

# A DEMOCRATIC THEORY OF AMICUS ADVOCACY

RUBEN J. GARCIA\*

## ABSTRACT

*Amicus curiae* (“friend of the court”) participation in litigation has flourished in recent years as many groups and individuals seek to influence the outcome of litigation. Amicus filers are not parties and judges have wide discretion to reject amicus briefs if they believe that the amicus participation does not add anything to the briefs already filed by the parties. In three recent cases, Seventh Circuit Court of Appeals Judge Richard Posner has rejected amicus filings and promised to closely scrutinize applications to file amicus briefs in the future. Judge Posner’s influence has led an increasing number of judges, primarily at the district court level, to deny leave to file amicus briefs.

This Article argues for the importance of amicus participation in a democratic system. The Article proposes changes to the federal appellate standards for granting leave to file amicus briefs. Currently, court rules generally require that amicus briefs add something new to the arguments already made by the parties. This Article argues that the standards for sanctions under the Federal Rules of Civil Procedure should determine whether amicus briefs should be accepted for filing. This standard might increase the number of amicus briefs that are accepted for filing, but would also increase democratic participation in the court system. While placing some limits on amicus participation is important to the proper functioning of the judicial system, this Article argues that limits on amicus participation should be minimal in light of the democratic and constitutional values that amicus participation furthers.

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\* Associate Professor, California Western School of Law, San Diego, rgarcia@cwsu.edu. Thanks to my colleagues who listened to me present this project at California Western and specifically those who provided feedback on earlier drafts, William Aceves and Tom Barton. My thanks also go to the students who provided research assistance on this project: Jay Aboudi, Cristian Arrieta, Emma Bennett-Williams, Joanna Jacob, Tracy Jones, Amy Osborne, Bart Parsley, Vanessa Ruggles, Dwayne Stein, and Shannon Stone. Thanks and love to my wife, Tori, for her advice, support, and persistence.

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## I. INTRODUCTION

Amicus curiae<sup>1</sup> (herein “amicus” or “amici”) briefs have become a regular part of the litigation process. Indeed, these briefs filed by nonparties to litigation have become so common that some judges are looking for ways to limit them. In a 2003 Seventh Circuit Court of Appeals opinion, Judge Richard Posner denied leave to file an amicus brief and cited the following reasons:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.<sup>2</sup>

As Judge Posner’s exasperated tone indicates, amicus briefs have flourished as a part of the litigation process. A recent study of amicus activity in the United States Supreme Court found that amicus briefs were filed in only 39% of the cases during the Warren Court (1953-1969) and 67.5% of the cases in the Burger Court (1969-1986).<sup>3</sup> By

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1. According to Black’s Law Dictionary: “[Latin ‘friend of the court’] A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter. . . . Often shortened to *amicus*. . . . Also termed *friend of the court*. Pl. amici curiae.” BLACK’S LAW DICTIONARY 93 (8th ed. 2004).

2. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (citing *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000) and *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062 (7th Cir. 1997)).

3. JUDITHANNE SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS *AMICUS CURIAE* BEFORE THE U.S. SUPREME COURT 28 (2005).

contrast, amicus briefs were filed in 83% of U.S. Supreme Court cases from 1986 to 1997.<sup>4</sup>

Amicus briefs are filed by persons or groups not directly involved in the litigation. All courts impose some limits on whether amicus briefs may be filed.<sup>5</sup> Despite the historical roots and proliferation of amicus participation in recent years, the practice is looked at with suspicion by some observers.<sup>6</sup> Judge Posner's influence on the law merits a closer examination of why we have amicus participation in our democratic system.<sup>7</sup>

This Article offers a normative defense of amicus participation, in light of its important role in the legal profession and in a democratic judicial system. The amicus brief is a form of speech and petition, to which the courts should give due consideration.<sup>8</sup> The use of amicus briefs to petition the government is especially important for constitutional issues since the judiciary is empowered to interpret the Constitution. The goal of this Article is to guide judicial discretion in favor of broad acceptance of amicus briefs, rather than the narrow view espoused by Judge Posner and other detractors who view amicus briefs as nefarious interest group activity.

Much of the scholarship on amicus briefs has described how the courts make decisions and the impact of amicus participation on

4. *Id.*

5. For example, Supreme Court Rule 37 states: "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored." SUP. CT. R. 37(1).

6. Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 LITIG. 5 (2006), available at <http://www.mayerbrown.com/publications/article.asp?id=3144&nid=6> (describing the recent trend of courts in limiting or rejecting amicus briefs); Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823 (1999) (expressing concern about the helpfulness of amici in Supreme Court employment cases); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667 (2005) (arguing that most amicus briefs are not helpful to courts and should be limited).

