss this at the next Conference."[117] Ten days later, the Court issued an order inviting Coleman to brief and argue the case.[118]

These two case files provide intriguing glimpses (limited as they are) into the Court's amicus appointments. And recent reporting suggests that this ad hoc and relationship-driven process remains largely unchanged today. A 2008 piece by Tony Mauro sheds some light on a more recent amicus appointment (though from the perspective of the appointed amicus, former Alito clerk Jay Jorgensen, rather than the Conference). As Mauro reports, Jorgensen received a phone call from Justice Alito asking him whether he would accept an appointment to defend the judgment below in *Greenlaw v. United States*, a case in which the Eighth Circuit had sua sponte extended a defendant's sentence by fifteen years.[119] Jorgensen, a former clerk to then-Judge Alito and Chief Justice Rehnquist, had never argued before the Court and he "eagerly agreed."[120] As it turned out, his argument occurred on the same day as another appointed amicus, former Thomas clerk Peter Rutledge, who was also arguing before the Court for the first time.[121] Kansas Solicitor General and University of Kansas Law Professor Stephen McAllister, who clerked for Justices White and Thomas, tells a similar story of receiving a phone call from Justice Alito asking him if he would accept an appointment in *Bond v. United States*.[122] For all of these amici—as with Coleman—a relationship with an individual Justice appears to have driven the invitation.

C. Invited Amici: What the Data Show

With that largely anecdotal background, this section discusses my key findings regarding the identities of the individu-

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117 *Id.*

118 456 U.S. 922 (appointment memo). The choice of Coleman was widely praised. *See, e.g.*, *A True Friend of the Court*, N.Y. TIMES, Apr. 21, 1982, at A22 (calling the selection of Coleman "a brilliant response" to the Reagan Justice Department's "shameful" change in policy, and opining that the appointment "assures first-class representation for Americans, black and white, who protest this tax subsidy").

119 552 U.S. 1135 (2008) (appointment memo); 554 U.S. 237, 240 (2008) (the case itself).

120 Mauro, *supra* note 96.

121 *Id.*

122 *McAllister Tapped for Rare Opportunity to Defend Orphaned Argument at U.S. Supreme Court*, KU LAW MAGAZINE, Spring 2011, at 17, http://issuu.com/kulaw/docs/ku_law_magazine_sp11 [https://perma.cc/GB9W-XL3C].

als the Court invites to serve as amici, as well as the outcomes of the cases in which they are selected to participate.

1. *Relationships to the Justices*

Forty of the fifty-nine invited amici—approximately 68%—once served as law clerks to one or more of the Justices.[123] This overall figure, however, is somewhat misleading; the general practice of inviting former clerks to serve as amici, though not a new development, has increased dramatically over time. While three of the Court's first ten amicus invitations were issued to former law clerks,[124] *all* of the ten most recent invitations have gone to former clerks.[125] Of the first twenty-five appointments in the dataset, ten were former law clerks to Supreme Court Justices; of the twenty-five most recent invitations, all twenty-five went to the Justices' former clerks.[126] The chart below depicts these general trend lines, by decade.

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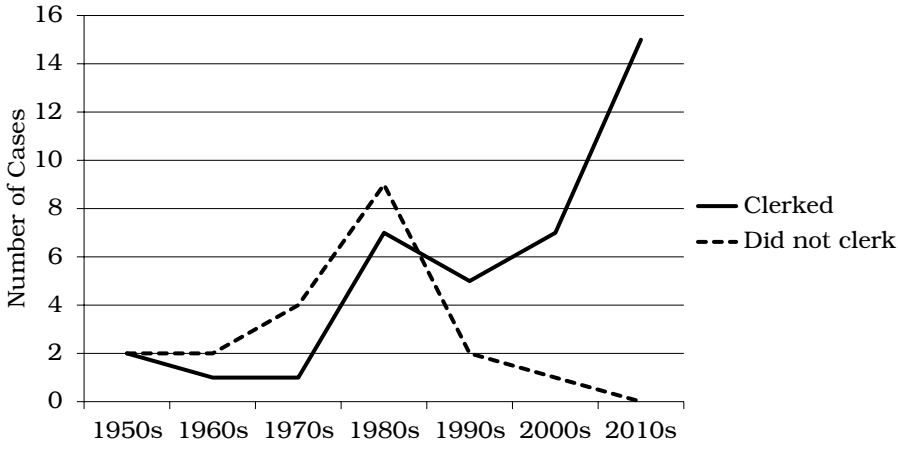
123 For purposes of this figure, and the others in the text, I count as a former Supreme Court law clerk one individual who clerked for Justice Alito when he was on the Third Circuit, Jeffrey S. Bucholtz. *See* Millbrook v. United States, 133 S. Ct. 785 (2012) (appointment memo).

124 Williams v. Georgia, 348 U.S. 957 (1955) (Murphy clerk Eugene Gressman); Lambert v. California, 354 U.S. 936 (1957) (Douglas clerk Warren Christopher); Cheng Fan Kwok v. I.N.S., 390 U.S. 918 (1968) (Warren clerk William H. Dempsey).

125 *See* Appendix.

126 Though the development is a striking one, it bears noting that for the early period covered by the dataset, Supreme Court law clerks in many chambers functioned primarily as legal secretaries; it was only around 1919 that the position began evolving into a full-time research assistant position in some chambers, see WARD & WEIDEN, *supra* note 48, at 34–35, and it took substantially longer in many chambers for the change to take hold, *see* THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON xxi (Dennis J. Hutchinson & David J. Garrow eds. 2002). Still, by the 1970s, the position had largely assumed its current form, and the norm of appointing prior clerks did not harden until somewhat later. TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 31, 174–90 (2006). So the shift is likely not fully attributable to the change in the institution of the Supreme Court clerkship. *See also infra* notes 259-269 and accompanying text.

NUMBER OF INVITEES WHO PREVIOUSLY SERVED AS SCOTUS CLERKS AND YEAR



* p<0.05; with 1950s (reference); N=58 Cases

Clerkships, however, are not the only discernible links between the Justices and amici; some of the early amici who did not serve as law clerks had other close relationships to one or more of the Justices. For example, the second amicus invitation in the dataset, in 1954,[127] went to Dean Griswold, a former student and close friend of Justice Frankfurter.[128] Fifteen years later, in 1969, Arkansas attorney James Gallman was invited to argue in defense of a discriminatory recreational facility in the case *Daniel v. Paul*;[129] although he did not clerk on the Court, Gallman had worked with Justice Marshall in the district court litigation in *Cooper v. Aaron*, when Gallman was an Assistant U.S. Attorney in the Eastern District of Arkansas and Marshall was at the NAACP.[130] Former California Senator Thomas Kuchel also did not clerk at the Court, but he had been appointed to the U.S. Senate by then-Governor Earl Warren in

127 Granville-Smith v. Granville-Smith, 348 U.S. 885 (1954) (appointment memo).

128 Goldman, *supra* note 11, at 916.

129 393 U.S. 1061 (1969) (appointment memo).

130 Aaron v. Cooper, 156 F. Supp. 220, 221 (E.D. Ark. 1957). The oral argument in *Daniel v. Paul* demonstrates Gallman's extraordinarily detailed knowledge of the facility in question and the surrounding region. *See* Transcript of Oral Argument at 7–9, Daniel v. Paul, 395 U.S. 298 (1969) (No. 488), http://www.oyez.org/cases/1960-1969/1968/1968_488 [http://perma.cc/R9BE-RCQ8].

1953;[131] though his 1971 amicus invitation came two years after Warren's retirement,[132] it seems highly likely that the relationship played a role.

These other relationships, then, seem to have played some role in a subset of the amicus invitations the Court has made. The more current paradigm, however, has shifted decisively from former colleagues or acquaintances of the Justices to former law clerks—including, as detailed below, law clerks without any prior experience arguing before the Court.[133]

2. *Geography*

Geography appears to play a role in a sizable number of amicus invitations, though by no means all. Most notably, in a significant number of cases in the dataset—more than pure chance would produce—former law clerks to the Justices in whose circuit of responsibility the case arose have received invitations.

An overview of the eleven most recent amicus invitations is illustrative. Four of the eleven went to individuals who were former law clerks to the Circuit Justice. Beginning with the most recent example, amicus Helgi Walker, who argued in March 2016, clerked for Justice Thomas, the Circuit Justice for the Eleventh Circuit, where the case arose. Richard Bernstein, who argued in October 2015 in *Montgomery v. Louisiana*, out of the Fifth Circuit, is a former law clerk to Justice Scalia, the former Circuit Justice for the Fifth Circuit.[134] Evan Young, who also clerked for Justice Scalia, was appointed in 2011 to argue *Setser v. United States*, another case out of the Fifth Circuit.[135] And Jeffrey Bucholtz, who argued as amicus in the 2012 case *Millbrook v. United States*,[136] is a former law clerk to Justice Alito; Justice Alito is the Circuit Justice for the Third Circuit, where *Millbrook* arose.

Other appointments may be in part traceable to geography, but not necessarily in the sense of a clerkship for the Circuit

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131 Lawrence E. Davies, *Successor to Nixon in Senate is Named: Warren Names Thomas H. Kuchel As Nixon's Successor in the Senate*, N.Y. TIMES, Dec. 23, 1952, at 1.

132 United States v. 12 200-Ft. Reels of Super 8mm. Film, 404 U.S. 813 (1971) (appointment memo).

133 *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1542 (2010) (describing former law clerks as key players in media and academic circles, with the power to influence the Justices).

134 *See* 135 S. Ct. 1729 (2015) (appointment memo).

135 132 S. Ct. 1463, 1466 (2012).

136 133 S. Ct. 1441, 1442 (2013).

Justice. William Peterson, who argued in the spring of 2015 in defense of a Fifth Circuit judgment, clerked for Justice Thomas, who was not (though he has subsequently become)[137] the Circuit Justice for the Fifth Circuit; but Peterson had done an appellate clerkship on the Fifth Circuit and was practicing in Texas when Justice Scalia called to invite him to defend the judgment below, so it is entirely possible that geography played some role.[138] And Harvard Law Professor John Manning, who clerked for Justice Scalia but whose invitation case arose in the D.C. Circuit,[139] for which the Chief Justice rather than Justice Scalia serves as Circuit Justice, clerked on the D.C. Circuit (though his appointment seems more likely to have been based on his expertise as a scholar of administrative law and statutory interpretation).

Others do not appear to satisfy any geographic criterion (perhaps in part because they served as law clerks to Justices no longer on the Court). Again, confining the discussion to the eleven most recent invitations, Catherine M.A. Carroll, one of the most recent appointees, is a former law clerk to Justice Souter;[140] Vicki Jackson, who argued one aspect of *Windsor*, is a former law clerk to Justice Thurgood Marshall;[141] James Feldman, who argued *Levin v. United States* in 2013, clerked for Justice William Brennan;[142] and H. Bartow Farr and Robert Long, who each argued an aspect of *NFIB v. Sebelius*, clerked for Chief Justice Rehnquist and Justice Powell, respectively.[143]

It is entirely possible that the invitations in this last group were driven by other relationships to the Circuit Justice, but the public record is silent on that question. In general, then, geography appears to be a significant factor in some amicus invitations, but one that in no way explains all such invitations.

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137 *See Circuit Assignments*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/circuitAssignments.aspx [https://perma.cc/X7AD-NP3C] (announcing circuit assignments as of Feb. 25, 2016).

138 Rozen, *supra* note 3.

139 Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 81 (2012).

140 But Justice Souter *was* the Circuit Justice for the Tenth Circuit, where Carroll's appointment case arose, as is his successor, Justice Sotomayor; it was Justice Sotomayor's chambers who called Carroll to invite her to argue. *See* Kimberly Robinson, *When the Supreme Court Comes Calling: WilmerHale Partner Invited to Argue Next Term*, 84 U.S.L.W. 106, 106 (2015). From most public reporting about the practice, it appears to be the Circuit Justice who typically makes the phone call inviting the amicus to serve.

141 133 S. Ct. 814 (2012).

142 133 S. Ct. 420 (2012).

143 132 S. Ct. 608, 608–09 (2011).

3. *Subject Matter Expertise*

Subject matter expertise appears to play a role in some appointments, although mostly when the amici are academics. When Dean Griswold was invited to argue in *Granville-Smith*, for example, he had recently published an article in the Harvard Law Review on "the problems raised by nonuniform state divorce laws," closely related to the jurisdictional issue in the case.[144] Paul Cassell's involvement in the Fourth Circuit appeal in *Dickerson* was likely the reason he was tapped to argue before the Court in that case, but his profile in criminal law would arguably have made him a natural selection even if he had not been involved below.[145] Stephanos Bibas, a prominent criminal law scholar, was invited to argue a question of district court sentencing authority in *Tapia v. United States*.[146] And the two academics discussed in the preceding section, John Manning and Vicki Jackson, both clearly possessed relevant subject matter expertise when it came to the jurisdictional issues in both *Windsor* and *Sebelius v. Auburn Regional Medical Center*.[147]

No similar subject matter expertise, however, appears to link the non-academics to the cases for which they are selected, at least in ways that are obvious from the public record. Indeed, one of the most striking features of the amicus data is how little subject matter expertise appears to drive most appointments. Compared to the preceding two factors—relationships and geography—the explanatory power of subject matter expertise is thus quite limited.

4. *Previous Supreme Court Advocacy*

One of the most interesting and surprising findings in the amicus dataset is the presence of first-time Supreme Court advocates among the amicus ranks. Indeed, it appears that thirty-three of the fifty-nine invited amici, or 56%, had never previously argued before the Court at the time of their invitations. Just in the past six years, nine invited amici (all of whom

144 Goldman, *supra* note 11, at 916.

145 530 U.S. 428, 430 (2000). *See* Brief for the Washington Legal Foundation and Safe Streets Coalition as Amici Curiae Supporting Appellant United States, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (amicus brief below); Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898, 898–99 & n.2 (2001) (describing Cassell's brief and oral argument before the Fourth Circuit).

146 131 S. Ct. 975 (2011) (appointment memo).

147 133 S. Ct. 817 (2013).

are former law clerks to the Justices) who had never argued before the Court were invited to do so.[148]

As detailed above, recent work on the modern Supreme Court bar argues convincingly that both the Court and the development of the law have been profoundly impacted by the increasing dominance of Supreme Court practice by a small, elite group of "expert" practitioners.[149] And at first glance, the Court's invitation practices appear consistent with this general trend: that is, they involve a relatively small group of elite attorneys, generally with connections to the Court or at least to one of the Justices, and their backgrounds frequently resemble those of the elite practitioners who make up the Supreme Court bar.[150] But the fact that the majority of amici in recent years have been first-time advocates may represent an important distinction between the appointment phenomenon and other trends at the Court.[151]

5. *Diversity*

In reviewing the fifty-nine amicus invitations the Court has issued, the lack of demographic diversity is immediately striking. This is to be expected in the case of early invitations, but the continuing exclusion of women and minorities from the amicus ranks is surprising. Only six of fifty-nine amici, or just over 10%, have been women, with five of those six invitations issued in just the last seven years (that is, prior to 2009 only one woman, Maureen Mahoney, had *ever* been invited to argue as an amicus).[152]

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148 Beginning with the most recent, they are: Welch v. United States, 136 S. Ct. 892 (2016) (appointment memo) (Helgi Walker); Mata v. Lynch, 135 S. Ct. 2150, 2152 (2015) (William Peterson); United States v. Windsor, 133 S. Ct. 2675 (2013) (Vicki Jackson); Millbrook v. United States, 133 S. Ct. 1441, 1442 (2013) (Jeffrey Bucholtz); Setser v. United States, 132 S. Ct. 1463, 1466 (2012) (Evan A. Young); Tapia v. United States, 131 S. Ct. 2382 (2011) (Stephanos Bibas); Pepper v. United States, 562 U.S. 476, 479 (2011) (Adam Ciongoli); Reed Elsevier v. Muchnick, 559 U.S. 154, 156 (2010) (Deborah Merritt); and Kucana v. Holder, 558 U.S. 233, 236 (2010) (Amanda Leiter). I should note that this analysis does not consider experience *briefing* Supreme Court cases, something many amici have done, even where they have not previously argued.

149 *See supra* notes 18–42 and accompanying text (arguing that Supreme Court practice has become an increasingly specialized enterprise).

150 Many of these first-time Supreme Court advocates are appellate attorneys, who may have argued previously before state and federal appellate courts, but they are nonetheless first-time Supreme Court advocates.

151 I take up the question of the significance of first-time advocates *infra* p. 1584.

152 They are: Mackey v. Lanier Collection Agency, 484 U.S. 809 (1987) (Maureen Mahoney); Kucana v. Holder, 557 U.S. 951 (2009) (Amanda Leiter); Reed Elsevier v. Muchnik, 556 U.S. 1161 (2009) (Deborah Merritt); United States v.

Overall data on demographic diversity within the Supreme Court bar is quite limited, but based on the few existing compilations, these numbers appear even lower than the already-low overall percentages. One recent article tracked the demographic makeup of "top" Supreme Court advocates, which the author defined as any advocate who had argued before the Court five or more times from 2000–2012. Of the eighty-three top advocates the article identified, the author found that fifteen were women (18%).[153] And figures in recent Terms have been similar: in the 2012 Term, 17% of Supreme Court advocates were women,[154] while in the 2015 Term, the figure was 23%.[155] The amicus invitation figure is far lower than either of these.

In addition, it appears that only three of the fifty-nine amicus invitees—5%—have been African American or Latino,[156] with no Asian Americans I have been able to identify in the dataset. Like the gender figure, this figure lags behind the overall percentage at the Court. The same study described above found that of the eighty-three top practitioners between 2000 and 2012, nine—or 11%—of the advocates were not white.[157]

Windsor, 133 S. Ct. 814 (2012) (Vicki Jackson); Green v. Brennan, 136 S. Ct. 14 (2015) (Catherine M.A. Carroll); and Welch v. United States, 136 S. Ct. 892 (2016) (Helgi Walker).

153 Kedar S. Bhatia, Note, *Top Supreme Court Advocates of the Twenty-First Century*, 1 J. LEGAL METRICS 561, 575 (2013).

154 *See* Mark Sherman, *Diversity Lacking Among Lawyers Who Argue Cases to Supreme Court*, THE DENVER POST, May 13, 2013, http://www.denverpost.com/ci_23229359/diversity-lacking-among-lawyers-who-argue-cases-supreme [https://perma.cc/V2T7-TK4Y].

155 Tony Mauro, *Supreme Court Specialists, Mostly Male, Dominated Argument this Term*, NAT'L L.J., May 16, 2016, at 1.

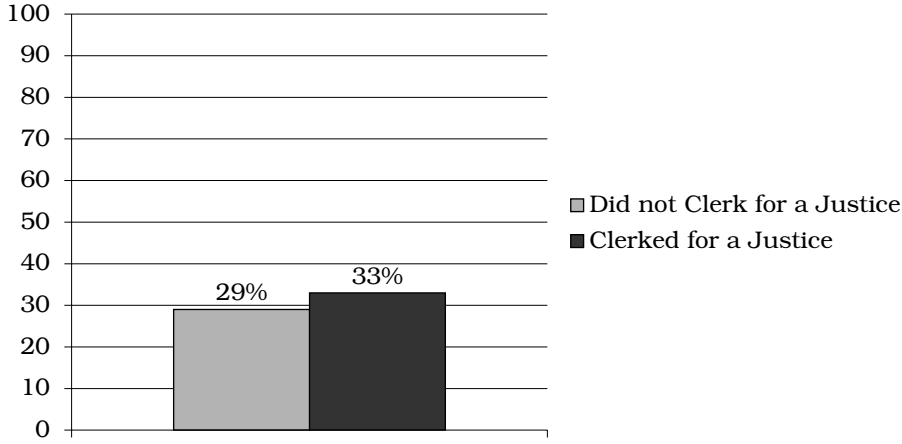
156 They are: Dorsey v. United States, 132 S. Ct. 2321, 2325 (2012) (Miguel Estrada); New York v. Harris, 495 U.S. 14, 15 (1990) (Barrington Parker, Jr., now on the Second Circuit); and Bob Jones Univ. v. United States, 461 U.S. 574, 576 (1983) (William T. Coleman, Jr.). This figure is more tentative than the gender figure because I have not been able to determine amicus race with absolute confidence in several instances, but it appears that all of the remaining fifty-six advocates have been white.

157 Bhatia, supra note 152, at 576—though the 11% figure includes a number of Asian American advocates; *see also* Mark Sherman, *Black Lawyers Rare at Supreme Court*, USA TODAY, Oct. 28, 2007, http://www. usatoday.com/news/washington/2007-10-28-3842117658_x.htm [https://perma.cc/UYY2-GNFZ] ("Several factors account for the dearth of minorities at the court: continuing problems in recruiting and retaining blacks and other minorities at the top law firms; the rise of a small group of lawyers who focus on Supreme Court cases; the decline in civil rights cases that make it to the high court; and the court's dwindling caseload.").

6. *Outcomes*

Of the fifty-six decided cases involving invited amici,[158] thirty-eight can be classified as losses and eighteen wins, for an approximate win rate of 32%. (In two cases, cert was denied as improvidently granted,[159] and in one case the Court did not reach the question the amicus had been invited to argue.[160]) At least an initial analysis, then, suggests that amicus win rates are not especially high—though in light of the nearly-hopeless task of many amici, who are often invited to take a position even the winning party will not defend,[161] perhaps the rate is rather high after all. Former clerk win rates are higher than the win rates of amici who did not clerk, although not dramatically so.

AMICUS WIN RATES FOR CLERKS & NON-CLERKS



I have coded these cases as wins or losses, but I am mindful of Richard Lazarus's caution that "[t]he content of the Court's opinion is almost always far more important than the formal judgment."[162] As the piece continues: "Binary analysis

158 *See* Appendix.

159 Ogbomon v. United States, 519 U.S. 1073 (1997); Vermont v. Cox, 484 U.S. 173 (1987).

160 NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (severability).

161 *Cf.* Stephen R. McAllister, *Federalism and Retroactivity in State Post-Conviction Proceedings*, 18 GREEN BAG 2D 271, 284 (2015) (predicting, regarding the then-pending amicus invitation in *Montgomery v. Louisiana*, that "(1) the amicus appointed in *Montgomery* will thoroughly enjoy the opportunity, (2) the Court will be grateful to him for providing such service, and (3) the Court will rule against his jurisdiction position *unanimously*.").

162 Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231, 252 (2012).

that treats Supreme Court rulings as either 'wins' or 'losses' misapprehends the nature of judicial rulings and the essential role served by legal reasoning. Not all losses are created equal."[163] Mindful of that concern, the next part attempts to engage with outcomes in a more nuanced and less binary fashion.

Another vector on which to assess the "outcome" of amicus appointments is their effect on the advocates themselves. Here, anecdotal evidence suggests that an appointment by the Court confers significant professional, reputational, and in some instances even concrete monetary advantages. Just as Supreme Court clerkships or positions in the Solicitor General's office can place a young attorney in the "pipeline to power,"[164] so too may the opportunity to argue before the Court provide or amplify such advantages, particularly for an attorney relatively early in his or her career.

In 2010, Adam Liptak interviewed Adam Ciongoli, a former Alito clerk who argued *Pepper v. United States*[165] approximately four years after finishing his clerkship. Liptak reported that Ciongoli, a first-time advocate, prepared for months for the argument, mostly at night and on the weekends, and "was paid solely in prestige."[166]

Tony Mauro suggests in a different piece that invitations to argue actually "launched the Supreme Court appellate careers of several former high court clerks. Among them: Chief Justice Roberts and Maureen Mahoney."[167] While it is difficult to draw a causal link between one event like a Supreme Court invitation and subsequent career developments, it is at least plausible that these early experiences had some impact on the career

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163 *Id.* at 231.

164 Linda Greenhouse, Keynote Speech at the 2012 Pipeline to Power Symposium (2012), *in* 2012 MICH. ST. L. REV. 1433, 1436; *see also* Christopher Avery et al., *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447, 450 (2007) ("Federal court clerkships are also often stepping stones to various elite legal posts.").

165 131 S. Ct. 1229 (2011); Charles Lane, *Alito Hires as a Clerk Former Ashcroft Aide*, WASH. POST, Feb. 15, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/02/14/AR2006021401811.html [https://perma.cc/A7SY-52KG] (noting that Justice Alito hired Ciongoli as his law clerk at the Supreme Court in 2006).

166 Adam Liptak, *Court Chooses Guardians for Orphaned Arguments*, N.Y. TIMES, Dec. 13, 2010, http://www.nytimes.com/2010/12/14/us/14bar.html?_r=0 [https://perma.cc/BEN4-H5QB].

167 Mauro, *supra* note 96. Mauro also argues that where ex-clerks are invited to return to the Court to argue as amici, "the intangible rewards for the lawyer are great, representing yet another way in which a Supreme Court clerkship can be a ticket to top-tier career opportunities." *Id.*

paths of the invited attorneys. And more immediately, in private practice, the difference between no Supreme Court arguments and a single Supreme Court argument may be quite significant, for everything from billing rates to the likelihood of being entrusted with future Supreme Court arguments.

III
ANALYSIS

Having first framed and then described the practice of amicus invitation, this section identifies several of the broader themes and dynamics that emerge from examining the practice. It begins with a discussion of the categories of cases in which the Court invites amicus participation. It then asks what the sort of review conducted here can tell us (since the Court gives no explicit guidance on this score) about the role of the invited amicus: the identity of the client, the nature of the mandate, and the precise relationship between the amicus and the Court. Finally, it explores more deeply the question of relationships—in particular, what the Justices' increasing tendency to turn to former law clerks to serve this function might tell us about the Court today.

A. Reason for the Appointment

Though they share a name, not all amicus invitations are alike. They do, however, cluster into several discrete categories, raising some distinct conceptual issues that merit brief discussion here.

Many amicus invitations involve what can be broadly described as confessions of error—either an error by the government itself, as where the Solicitor General's office decides to disavow a position taken by litigators below, or an error by the lower court or courts.[168] Much of the time, cases in this category involve a decision by the federal government not to defend or press for a victory, for various institutional and legal reasons. As I have argued elsewhere, there are considerable advantages to permitting government entities to change positions in litigation, including by declining to defend statutes they have concluded are unconstitutional;[169] from this perspective, the

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168 Goldman, whose focus is on Article III concerns, slices the cases slightly differently, dividing out Solicitor General error confessions and changes in position from cases in which neither party accepts a sua sponte decision of the lower court. *See* Goldman, *supra* note 11, at 918.

169 *See* Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 263–71 (2014) (defending executive nondefense).

practice of amicus invitation enables the government to make such decisions without undermining courts' ability to answer important questions. *Dickerson* supplies the best example of this phenomenon; in that case, one of the most important instances of constitutional nondefense by the federal executive, the federal government argued in the Supreme Court against the constitutionality of 18 U.S.C. § 3501 (and in support of the view that *Miranda* was a constitutional rule); at the invitation of the Court, Paul Cassell stepped in to fill the gap.[170] In a more representative example, the federal government in *Ornelas v. United States*, after arguing below that appellate review of a lower court's finding of reasonable suspicion and probable cause should be for clear error, joined with the petitioner before the Supreme Court in arguing for a de novo standard.[171] The Court accordingly invited attorney Peter Isakoff to defend the lower court judgment.[172]

In other cases, the Court itself raises an issue or question it wishes to consider, but which the parties have not presented. A recent example in this category is *Windsor*, in which amicus Vicki Jackson was asked to brief and argue the position that the executive branch, which agreed with the plaintiff on DOMA's unconstitutionality, was without authority to invoke the Court's jurisdiction; and, additionally, that the Bipartisan Legal Advisory Group lacked Article III standing.[173] *Alabama v. Shelton* is a slightly older example; in that case, amicus Charles Fried was invited to argue the position that the Sixth Amendment did not bar imposition of a suspended criminal sentence even where the original conviction had been obtained without counsel,[174] although the state of Alabama agreed with Shelton that the Sixth Amendment did *not* allow the imposition of such a sentence.[175]

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170 530 U.S. 428, 430 (2000); *see supra* note 143 and accompanying text.

171 *See* Brief for the United States at 11, Ornelas v. United States, 517 U.S. 690 (1996) (No. 95-5272) ("A court of appeals should apply a de novo standard of review to a trial court's holding of whether the facts known to law enforcement officers add up to the reasonable suspicion or probable cause required to justify the warrantless search or seizure in question.").

172 516 U.S. 1008 (1995) (appointment memo).

173 133 S. Ct. 814 (2012) (appointment memo).

174 534 U.S. 987 (2001) (appointment memo).

175 Specifically, as the Court explained, "Alabama now concedes that the Sixth Amendment bars *activation* of a suspended sentence for an uncounseled conviction, but maintains that the Constitution does not prohibit *imposition* of such a punishment as a method of effectuating probationary punishment." Alabama v. Shelton, 535 U.S. 654, 660–61 (2002).

In a third category of cases, the Court invites amicus participation where one party to a case simply fails to appear or to respond to communications with the Court. *New York v. Harris* is one such example: in that case amicus (now Judge) Barrington Parker, Jr., was invited to argue for suppression of a confession as insufficiently attenuated from an unlawful search, after the criminal defendant in the case failed to respond to numerous communications from the Clerk's office.[176] And in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Court invited the participation of amicus Charles Lipsey after being notified that the respondent had not authorized its counsel to participate in Supreme Court litigation in the case.[177]

Finally, in a small subset of these cases, the Court appears simply to conclude that the quality of the advocacy on one side of a question is not sufficient to enable it to decide a case. The presidential power case *Myers v. United States*, discussed above,[178] was such a case. Myers did have his own attorney; although that attorney had twice failed to appear for oral argument, he did file several briefs and ultimately did participate in the argument in which amicus George Pepper appeared.[179] An even clearer example of such a case is *Lambert v. California*,[180] in which attorney quality almost certainly drove the Court's appointment. The Court first considered *Lambert*, which raised the question of the constitutionality of a California felon registration statute, in the 1956 Term. But rather than deciding the case, the Court set the case for reargument the next

176 492 U.S. 934 (1989). *See also* Memorandum from Clerk Joseph F. Spaniol to Justice Marshall (Aug. 8, 1989) (papers of Justice Blackmun) (on file with author) ("The respondent, Bernard Harris, has been asked to tell us the name of the attorney who will be representing him . . . . To date, we have had no response. . . . Efforts to reach Mr. Harris by phone have been to no avail.").

177 487 U.S. 1231 (1988). *See also* Memorandum from Justice Anthony Kennedy to the Conference (June 28, 1988) (on file with author) ("The Conference requested me to recommend an attorney for appointment as amicus in this case. . . . After checking, I recommend Charles Lipsey . . . . Each of you has far more extensive knowledge of the D.C. Bar than I do, and I will be pleased to defer to you if you have an alternate suggestion."). Another case that appears roughly to fall into this category is *Levin v. United States*; after his pro se petition was granted, petitioner Levin spent weeks negotiating with a number of firms about their offers of free representation, until the Court simply invited James Feldman to argue the case. *See* 133 S. Ct. 420 (2012) (appointment memo); *see also* Joan Biskupic, *Special Report: For Top U.S. Lawyers, Case in Guam is Rare Prize*, REUTERS (June 18, 2013, 7:01 AM), http://www.reuters.com/article/us-usa-court-coterie-special-report-idUSBRE95H0DD20130618 [https://perma.cc/ULV5-ELLH].

178 *See supra* notes 71–77 and accompanying text.

179 *See* Prakash, *supra* note 75, at 175 (describing the litigation).

180 355 U.S. 225 (1957).

Term, appointing former Douglas clerk Warren Christopher to represent Lambert, in lieu of the attorney who had represented her below and in the 1956 argument.[181] And yet a third example is *Keeton v. Hustler*,[182] in which the Court learned on the eve of oral argument that Hustler publisher Larry Flynt had discharged his attorney and wished to argue on his own behalf; the Court instead appointed Mayer Brown attorney (formerly of the Solicitor General's office) Stephen Shapiro, who was already counsel of record in an amicus brief in support of Hustler.[183]

B. Nature of the Role

At the conclusion of oral arguments in a case involving an invited amicus, Chief Justice Roberts typically includes a brief acknowledgment of the amicus's presence in the case, usually hewing closely to a script along the following lines: "[Y]ou briefed and argued the case at the invitation of the Court, and you have ably discharged that responsibility, for which we are grateful."[184] Opinions frequently contain similar language.[185] But what exactly is the "responsibility" the Chief Justice references in these acknowledgments?

The Court never specifies, at least in its public communications; nor does it explain who the amicus's client is—if there is one—or elaborate on the nature of the role. In some respects,

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181 *See* 354 U.S. 936 (1957) (appointment memo). For additional discussion of *Lambert*, *see infra* notes 212-224 and accompanying text.

182 465 U.S. 770 (1984).

183 *See* 464 U.S. 958 (1983) (denying Flynt's motion to present oral argument pro se and inviting Shapiro to present oral argument as amicus curiae). The idea of appointing Shapiro seems to have come from Clerk Alexander Stevas, who notified the Chief Justice of Flynt's attorney's discharge in a memo in which he suggested the Court issue an order authorizing Shapiro to present argument. *See* Memorandum from Clerk Alexander Stevas to the Chief Justice (Nov. 3, 1983) (papers of Justice Blackmun) (on file with author) ("Mr. Stephen M. Shapiro . . . is counsel on the *amicus curiae* brief for Motor Vehicle Manufacturers Assn. . . . Counsel for the other *amici curiae* have not argued before this Court."); *see also* Jeffrey Cole, *Discovery: An Interview with Steve Shapiro*, 23 LITIG. 19, 22 (1997).

184 *See, e.g.*, Transcript of Oral Argument at 57, Kucana v. Holder, 558 U.S. 233 (2010) (No. 08-911) ("Ms. Leiter, you have briefed and argued this case in support of the judgment below, at the invitation of the Court, and have ably discharged that responsibility, for which we are grateful.").

185 *See, e.g.*, Dorsey v. United States, 132 S. Ct. 2321, 2330 (2012) ("Since petitioners and the Government both take the position that the Fair Sentencing Act's new minimums do apply in these circumstances, we appointed as *amicus curiae* Miguel Estrada to argue the contrary position. He has ably discharged his responsibilities."); *Kucana*, 558 U.S. at 242 ("We appointed Amanda C. Leiter to brief and argue the case, as *amicus curiae*, in support of the Seventh Circuit's judgment. Ms. Leiter has ably discharged her assigned responsibilities.") (citation omitted).

of course, the role is clear—to take a particular position before the Court, whether that position entails defending a judgment or making a specific argument. But is the role of the amicus akin to the role of a private attorney, whose obligation is one of zealous advocacy, within ethical bounds? Or is it more similar to the role of the Solicitor General, whose role requires the incorporation of other considerations—as one Solicitor General has described it, "not to achieve victory, but to establish justice"?[186] Does the amicus appropriately consider, say, the proper development of the law? And do the answers to these questions turn on the particular type of amicus invitation at issue?

One answer might be that all of these amici are in some ways akin to the original amici who morphed into the unsolicited filers so prevalent in Supreme Court litigation today.[187] In a widely cited piece on the emergence of the amicus curiae, Samuel Krislov traces the historical evolution of the amicus curiae in England and the United States.[188] Initially an attorney with no interest in the proceedings, who simply brought matters of law or fact to the attention of the judge,[189] the amicus under English common law soon morphed into a represen-

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186 Seth P. Waxman, *"Presenting the Case of the United States As It Should Be": The Solicitor General in Historical Context* (June 1, 1998), http://www.justice.gov/osg/about-office [https://perma.cc/Z5K5-DQM7] ("The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice." (quoting Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955))); LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3 (1987) (claiming that the Justices "count on him [the Solicitor General] to look beyond the government's narrow interests. They rely on him to help guide them to the right result in the case at hand, and to pay close attention to the case's impact on the law.").

187 *See supra* note 6. For a novel recent examination of the world of these unsolicited filers, see Allison Orr Larsen & Neal E. Devins, *The Amicus Machine*, 102 VA. L. REV. (forthcoming 2016).

188 *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963); *see also* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1765–76 (2014) ("Interestingly, the original amicus was the lawyer, not the client. . . . It was not until the early 1900s that courts began to attribute amicus briefs to the organization that sponsored it rather than to the lawyer who submitted it.").

189 As one nineteenth century state-court case put it, "[h]e acts for no one, but simply seeks to give information to the Court." Campbell v. Swasey, 12 Ind. 70, 72 (1859). A law clerk memo in one of the Court's amicus invitation cases makes passing reference to this sort of role for an amicus. At issue in *Mathews v. Weber* was a provision of the Magistrate Judge's Act authorizing the initial referral of certain social security benefit cases to magistrate judges. 423 U.S. 261 (1976). In a lengthy discussion of the role of the magistrate in such cases, the memo contended that "[w]ithout oral argument, the magistrate's function is essentially that

tative of a third party whose interests might be impacted by a case.[190] The problem of unrepresented third party interests was only magnified in the United States, with its more complex federal system and a variety of doctrines limiting access to the federal courts, and so the practice expanded in the United States.[191]

Although Krislov's piece predates most of the amicus invitations discussed here, the early amici Krislov describes do seem to supply the closest analogue to today's invited amici, who, alone among Supreme Court players, stand in a closer relationship to the Court than to any identifiable client.[192] And the generally underspecified nature of the role is quite similar; as Krislov explains of the amicus at early common law, "Inasmuch as permission to participate as a friend of the court has always been a matter of grace rather than right, the courts have from the beginning avoided precise definition of the perimeters and attendant circumstances involving possible utilization of the device."[193] The Court similarly avoids precise public definition of the nature of the role of its invited amici; and even its internal mentions of the practice are exceedingly cryptic. A memo from Chief Justice Burger regarding *Kolender v. Lawson*, a 1983 amicus invitation case, is illustrative. After the Court agreed to hear the case, Mark Rosenbaum, Lawson's counsel below, notified the Court of his withdrawal from the case—his client wished to represent himself, "based upon . . . his continuing commitment to a principle of the right of self-

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of a law clerk or neutral amicus." Memorandum at 2, Mathews v. Weber, 423 U.S. 261 (1976) (on file with author).

190 *See* Krislov, *supra* note 188, at 697; *see also* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 676 (2008) ("Over time, amici curiae evolved into third party representatives, less concerned with providing unbiased scholarly guidance to the court and more interested in protecting the interests of individuals or entities who were not named parties in a suit."). *But see* Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890*, 112 CONST. COMMENT. 111, 112 (2003) (attributing the "conventional story of a transformation from neutral to partisan amici" to "a common but unrealistically nostalgic version of the history of American legal practice.").

191 *See* Krislov, *supra* note 188 at 697–98.

192 Professor Helen Anderson makes this point in a recent piece that offers a taxonomy of all amici, both invited and unsolicited. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 376 (2015) (terming the type of invited amicus explored above "[t]he Court's Lawyer," a "hand-picked advocate who is asked to represent a particular position").

193 *Id.* at 695.

representation before this Court."[194] Rosenbaum in the same letter indicated his willingness "to assist [the Court] in the consideration of this appeal in any way the Court may find helpful and appropriate."[195] In a memo to the Conference, the Chief Justice advised his colleagues of these developments, then wrote this puzzling sentence: "[s]ince I am opposed to 'lay advocates' here, I would lean to appointing Mr. Rosenbaum as an *amicus* to argue the case for respondent, with full awareness that he is 'neutral in favor of Lawson.'"[196]

If the murkiness of the mission connects early English amici to today's invited amici, several of the cases discussed here give some clues about the nature of the role (and the Court's apparent grappling with it). First, the 1967 case *Commissioner v. Stidger* featured a question about the tax treatment of certain expenses by a Marine Corps officer.[197] After the Court granted cert, the respondent, a taxpayer who had prevailed in the Ninth Circuit, informed the Court that he did "not intend to brief or argue the case here because the amount involved is so small ($180). He asks that counsel be appointed but does not claim that he qualifies to proceed in forma pauperis."[198] Instead of appointing counsel to actually represent the petitioner, a law clerk suggested "that counsel be appointed as amicus curiae to argue *from the point of view of the taxpayer.* This would give the Court the benefit of the argument without setting a precedent of appointing lawyers for liti-

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194 Letter from Mark D. Rosenbaum to Clerk Alexander L. Stevas (Oct. 21, 1982) (papers of Justice Marshall) (on file with author) [hereinafter Letter from Rosenbaum]; Kolender v. Lawson, 461 U.S. 352 (1983).

195 Letter from Rosenbaum, *supra* note 194.

196 Memorandum from Chief Justice Burger to the Conference (Oct. 27, 1982) (papers of Justice Marshall) (on file with author); *Kolender*, 461 U.S. at 352. The Conference evidently agreed, denying Lawson's request to represent himself and appointing Rosenbaum in a joint order a few days later. 459 U.S. 964 (1982).

197 386 U.S. 287 (1967).

198 Memorandum re: Motion for Appointment of Counsel #171-2000 (Oct. 19, 1966) (papers of Chief Justice Warren) (on file with author). The papers in *O'Connor v. Ortega*, 480 U.S. 709 (1987), tell a similar story: Joel Klein represented the respondent below; in the Supreme Court, the respondent first sought in forma pauperis status and the appointment of Klein to represent him, but Klein informed the clerk's office that he had "'indicated to respondent that [he] could not represent him under' the conditions set by respondent." Memorandum from the Chief Justice to the Conference at 1 (Jan. 28, 1986) (on file with author). According to the Chief Justice, those conditions included respondent's insistence that he retain "control over the preparation of the joint appendix and respondent's brief for the Court," and also that respondent himself retain two minutes at the end of the argument to "present important facts that may otherwise be buried by overgeneralizations." *Id.* Klein did inform the clerk's office that "he would be willing to present oral argument in this case on behalf of 'no specific client.'" *Id.* at 2. The Court took Klein up on his offer.

gants who are not paupers."[199] This framing made clear that the amicus was not to report to, or stand in any formal relationship with, the petitioner, but rather to give the Court the benefit of the sorts of arguments the petitioner might make. The order then described the amicus's status vis-à-vis not the petitioner or a taxpayer, but the judgment below ("John A. Reed . . . is invited to brief and argue this case . . . in support of the judgment below.").[200]

Where the task is defined as defending the judgment below, amici frequently offer alternate grounds on which to affirm the judgment, including grounds rejected by the lower court. In *Verlinden B.V. v. Central Bank of Nigeria*, for example, amicus Stephen Shulman offered a number of arguments for the position that the lower courts had lacked jurisdiction over the dispute in question. At one point in oral argument, Justice Rehnquist pushed back on an argument—that jurisdiction was lacking as a statutory as well as a constitutional matter—as having been rejected below.[201] Shulman reminded Rehnquist, with an audible chuckle, that his task was to "support[ ] . . . the judgment below," and explained that he was merely offering an alternate basis to affirm.[202] It's a brief exchange, but a revealing one, in that it features a rare moment of an amicus acknowledging the somewhat peculiar role—stepping through a fourth wall of sorts.

A more recent example highlights the subtle ways the ambiguity surrounding the role might be made manifest. In the 2013 case *Millbrook v. United States*, the lower court had held that the immunity waiver in the Federal Torts Claim Act was limited to tortious conduct "that occurs during the course of

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199 *See* Memorandum re: Motion for Appointment of Counsel, *supra* note 198, at 1–2 (emphasis added).

200 Commissioner v. Stidger, 385 U.S. 925 (1966) (appointment memo).

201 Specifically, he urged the Court to find that the Foreign Services Immunities Act conferred jurisdiction only when the plaintiff was a citizen. Oral Argument at 18, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (No. 81–920), https://www.oyez.org/cases/1982/81-920 [https://perma.cc/HX5P-DCMQ].

202 Here is an excerpt from the exchange:

> *Mr. Shulman:* This Court should construe the Foreign Sovereign Immunities Act to provide jurisdiction only when the plaintiff is a citizen. . . .
>
> *Justice Rehnquist*: The court of appeals didn't agree with you on that point, did it? I mean, it . . . I take it it would have liked to construe the statute that way, but it felt it just couldn't.
>
> *Mr. Shulman:* That is correct, Justice Rehnquist. I am arguing in support of the judgment below, and this is an additional ground which I believe is available to support the judgment.

Id.

executing a search, seizing evidence, or making an arrest."[203] Though ostensibly appointed to defend the judgment below, amicus Jeffrey Bucholtz took a slightly different position than the court below had adopted: while the court below had held that the immunity waiver was limited *just* to law enforcement officers engaged in one of three enumerated activities (searching, seizing, arresting), Bucholtz conceded (very effectively, though unsuccessfully) that immunity might be waived for certain sorts of law enforcement officials *all of the time*, whether or not they were engaged in the enumerated activities.[204] That concession did not adversely impact the named defendants in the case—prison guards, rather than more traditional law enforcement officers like FBI agents—but it was still a very different rule from the one the lower court adopted.

These exchanges, though suggestive, in many ways only confirm both the complexity and the ambiguity that surrounds the role of the amicus. The best answer to the question of the nature of the role may simply be that the mandate varies with the particular circumstances of the amicus invitation. And the diversity of those circumstances suggests that the Court perhaps should not use the same label to describe what are in fact quite disparate invitations.

C. The Function of Familiarity

As the findings in Part II make clear, the Court relies heavily on familiarity when making these appointments: the Justices' familiarity with any potential invitees and the invited attorneys' familiarity with the Court.

There is no question that the Justices' preference for parties who have had some exposure to the Court makes a certain sense. The Supreme Court is an institution with its own norms

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203 There's a similar moment in *Thigpen v. Roberts*, in which amicus Rhesa Barksdale is asked "So if you are wrong and the other side wins, what will happen to the gentleman on whose behalf you are speaking?" He reminds the Court, "Your Honor, I am not speaking on behalf of Mr. Roberts. I am speaking in support of the judgment below," and the questioning Justice (unidentified in the transcript) responds, "Yes. That means that you are supporting him to some extent." Transcript of Oral Argument at 42–43, Thigpen v. Roberts, 468 U.S. 27 (1984) (82-1330), https://www.oyez.org/cases/1983/82-1330 [https://perma.cc/AJ7V-XJBT].

Millbrook v. United States, 133 S. Ct. 1441, 1442 (2013).

204 *See* Transcript of Oral Argument at 53, Millbrook v. United States, 133 S. Ct. 1441 (2013) (No. 11-10362) ("Where somebody doesn't have two hats, they only have one hat, like an FBI agent, and they are on the job and they are engaged in what normal people would think of as law enforcement activity, maybe that's covered.").

and traditions, and it is surely at least in part for this reason that the Court is most comfortable using insiders to serve in the amicus role.[205] In general, former law clerks are quite familiar with the Justices—at a bare minimum they know their identities,[206] and they likely know a good deal about their jurisprudence as well. And, by virtue of their experience observing oral arguments, they are familiar with the rhythm of the exchange with the Justices. As Justice Jackson explained in an essay on Supreme Court advocacy many years ago: "One who is at ease in its presence, familiar with its practice, and aware of its more recent decisions and divisions, holds some advantage over the stranger to such matters."[207]

Just this sort of familiarity was on display in last Term's appointed amicus case, *Mata v. Lynch*. Late in the argument of appointed amicus William Peterson, Justice Breyer engaged in the following colloquy with Peterson:

> JUSTICE BREYER: And—and so we're getting into what's actually I think a tough question. And maybe it's cowardly. But I'm thinking why go into those two tough questions, when in fact we asked for the answer to a simple question. There are—you have written a very good brief and I understand what you're doing and—but I still am sort of stuck on this, which I'll put to you.

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205 *Cf.* Mauro, *supra* note 31, at 15 ("Those experiences [clerking and working at the Solicitor General's office] giv[e] lawyers insight into the folkways of the Court and the kinds of arguments that appeal to the justices. There's no way to overstate the value of that experience, says [Carter] Phillips, a clerk for the late Warren Burger. It's a very warm environment if you've been there before. Everyone says hello.").

206 Where the non-expert advocate confuses the Justices, the response can be unforgiving, especially where an advocate stumbles multiple times. *See, e.g.*, Transcript of Oral Argument at 34, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) ("No. Justice Breyer, what I'm saying is that — ." "I'm Justice Souter —you'd better cut that out."). But see this exchange, in the oral argument in *Mata v. Lynch*, the case that began this essay, after a question from Justice Kagan:

> MR. PETERSON: Justice Scalia, when Ramos-Bonilla adopted the—
> JUSTICE KAGAN: He's definitely Justice Scalia.
> (Laughter.)
> MR. PETERSON: I'm very sorry—
> JUSTICE KAGAN: And we're not often confused.
> (Laughter.)
> JUSTICE SCALIA: It's a good question though.
> (Laughter.)

Transcript of Oral Argument at 34, Mata v. Lynch, 135 S. Ct. 2150 (2015) (No. 14-185) [hereinafter Mata Transcript].

207 Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 802 (1951).

> MR PETERSON: Well, thank you, Justice Breyer. I know it's the end of the term and I'm asking you to complicate the case—
> JUSTICE BREYER: Yes.[208]

There's not much of substance in this exchange; the fact that the Court is unlikely to want to complicate an apparently simple case at the end of April during a Term with a number of significant cases pending (e.g., marriage and healthcare) isn't especially privileged information. But it's nevertheless a dialogue in which only someone steeped in the schedule and rhythms of the Supreme Court would likely participate.

In addition, some of the Court's amicus appointments have arisen very late in the process, occasionally on the eve of oral argument; in *Keeton v. Hustler*, the Court's invitation to amicus Stephen Shapiro issued only five days before oral argument.[209] In such cases, the Court quite naturally reaches for familiar players (and, in the case of Shapiro, one with a number of previous arguments before the Court.)

In short, it is easy to see why the Court prefers to anoint insiders. But the question, which I take up in the next Part, is in service of what values, with what implications, and at what costs.

IV
NORMATIVE IMPLICATIONS

A. Outcomes and the Path of the Law

In some instances, the presence or arguments of an amicus may have profound consequences—either for the case at hand, or for the path of the law more broadly. And the magnitude of those consequences may argue in favor of clearer standards and guidelines, regarding both when and whom to invite.

In *United States v. Halper*,[210] for example, then attorney (now Chief Justice) John Roberts, in his first Supreme Court argument, managed to convince the Court that where a civil judgment arose out of conduct that had already resulted in a criminal sentence, that civil judgment constituted unconstitutional double jeopardy. Eight years later the Court reversed itself, calling its decision in *Halper* "ill considered" and "un-

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208 Mata Transcript, *supra* note 206, at 36.

209 *See* Memorandum from Clerk Alexander Stevas to the Chief Justice (Nov. 3, 1983) (papers of Justice Harry Blackmun) (on file with author); Keeton v. Hustler Magazine, Inc., 464 U.S. 958 (1983).

210 490 U.S. 435 (1989).

workable."[211] It seems at least possible that the quality of Roberts' advocacy is what led the Court to reach what it later determined was the incorrect result.

Another case in which the quality of the advocacy almost certainly drove the result, along the way shaping the law more broadly, is *Lambert v. California*.[212] *Lambert* was argued initially, and disastrously, by Samuel McMorris, who had represented petitioner Virginia Lambert below.[213] McMorris's brief was poorly structured and difficult to follow,[214] and the oral arguments in the Spring of 1957 were something of a disaster, with McMorris repeatedly resisting the Justices' explicit requests for the facts of the case or the specifics of the state statute in question.[215] Three months after the initial oral argument, the Court set the case for reargument, inviting Warren Christopher—former clerk to Justice Douglas, future Secretary of State—to argue that the California felon registration statute under which Lambert had been convicted was unconstitutional.[216] Christopher's brief, which has been described as "a masterpiece,"[217] proved persuasive to the Court, with Justice Douglas's opinion for a five-Justice majority holding that due process prevented the conviction of a person who "did not know of the duty to register and where there was no proof of the probability of such knowledge."[218] Justice Frankfurter's dissent struck a cautionary note, charging that the state and federal law books were "thick with provisions" that would "fall or

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211 Hudson v. United States, 522 U.S. 93, 101–02 (1997).

212 355 U.S. 225 (1957).

213 *See supra* note 181 and accompanying text.

214 *See* Appellant's Opening Brief, Lambert v. California, 355 U.S. 225 (1957) (No. 590); *see also* Peter W. Low & Benjamin Charles Wood, Lambert *Revisited*, 100 VA. L. REV. 1603, 1608 (2014) (describing the brief as containing "a scattergun array of assertions, some of which met their mark, but most of which were clearly wide of the target and plainly of no interest or persuasive power at that level.").

215 *See, e.g.*, Transcript of Apr. 3, 1957 Oral Argument at 4, 9, Lambert v. California, 355 U.S. 225 (1957), http://www.oyez.org/cases/1950-1959/1956/1956_47 [https://perma.cc/GLR2-4GFN] (responding to an unidentified Justice's question, "Would you mind stating the facts that give rise to the question to your argument? What happened here?", with "Now, I have planned to go to those as soon as I get back at—" and, later, from Chief Justice Warren, "Mr. McMorris, don't—don't you think that in response to Justice Harlan's question that it would be better for you to tell how you'd come here to this Court, tell the facts of your case . . . .").

216 354 U.S. 936 (1957) (appointment memo).

217 Low & Wood, *supra* note 214, at 1609 ("The Christopher brief was a masterpiece."); *see also* Brief of Amicus Curiae for Appellant, Lambert v. California, 355 U.S. 225 (1957) (No. 47).

218 Lambert v. California, 355 U.S. 225, 229 (1957).

be impaired" if the majority's opinion were read expansively.[219] Ultimately, though, he predicted that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."[220]

Although the Court has not subsequently repudiated *Lambert*, as it did with *Halper*, the consensus seems to be that Justice Frankfurter's prediction has proven accurate. As one scholar has written, "*Lambert*'s notice principle has never taken off. Few decisions rest on it, and the principle itself remains an unenforced norm, not a genuine constitutional rule."[221] Another commentator argues that the rule of *Lambert* has proven most relevant in "criminal law casebooks . . . . while local governments have proceeded to enact a myriad of criminal laws, rendering residents and non-residents alike susceptible to prosecution" without regard for their knowledge of the law.[222]

But the fact that the decision has not led to a reformation of our concepts of notice in criminal law does not mean that its impact has not been profound. A recent piece lays blame for many of the pathologies of criminal law enforcement on decisions like *Lambert*, which purport to provide protections but instead concentrate power in prosecutors.[223] Other work describes *Lambert* as part of "a story of unfulfilled potential," regarding "a more humane, moral, and altogether more sound substantive penal law."[224] To be sure, there is no way to draw a clear causal link between the Court's invitation to Christopher and the effects commentators believe have flowed from the decision in *Lambert*. But the amicus invitation is an important part of the story of *Lambert*, and thus of the criminal law.

Invited amici do not necessarily need to prevail, as Roberts and Christopher did, in order to impact the path of the law. Although Vicki Jackson's argument that the Court was without jurisdiction to decide DOMA's constitutionality did not carry

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219 *Id.* at 230–32 (Frankfurter, J., dissenting).

220 *Id.*

221 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 589–99 (2001) ("The system by which we make criminal law has produced not the rule of law but its opposite. And the doctrines that aim to reinforce the rule of law only add to the lawlessness.").

222 Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1461–62 (2001).

223 *Cf.* Stuntz, *supra* note 221, at 599 ("The criminal justice system seems characterized by diffused power, but its real difficulty is that it concentrates power in prosecutors.").

224 Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1270 (1998).

the day in *Windsor*, it received substantial support from the dissenting Justices. Justice Scalia, joined by Justice Thomas and the Chief Justice, insisted that "[w]e have no power to decide this case."[225] The Chief Justice's separate writing underscored his agreement with Justice Scalia,[226] and Justice Alito agreed in part, accepting Jackson's argument that the executive branch had suffered no injury that allowed it to seek Supreme Court review, but ultimately concluding that the House of Representatives, acting through the Bipartisan Legal Advisory Group, was able to invoke the Court's jurisdiction.[227] Four votes, therefore, existed in the aftermath of *Windsor* for the proposition that the executive branch cannot invoke the Court's jurisdiction where it has prevailed below, an unquestionably significant development—and perhaps the result of Professor Jackson's expert advocacy.

One of the key cases whose meaning divided the *Windsor* majority and dissents—at least on jurisdiction—was *I.N.S. v. Chadha*, in which the Court considered the constitutionality of the legislative veto.[228] The *Chadha*/*Windsor* dyad highlights something else quite significant about amicus invitations: the power they give the Court to place substantive issues on the table, and thus to incorporate those issues into the development of the law, *or* to leave particular issues either underdeveloped or unexamined altogether.

The *Chadha* Court, before it considered the substantive constitutionality of the legislative veto, examined its own authority to resolve the dispute. The case pitted the I.N.S. and Chadha, an alien whose suspension of deportation had been overridden by a one-house veto, against Congress. Both houses of Congress argued that the I.N.S., which had prevailed in the Ninth Circuit, was not an aggrieved party and accordingly could not appeal.[229] The Court held, however, that "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal."[230] The Court also concluded that Chadha had standing

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225 United States v. Windsor, 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting)

226 *See id.* at 2696 (Roberts, C.J., dissenting) ("[T]his Court lacks jurisdiction to review the decisions of the courts below.").

227 *See id.* at 2711–14 (Alito, J., dissenting)

228 I.N.S. v. Chadha, 462 U.S. 919, 931 (1983).

229 *Id.* at 929 ("Both Houses of Congress contend that we are without jurisdiction . . . to entertain the INS appeal in No. 80-1832.") (citations omitted).

230 *Id.* at 931.

to challenge the deportation order the agency had issued as a result of the House's veto. Accordingly, the Court proceeded to decide the merits of the case. The Court did *not*, however, delve separately into the status of the two houses of *Congress* as proper parties to the dispute, probably because the parties did not devote much attention to the question. The Department of Justice's brief merely noted in a footnote that "An adversary presentation of the issues will be assured in this Court by the participation of the Senate and House of Representatives, which have the principal interest in sustaining the constitutionality of [the statute]."[231] No other discussion of congressional authority to participate appears in the briefing. The Court explained in its short discussion of the issue that, "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[232] But this statement, whether correct or incorrect, was not subjected to any sort of adversarial testing, and the issue might have benefited from the sort of careful briefing and argument Professor Jackson provided in *Windsor*.[233]

The Court's divergent approaches to jurisdictional questions in its two recent considerations of the Affordable Care Act, *NFIB v. Sebelius* and *King v. Burwell*, supply another illuminating example of just this dynamic. The Court in *NFIB* invited two different amici to brief and argue separate aspects of the case—in particular, as relevant here, that the Anti-Injunction Act barred the Court's consideration of the case.[234] As

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231 Jurisdictional Statement of the United States, I.N.S. v. Chadha, 462 U.S. 919 (1983) (No. 80-1832), reprinted in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1982 TERM SUPPLEMENT 1, 13 n. 9 (Philip B. Kurland & Gerhard Casper eds., 1997).

232 *Chadha*, 462 U.S. at 940.

233 Linda Greenhouse has suggested, based on her examination of Justice Blackmun's papers, that Chief Justice Burger badly mishandled the *Chadha* case in general—that, faced with a difficult case that threatened to upend much of the business of Congress, he essentially "froze"—and that this saga supplies "dramatic evidence . . . of Burger's foundering leadership." LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 157, 154 (2005); *see also* Linda Greenhouse, *How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. PA. L. REV. 1365, 1365 (2006). So it is at least conceivable that the failure to appoint an amicus is connected to the larger behind-the-scenes story of the case.

234 132 S. Ct. 609 (2011) ("Robert A. Long, Esquire, of Washington, D.C., is invited to brief and argue this case, as *amicus curiae*, in support of the position that the Anti–Injunction Act, 26 U.S.C. § 7421(a), bars the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act."); *see also id.* at 608–09 ("H. Bartow Farr, III, Esquire, of

the Court noted in an unusual explanation in its opinion in the case, it chose to appoint an amicus "because there is a reasonable argument that the Anti-Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition."[235] In the end, the Court unanimously agreed with the parties that the Anti-Injunction Act posed no jurisdictional obstacle.[236]

By contrast, the Court in *King v. Burwell* did *not* invite an amicus to argue against the standing of the plaintiffs, who challenged federal health-care subsidies in states without their own health-care exchanges, despite the presence of what some perceived as a reasonable argument against standing.[237] Although the federal government had argued against the plaintiffs' standing in the court of appeals,[238] the Solicitor General's Supreme Court merits brief failed to raise standing at all,[239] and at oral argument the Solicitor General indicated, after a lengthy exchange with a number of Justices, that he was "willing to accept the absence of a representation [of changed circumstances that would defeat standing] as an indication that there is a case or controversy here."[240] That concession, however, did not mean that the issue was beyond dispute; Justice Ginsburg began the arguments by posing a standing question,[241] and the standing exchanges with both the Solicitor General and the petitioners' counsel occupied a full eleven pages of the oral argument transcript.[242] So it was in many ways conspicuous that the Court received neither briefing nor

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Washington, D.C., is invited to brief and argue this case, as *amicus curiae*, in support of the judgment of the Court of Appeals that the minimum coverage provision of the Patient Protection and Affordable Care Act . . . is severable from the entirety of the remainder of the Act.").

235 NFIB v. Sebelius, 132 S. Ct. 2566, 2582 (2012).

236 *Id.* at 2572 (Roberts, C.J.), 2609 (Ginsburg, J.), 2656 (Scalia, J., dissenting).

237 *See, e.g.*, Liz Goodwin, *Twist in Obamacare Supreme Court Case: Weak Plaintiffs*, YAHOO NEWS (Mar. 2, 2015), https://www.yahoo.com/news/twist-in-obamacare-supreme-court-case—weak-plaintiffs-161925430.html [https://perma.cc/XP7P-4AYE]; Louise Radnofsky & Brent Kendall, *New Questions Swirl on an Affordable Care Act Challenger; Plaintiff Listed Motel as Her Address, Which Was Basis for Her Legal Grounds*, WALL ST. J., Feb. 9, 2015.

238 *See* Brief for the Appellees at 48–50, King v. Burwell, 759 F.3d 358 (4th Cir. 2014) (No. 14-1158), 2014 WL 1028988 at **48–50. It was noteworthy, however, that the federal government presented its standing argument *after* its merits argument, a highly unusual sequencing. *See id.*

239 *See* Brief for Respondent United States, King v. Burwell, 135 S. Ct 2480 (2015).

240 Transcript of Oral Argument at 44, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

241 *See id.* at 3.

242 *See id.* at 3–7, 39–44.

oral argument that took the position that the plaintiffs lacked standing, and that standing was not even mentioned in the Court's opinion in the case.[243]

The point here is not that the Court was incorrect in any of its decisions to invite, or not to invite, amici in any of these cases. Indeed, there may well have been principled reasons to make each decision as it did. But without any public guidelines or explanation, it is impossible to make such a determination. And decisions this consequential merit a higher degree of both rigor and transparency.

B. Diversity, Revisited

One set of critiques of both the opaque processes described above, and the results of those processes, sounds in concerns about diversity—both demographic and experiential.

Why should we be concerned that advocates before the Court be diverse—that is, that they be drawn from a relatively broad cross-section of the population? One reason is the considerable evidence that diverse groups produce better outcomes—specifically, that they are better at problem-solving and decision-making—than homogenous groups, even when those homogeneous groups are composed of highly competent individuals. As economist Scott Page argues in his book *The Difference*, experimental studies suggest that under certain circumstances, "collections of diverse individuals outperform collections of more individually capable individuals."[244] That is, Page argues, diverse groups not only perform better than their constituent members would perform individually or better than otherwise similar non-diverse groups; given a baseline of ability and a sufficiently large pool from which to draw, diverse groups

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243 *See* King v. Burwell, 135 S. Ct. 2480 (2015). One difference between the two cases is that the Fourth Circuit in *NFIB* had held that the Anti-Injunction Act stripped the court of jurisdiction, Liberty University v. Geithner, 671 F.3d 391, 397 (4th Cir. 2011), while the lower Court in *King* had found standing, 759 F.3d 358, 365–66 (4th Cir. 2014). An additional difference may have been the fact-bound nature of the standing argument in *King*, which would have made the amicus argument challenging. But it is not clear why either difference should have been dispositive.

244 SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 133 (2007). These conditions include that the problem be difficult (otherwise any problem solver would be able to find the best solution), *id.* at 159; that "all problem solvers are smart" (an oversimplification of what Page terms "the calculus condition"—in essence, that the members of the group must have some knowledge that is relevant to the problem at hand), *id.* at 160; there must be genuine diversity (that is, not all problem-solvers in a group should identify the same solution), *id.* at 160–61; and the pool must be large enough, *id.* at 162.

will perform *better* than non-diverse groups, even where the non-diverse groups are composed exclusively of individuals of higher "ability"[245] than the diverse groups.

This is a striking finding, and Page offers one possible explanation: "The best problem solvers tend to be similar; therefore, a collection of the best problem solvers performs little better than any one of them individually. A collection of random, but intelligent, problem solvers tends to be diverse. This diversity allows them to be collectively better."[246]

Page's work is largely concerned with group problem solving and decision making. So while the applicability of his theory to certain dimensions of Supreme Court practice—the Justices' own deliberative processes, for example—may be self-evident, its relevance to the invited outside attorneys who are the focus of this Essay is less obvious. Are these attorneys participants in a *decisional* process that would bring them within the reach of Page's theory? Put differently, is making legal arguments analogous to solving problems in the way Page describes?

Perhaps not perfectly. But in several senses the endeavors are similar. First, drafting briefs and preparing for oral arguments is often a deeply collaborative undertaking, and the briefs filed by amici today typically contain a number of names on their covers, beyond the direct recipients of the Court's invitations. Those individuals closely resemble, at least experientially, the actual invitees, who are in broad terms elite members of the world of Supreme Court advocates (even if they are presenting their first oral arguments, as is often the case with recent invitees). In some sense, then, it may be that the individuals the Court currently relies upon are all "smart" in the same way—they share roughly similar backgrounds and thus approach the task of making arguments before the Court in similar ways.[247] As social scientists have noted in the context of interest groups and unsolicited amicus filings, "groups of the

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245 *Id.* at 164; *see also* Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16385, 16389 (2004) (explaining that the reason groups of diverse problem solvers outperform groups of problem solvers composed of higher-ability individuals is that in large groups of problem solvers, "the very best problem solvers must become similar."). This similarity is an impediment to optimal problem solving. *Id.*

246 PAGE, *supra* note 244, at 137.

247 Of course, one fix here might be more diversity within the groups at law firms that work together on the briefs that end up filed under the name of an invited amicus. But those employment decisions are not in the hands of the Court; what is unique about the amicus invitation is that it is.

same organizational typology are likely to rely on similar presentation styles and authorities in their advocacy efforts."[248] A similar dynamic likely applies in the context of the Court's current practices with respect to invited amici.

Moreover, the advocates themselves are in some sense participants in the Court's decision-making processes. This may be particularly true in the context of oral argument, which Chief Justice Roberts has described as "the organizing point for the entire judicial process."[249]

Of course, if there is force to this argument, it is not limited to the amicus context, but applies generally to the task of Supreme Court advocacy. So it may be more broadly true that a more diverse pool of advocates might bring to the Justices creative ways of approaching cases—ways they might not otherwise encounter, and that might ultimately enrich and even improve our body of law. But it is uniquely in the context of amicus invitations that the Justices, without any upheaval, could make small but meaningful changes that would bring a degree of additional diversity to their decisional processes.

C. Distributional Consequences

As the preceding Part makes clear, the Justices' opaque and relationship-driven invitation practices dramatically limit the universe of parties who might well provide excellent service to the Court (and might reap the obvious benefits that flow from such service). Indeed, the current approach permits the Justices to dole out the valuable asset of a Supreme Court argument to friends and former employees, in a way that is reminiscent of the cronyism and patronage that characterized government employment writ large before the adoption of the federal Pendleton Act and various state analogues.[250]

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248 Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 L. & SOC. INQUIRY 955, 958 (2007).

249 Roberts, *supra* note 19, at 70 ("Oral argument matters, but not just because of what the lawyers have to say. It is the organizing point for the entire judicial process. The judges read the briefs, do the research, and talk to their law clerks to prepare for the argument. The voting conference is held right after the oral argument . . . . [I]t is natural, with the voting coming so closely on the heels of oral argument, that the discussion at conference is going to focus on what took place at argument.").

250 *See also, e.g.*, David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1073, 1086 (2007) ("One of the primary motivations for the 1883 passage of the Pendleton Act was to ensure competent administration of federal programs by creating a merit-based civil service system."); *see generally* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE (1904) (discussing the history of the civil service in the United States).

The rise of the elite Supreme Court bar may be in part responsible for the Court's current amicus practices in two distinct ways. First, as the Justices increasingly hear only from experts, they may in turn be even more inclined to reach only for individuals who are already steeped in the institution's culture. And second, as practice before the Court becomes increasingly limited to expert practitioners, who tend to present arguments in very similar styles and to adhere to very similar norms, outsiders may find it more and more difficult to perform in a way that is consistent with the Court's desires and expectations around advocacy, both written and oral.[251]

But is the Court's preference for familiarity enough to outweigh the costs of this practice in distributional effects—and to justify the persistence of something that feels like genuine patronage in 2016? The costs to the Court of hearing argument from a lawyer *not* fully socialized into the norms of the Supreme Court would hardly be catastrophic; the Court is not the sort of fragile ecosystem whose existence would be threatened by the introduction of unknown outsiders. The desire for experienced appellate advocates—who are able to argue in a range of registers, who are fluent in both doctrine and the policy implications of various positions[252]—is surely reasonable. But it is beyond dispute that there are skilled appellate advocates without relationships to the Justices who could nevertheless produce strong briefs and supply effective oral advocacy.

Notwithstanding the foregoing critique, there is a sense, perhaps a counter-intuitive one, in which the sort of quasi-patronage involved in these invitations may actually hold out the promise of disrupting the domination of Supreme Court advocacy by the elite bar. That is, although recent invitations invariably issue to lawyers with some relationship to the Justices, the Court's invitation practices *do* seem to indicate a willingness to depart from the increasing norm of extensive prior experience arguing before the Court. They therefore may suggest a route to opening or democratizing Supreme Court advocacy. Consider that 56% of the invitations in the amicus dataset were issued to individuals who had never argued before the Supreme Court; by contrast, the overall number of first-

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251 *See* Larsen & Devins, *supra* note 187, at 50 ("Supreme Court insiders are attuned to presenting the types of arguments and facts that the Justices care about—they know the Court's language and they know the Court's goals.").

252 *See generally* MCGUIRE, *supra* note 26, at 47–77 ("Often, the lawyers who litigate frequently before the Court have abilities that allow them to span the range of legal issues while also serving the specific demands of individual cases and clients.").

time advocates was 43% during the 2007 Term,[253] and is likely even lower today.

It is possible that the Court's willingness to invite these attorneys even given their lack of experience may suggest a degree of openness on the part of the Justices to new participants in the dialogue that precedes their law-making. True, these first-time advocates are both familiar with, and familiar to, the Court and the Justices. But their invitations represent an implicit acknowledgment that first-time advocates can still be up to the task of a Supreme Court argument. The challenge, then, is merely to expand the pool of eligible advocates.

V
SOLUTIONS

There is no question that the relationship-based and opaque process by which these appointments currently issue is troubling; the Supreme Court is one of our most important public institutions, and the opportunity to brief and argue a case before it is of great (and undeniable) value.[254] And, in addition to the distributional consequences of permitting the Justices to dole out these invitations only to former law clerks, the Court's practices have the possibility of shaping the path of the law. So it seems uncontroversial to suggest that in handing out such invitations, the Court should be subject to a degree of transparency and fair process, whatever precise shape any reforms might take. At the very least, an element of both regularity and transparency would be a start, since in many ways "procedural regularity begets substantive legitimacy."[255]

In an illuminating discussion of the context-specific nature of corruption, Deborah Hellman writes:

> Suppose I am a public official hiring someone for a public job. Giving the job to John, despite the fact that he is less qualified than other applicants, because he is my brother-in-law, constitutes a classic case of corruption. Here, I act corruptly because the benefit I allocate is supposed to be awarded on the basis of criteria that exclude family connectedness. Contrast this example with the following one. Suppose I decide to invite John to a holiday dinner at my house. I invite him, even though he is a less-gifted conversationalist than other possible dinner invitees, because he is my brother-in-law.

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253 Lazarus, *supra* note 1, at 1520.

254 I am grateful to Rachel Barkow for helping me clarify some of the framing in this section.

255 Baude, *supra* note 57, at 10.

> Here I do not act corruptly. The criteria that apply to this decision (whom to invite to a holiday dinner) are either completely within my discretion or, properly understood, include family connectedness as a valid criterion.[256]

The question raised by this thought experiment is whether a Supreme Court argument is the sort of public good that ought to be distributed in a method that is subject to public process, or whether it is sufficiently personal, and perhaps inconsequential, that there is no such need. As the foregoing discussion has established, these invitations are too consequential to be considered purely personal. And it is difficult to conceive of an argument that they are "personal" in the sense in which Hellman uses the term. Accordingly, they should be "awarded on the basis of criteria that exclude . . . connectedness."[257]

This Part identifies two sites of possible reform. First, the Court might revise the selection process to allow for the participation of a broader pool of qualified advocates. Second, the Court could clarify the mandate. On the latter score, it could do two things: first, announce and describe with specificity the circumstances under which it will invite amicus participation, to avoid the possibility that ad hoc decisions to appoint or not to appoint will adversely impact the development of the law. And second, it could provide general guidance about the contours of the role, so that lawyers who are not fully socialized into the norms of Supreme Court argument might nevertheless participate.

A. The Messengers

The Court's willingness to depart from the increasing norm of extensive prior experience arguing before the Court actually may suggest that surprising potential inheres in the practice of amicus argument. That is, the Court has already conceded that first-time advocates are up to the task of amicus advocacy. The real challenge, then, may merely be expanding the pool of attorneys from which the Court currently draws, beyond individuals with whom the Justices already have some personal relationship.

An open application process for amici—analogous to the systems some federal appeals courts have implemented for creating pools of willing pro bono attorneys—is one obvious procedural fix. The Second Circuit, for example, maintains such a

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256 Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1392 (2013).

257 *Id.* at 1392.

panel, with inclusion criteria that are publicly available and straightforward—primarily, "at least three years of appellate experience."[258] Such a change would no doubt expand the universe of attorneys willing to serve to include those with no personal relationships to the Court or the Justices. And the Justices could certainly craft criteria that involve significant legal experience, including with appellate advocacy.

Another possibility is for the Court to simply pose the question it wishes to have addressed—e.g., "does the Court lack jurisdiction in this case?"—and allow interested parties to file. It is almost certain that many filers would emerge, and likely very fine ones. Given the resources involved in assembling and filing an amicus brief, it is not clear that this change would have much of a democratizing effect. Moreover, the Court might find itself with multiple briefs making the same argument in different ways; but, given the current norms in favor of allowing virtually unrestricted amicus filing, this would not likely represent a significant change.[259] The Court could then, if it wished to hear oral argument, select from among these invited filers, although the fact that each amicus brief would represent the views of a particular outside entity could complicate matters. Still, this process would be far more transparent than the current approach.[260]

B. The Law Clerk Analogy

Both because a large percentage of amicus invitations go to former Supreme Court law clerks and because law clerk selection processes once closely resembled current amicus invitation processes, both the history and the contemporary practice of law clerk hiring are instructive here.[261]

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258 *See, e.g.*, Notification of Applications for Pro Bono Panel, 2d Cir., (May 1, 2015), http://www.ca2.uscourts.gov/Docs/2015_ProBono_Panel_Recruitment.pdf [https://perma.cc/9D4L-4EAG]. Other federal circuits maintain similar lists of attorneys willing to accept a pro bono appointment, but those lists do not appear to be public, and inclusion criteria are not public. *See* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 323 n.39 (2008) (describing the Federal Circuit list and Rule 29(b)).

259 *See* SUP. CT. R. 37; *see also* PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 45 (2008) ("[T]he Court's modern rules and norms clearly allow for essentially unlimited amicus participation.").

260 Indeed, the Court essentially followed this path in both *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), and *Keeton v. Hustler*, 465 U.S. 770 (1983). *See supra* notes 102–108, 182–183 and accompanying text.

261 For general discussions of the institution of the Supreme Court law clerk, see PEPPERS, *supra* note 126, at 206–12; Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95 (2012);

Supreme Court law clerk hiring was once driven almost entirely by individual Justices' relationships with professors or deans at elite law schools. Judge Richard Posner has described the selection process in the 1960s, when he served as a law clerk, this way: "There weren't many applications; there were no particular standards. Often the justice would delegate the selection of his law clerks to a personal friend, a professional acquaintance, or a law professor he was friendly with, without bothering to screen or interview applicants himself."[262] Justice Stevens tells a similar story about law clerk selection in the late 1940s, when he secured a clerkship with Justice Wiley Rutledge:

> Willard Wirtz, then a professor of law at Northwestern, was a close friend of Justice Wiley Rutledge, and Willard Pedrick, also a law professor at Northwestern, had a close relationship with Chief Justice Fred Vinson . . . . Unbeknownst to Art [Justice Stevens's Law Review Co-Editor-in-Chief] and me, the two Willards had had discussions with the two Justices and believed that two clerkships would be available to us: one with Rutledge during the 1947 Term and the other with the Chief Justice during the 1948 Term. Considering us equally qualified for both positions, they came to the *Law Review* office to find out which position each of us would prefer. While more prestige would attach to a clerkship for the Chief Justice, given our advanced age [both men had served in the war prior to law school], we both wanted the earlier opportunity. To resolve the conflict, we resorted to a tie-breaking method, one that I have often been tempted to use during my years on the bench: We flipped a coin.[263]

Others describe geography as a key factor in the Justices' early hiring decisions.[264] According to one anecdote, Justice Hugo Black was generally inclined to hire law clerks from Ala-

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David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 963–68 (2007) (book review).

262 Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 301 (2013). Ward & Weiden paint a similar picture, although they suggest that the justices did receive unsolicited applications, even before the dawn of the current era in law clerk hiring. WARD & WEIDEN, *supra* note 48, at 56.

263 John Paul Stevens, *A Personal History of the* Law Review, 100 NW. U. L. REV. 25, 26 (2006).

264 Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution*, 23 HARV. BLACKLETTER L.J. 23, 27 (2007) ("Selection during earlier years was comparatively informal, and Justices often based their decisions on idiosyncrasies such as geography.").

bama, if "suitable" candidates from Alabama could be located.[265]

By contrast, every Justice now employs a law clerk hiring process that is, at least in theory, open and competitive. The basic criteria for eligibility are relatively transparent—graduation at or near the top of the class at an elite law school, generally followed by a clerkship for a federal appellate judge—although many Justices continue to rely heavily on personal relationships with members of law school faculties. Some also use screening committees to select finalists, or rely on lower court clerkships with "feeder" judges as proxies for quality and/or fit.[266]

The existing scholarship does not offer a satisfactory explanation for the transformation of the law clerk hiring process, from one based entirely on personal networks and relationships, to one in which every top law student with a post-graduate clerkship with a well-regarded federal judge is at least in theory eligible. The authors of the recent books *Sorcerers' Apprentices*[267] and *Courtiers of the Marble Palace*,[268] two exhaustive examinations of the institution of the Supreme Court law clerk, note the increase in application numbers and thus competition for Supreme Court clerkships beginning in the Burger and Rehnquist Courts, and appear to attribute the increasing formality of the selection process to this increase in applications. But neither book engages in any sustained exploration of this transformation.

The degree to which the law clerk hiring process is now a merit-based one should not be overstated; there is considerable evidence that law clerk hiring, at both the Supreme Court and lower federal courts, is largely driven by applicants' academic or social connections to faculty members or even current law clerks.[269] The point is simply that a process that is to some degree competitive—and which does at times produce law

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265 In SORCERER'S APPRENTICES, authors Ward & Weiden recount a telling exchange between Justice Black and Yale Law School Dean Wesley Sturges. Dean Sturges wrote Justice Black a letter highlighting three potential law clerks for the 1948 Term, noting that, "We all appreciate that you may prefer a boy from your home State of Alabama, and I am placing an Alabama boy before you for first consideration." Black responded that if the candidate from Alabama "desires to be my clerk, I should be glad to have him." WARD & WEIDEN, *supra* note 48, at 56.

266 *See* Shapiro, *supra* note 55, at 105.

267 WARD & WEIDEN, *supra* note 48, at 58 ("The number of applicants exploded during the Burger and Rehnquist Courts, and now more than one thousand applicants apply each year for less than a handful of spots per chamber.").

268 PEPPERS, *supra* note 126, at 174–205.

269 *See* Avery et al., *supra* note 164, at 473–75.

clerks with no existing connections to the Court or to the Justices—does exist.

C. The Mandate

Finally, clear standards and instructions might both limit the use of the invitation power to quietly shape the path of the law and facilitate the participation of non-insiders. First, the Court could promulgate formal standards or rules for the appointment of amici, explaining in at least general terms the types of situations in which it will appoint an amicus. As a recent Note catalogues, the Court today frequently chooses to "grant, vacate, and remand" (GVR) in cases involving confessions of error by the government.[270] But, as the prevalence of confession-of-error cases in the amicus dataset illustrates, the Court also invites amici in many such cases. The Court may well use internal criteria for deciding when to GVR a case rather than inviting an amicus; but to date it has given no clear sense of what those criteria might be.

In addition to eliminating the sort of subtle shaping of the development of law that may occur through the use—and non-use—of invitations in particular cases, clear criteria might aid outsiders by articulating the nature of the mission beyond simply, say, defending a judgment below. Were it to consider formalizing the process, the Court might eliminate the category of invitations that seems most troubling, in part because they are so subjective—those in which the quality of the advocacy drove the invitation.[271]

D. To What End?

Many of these recommendations go broadly to concerns about transparency. Transparency in the political branches is generally viewed as a mechanism of governmental accountability,[272] although many critics question its efficacy on that

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270 Michael T. Morley, Note, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 309–12 (2014).

271 Note that the Court has other tools it can use when it is concerned about the quality of advocacy. For example, in *Kennedy v. Louisiana*, a case challenging the constitutionality of a Louisiana statute authorizing the death penalty for the rape of a child, the Court granted a request for divided argument by another state with a similar statute, perhaps at least in part because an experienced Supreme Court advocate and former law clerk was at the time the Solicitor General of the second state. *See* 554 U.S. 407, 411 (2008) ("R. Ted. Cruz et al. as amici curiae, by special leave of Court, in support of respondent.").

272 *See* Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 619–20 (2010):

score.[273] This democratic-accountability concern makes good sense in the context of the political branches. But these precise concerns are arguably inapplicable in the context of the Supreme Court—an institution that is by constitutional design insulated from the democratic process. So there is a genuine question as to whether an accountability interest has any salience in the context of the Supreme Court—and, if not, whether transparency itself as a substantive value fits poorly with the role of the Supreme Court in our constitutional order.

While the notion of accountability may be an imperfect fit with the design and role of the federal courts, courts may serve an *indirect* accountability-forcing function vis-à-vis the other branches of government—that is, open and independent courts are arguably critical to ensuring the accountability of the political branches, particularly where mechanisms allow courts to review and pass on the conduct of those branches. And scholars have argued that the values of openness or transparency, on the one hand, and independence, on the other, need not exist in tension in the context of the judiciary itself. Judith Resnik, for example, contends that openness promotes judicial independence: "Open processes serve as a mechanism to make plain that a government must acknowledge the independent power of the judge, or open processes can reveal state efforts to try to impose its will on judges."[274]

> Government institutions operate at a distance from those they serve. To be held accountable and to perform well, the institutions must be visible to the public. But in the normal course of their bureaucratic operation, public organizations—sometimes inadvertently, sometimes willfully; sometimes with good intent, sometimes with unethical or illegal intent—create institutional impediments that obstruct external observation. These obstructions must be removed in order for the institutions to be visible and, ultimately, transparent.

See also Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1346 ("Foremost among [the aims of transparency], at least in much of contemporary discourse, is what is commonly described as 'accountability.'"); Shkabatur, *supra* note 46, at 83 ("Public accountability has been inseparably linked to transparency; and transparency is routinely regarded as a necessary precondition of accountability.").

273 *See* Shkabatur, *supra* note 46, at 84 ("[I]t is not clear to what extent current transparency policies actually enhance public accountability.").

274 Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 787, 809 (2008) (graphically "mapping" the "declining public dimensions of conflict resolution" in the United States); *see also* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 665 (2010) ("One can find numerous affirmations in constitutions and in case law at the state, national, and international levels about obligations to provide 'open and public courts' and independent judges . . . .").

More broadly, Rebecca Brown has argued that accountability need not be conceived of merely as a "means to achieve maximum satisfaction of popular preferences," but rather is "a structural feature of the constitutional architecture."[275] And she argues that the goal of this structure is to protect liberty, not merely to promote majoritarianism. If she is correct, perhaps accountability values need not exist in tension with an independent judiciary[276]—rather, one central goal of each is the protection of individual liberty. And if that is true, there may be good reason to attend to questions of transparency and the Supreme Court.

In addition, as perceived governmental legitimacy comes increasingly to rest, to at least a degree, on openness in the political branches of government—and, as a corollary, as secrecy comes increasingly to be associated with illegitimacy—there is ever greater urgency to questions of transparency at the Court.

CONCLUSION

As this discussion has shown, examining the practice of amicus invitation can shed important light on "where the Court is today, what cues it responds to, and what kind of dialogue the Justices are currently engaged in with the legal, political, and social culture that surrounds them."[277] What emerges is a picture of a Court that has become increasingly insular and cloistered over time, less and less inclined to invite in outsiders who might approach the law in different, perhaps radically different, ways. The results of the process examined here, in particular its distributional consequences and its potential for impacting the path of the law, should give all serious Court-watchers pause.

At the same time, there is another side to the story, both more optimistic and more pragmatic: the Court's willingness to depart from the norm of prior experience holds out the tantalizing possibility of expansion of the ranks of the Supreme Court bar. The Justices have shown themselves to be comfortable with first-time advocates, and this may be a significant fact in an era of a shrinking Supreme Court bar; the task, then,

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275 Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998).

276 *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

277 Linda Greenhouse, *What Got Into the Court? What Happens Next? Libra Journalist-in-Residence Lecture*, 57 ME. L. REV. 1, 2 (2005).

is designing an invitation system that will grant first-time advocates from outside the ranks of former law clerks to the Justices the opportunity to participate in the Court's production of law.

Of course, the unfettered discretion the Court enjoys in its invitation practice is not the exception, but rather the rule—the Court's recusal practices and its promulgation of its own internal rules are but two notable examples. But there is real value in focusing on aspects of Supreme Court practice that are shrouded in secrecy for reasons unrelated (or antithetical) to the integrity of the Court's decision-making processes. The Court's invitation practices have gone uniquely unnoticed, and I hope through this Essay to draw attention to both the troubling dimensions of the practice, and the promise it may hold out.

APPENDIX
AMICUS INVITATIONS

	Year of decision	Case	Amicus	SCOTUS clerkship
1	1926	Myers v. United States	George Wharton Pepper	
2	1955	Granville-Smith v. Granville-Smith	Erwin N. Griswold	
3	1955	Williams v. Georgia	Eugene Gressman	Justice Murphy
4	1957	Lambert v. California	Warren M. Christopher	Justice Douglas
5	1958	United States v. Cores	Clark M. Clifford	
6	1967	Commissioner v. Stidger	John A. Reed	
7	1968	Cheng Fan Kwok v. INS	William H. Dempsey, Jr.	Chief Justice Warren
8	1969	Daniel v. Paul	James W. Gallman	
9	1972	Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.	J. Robert Murphy	
10	1973	United States v. 12 200-Ft. Reels of Super 8mm. Film	Thomas H. Kuchel	
11	1973	Gomez v. Perez	Joseph Jaworski	
12	1974	Kokoszka v. Belford	Benjamin R. Civiletti	
13	1976	Matthews v. Weber	Peter D. Ehrenhaft	Chief Justice Warren
14	1982	Brown v. Hartlage	L. Stanley Chauvin, Jr.	
15	1983	Bob Jones University v. United States	William T. Coleman, Jr.	Justice Frankfurter
16	1983	Verlinden B.V. v. Cent. Bank of Nigeria	Stephen N. Shulman	Justice Harlan II
17	1983	Kolender v. Lawson	Mark D. Rosenbaum	
18	1984	Keeton v. Hustler Magazine	Stephen M. Shapiro	
19	1984	Thigpen v. Roberts	Rhesa H. Barksdale	Justice White
20	1985	United States v. Sharpe	Mark Jeffrey Kadish	
21	1987	O'Connor v. Ortega	Joel I. Klein	Justice Powell
22	1987	Pennsylvania v. Ritchie	John H. Corbett, Jr.	
23	1987	Vermont v. Cox	Henry Hinton	
24	1988	Mackey v. Lanier Collection Agency & Service	Maureen E. Mahoney	Justice Rehnquist
25	1988	United States v. Fausto	John M. Nannes	Justice Rehnquist
26	1989	Bonito Boats, Inc. v. Thunder Craft Boats, Inc.	Charles Lipsey	
27	1989	United States v. Halper	John G. Roberts	Justice Rehnquist
28	1990	New York v. Harris	Barrington D. Parker, Jr.	
29	1991	Toibb v. Radloff	James Hamilton	
30	1995	Gutierrez de Martinez v. Lamagno	Michael K. Kellogg	Justice Rehnquist
31	1996	Ornelas v. United States	Peter D. Isakoff	Justice Stevens
32	1997	Ogbomon v. United States	Thomas G. Hungar	Justice Kennedy
33	1998	Bousley v. United States	Thomas C. Walsh	
34	1998	Forney v. Apfel	Allen R. Snyder	Justices Rehnquist & Harlan II
35	1998	Hohn v. United States	Jeffrey S. Sutton	Justices Powell & Scalia
36	2000	Dickerson v. United States	Paul G. Cassell	Chief Justice Burger
37	2001	Becker v. Montgomery	Stewart A. Baker	Justice Stevens
38	2002	Great-West Life & Annuity Insurance Co. v. Knudson	Richard G. Taranto	Justice O'Connor
39	2002	Alabama v. Shelton	Charles Fried	Justice Harlan II
40	2003	Clay v. United States	David W. DeBruin	Justice Stevens
41	2008	Greenlaw v. United States	Jay T. Jorgensen	Chief Justice Rehnquist
42	2008	Irizarry v. United States	Peter B. Rutledge	Justice Thomas

43	2010	Kucana v. Holder	Amanda C. Leiter	Justice Stevens
44	2010	Reed Elsevier, Inc. v. Muchnick	Deborah Jones Merritt	Justice O'Connor
45	2011	Pepper v. United States	Adam G. Ciongoli	Justice Alito
46	2011	Bond v. United States	Stephen R. McAllister	Justices White & Thomas
47	2011	Tapia v. United States	Stephanos Bibas	Justice Kennedy
48	2012	Dorsey v. United States	Miguel A. Estrada	Justice Kennedy
49	2012	Setser v. United States	Evan A. Young	Justice Scalia
50	2012	National Federation of Independent Business v. Sebelius	Robert A. Long	Justice Powell
51	2012	National Federation of Independent Business v. Sebelius	H. Bartow Farr III	Justice Rehnquist
52	2013	Millbrook v. United States	Jeffrey S. Bucholtz	Justice Alito (on the Third Circuit)
53	2013	Levin v. United States	James A. Feldman	Justice Brennan
54	2013	United States v. Windsor	Vicki C. Jackson	Justice Marshall
55	2013	Sebelius v. Auburn Regional Medical Center	John F. Manning	Justice Scalia
56	2015	Mata v. Lynch	William Peterson	Justice Thomas
57	2016	Montgomery v. Louisiana	Richard Bernstein	Justice Scalia
58	2016	Green v. Brennan	Catherine M.A. Carroll	Justice Souter
59	2016	Welch v. United States	Helgi C. Walker	Justice Thomas