7. Judge Posner is a prolific author of both judicial opinions and legal scholarship in a number of areas ranging from law and economics to pragmatism and security policy. His most recent books deal with the government's prosecution of terrorism post-9/11. See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006); RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM (2006). For scholarship examining the influence of Judge Posner on the law, see, for example, Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000); see also Project Posner, <http://www.projectposner.org> (last visited Feb. 15, 2008) (searchable database of Judge Posner's decisions).

8. Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835 (2002).

those decisions.<sup>9</sup> These articles focused on empirical data documenting the rise in amicus participation in courts at all levels over the last thirty years.<sup>10</sup> Courts have generally allowed amicus briefs to be filed, and several studies have tried to measure their effectiveness and impact. This Article, building on previous studies revealing that amicus briefs have some impact on judicial decisionmaking,<sup>11</sup> will focus on the normative question of how courts ought to decide whether to grant leave to file amicus briefs. This Article places the amicus brief in historical, constitutional, and institutional contexts to argue for a broader standard for courts to accept the filing of amicus briefs. Further, this Article argues that judges may have an ethical duty to give fair consideration to all amicus briefs filed.

This Article also argues that amicus litigation has an expressive function that may be protected by the Constitution. Research on the efficacy of litigation as a social movement strategy continues to produce divergent results.<sup>12</sup> Some activists argue that engaging in litigation diverts movement resources away from needed work in other arenas, such as legislative or grassroots organizing work.<sup>13</sup> Others point to the need for litigation to shape the goals of social movements.<sup>14</sup> Regardless of the efficacy of the litigation, it is clear that many social movements use the courts to send messages about their goals. Rather than initiating lawsuits for this purpose, many groups are utilizing amicus curiae status to get their messages into the public domain. The amicus brief is typically the only court appearance allowed by a nonparty to litigation.

9. See, e.g., Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *YALE L.J.* 694 (1963) (discussing that amicus curiae briefs can, among other things, provide factual information to the court and point out implications of the court's ruling).

10. Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *LAW & SOC'Y REV.* 807, 810-16 (2004) (analyzing why amicus briefs are effective); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. PA. L. REV.* 743, 751-56 (2000) (exploring amici curiae activity to the Supreme Court in the last fifty years).

11. Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 *J. POL.* 782 (1990); Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 *POL. RES. Q.* 339 (1993).

12. See generally MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

13. LEE EPSTEIN, *CONSERVATIVES IN COURT* (1985) (examining the use of amicus curiae briefs by conservative interest groups); Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 *L. & SOC. INQUIRY* 663, 666-67 (2005) (critiquing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991)).

14. Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 *AM. U. L. REV.* 1243, 1258-65 (1992) (arguing for a limit on court discretion to allow the amicus curiae device).

The burden on lawyers' First Amendment rights by court sanctions and bar discipline is frequently justified by lawyers' role as officers of the court.<sup>15</sup> As officers of the court, attorneys are ethically bound not to clog the courts' docket with frivolous litigation, and also to display candor to the tribunal.<sup>16</sup> Because amicus briefs are often used by organized groups to send a message to legislatures, courts, and the public rather than to achieve a particular result, the "officer of the court" function is in tension with free speech.<sup>17</sup> This Article does not argue for an abolition of the limits on the filing of amicus briefs. Instead, the standard of Federal Rule of Civil Procedure (FRCP) 11, usually used to sanction parties, can provide a better "gatekeeper" function to decide which briefs should be accepted for filing than the current rules on amicus participation.<sup>18</sup>

This Article places the right to file amicus briefs within the First Amendment right to petition.<sup>19</sup> Although the First Amendment's Petition Clause and its language "for the redress of grievances" seems to require that the citizenry have something approaching the standing required by Article III of the Constitution, this is inconsistent with common usage of the petition clause in town halls and public meetings and congressional hearings.<sup>20</sup>

The amicus brief is an institutional part of U.S. court systems, serving to broaden the transparency and democratic legitimacy in the courts. I argue in this Article that the courts should give fair consideration to amicus briefs unless they are plainly sanctionable.<sup>21</sup>

15. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 569-70 (1998).

16. MODEL RULES OF PROF'L CONDUCT R. 3.1-3.4 (2003).

17. Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 *EMORY L.J.* 859, 872-74 (1998) (arguing that lower scrutiny of restrictions on lawyer speech is an unconstitutional condition on bar membership); W. Bradley Wendel, *Free Speech for Lawyers*, 28 *HASTINGS CONST. L.Q.* 305, 357-59 (2001) (examining the consistency of lawyers' diminished speech rights with ethical obligations).

18. FED. R. CIV. P. 11.

19. Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: Appraisal of Hakman's "Folklore"*, 16 *LAW & SOC. REV.* No. 2, 311 (1981) (testing Hakman's 1956 argument that amicus parties are not engaging in interest group activity); Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 *JUST. SYS. J.* 35 (1983) (finding that the Supreme Court rarely rejects amicus briefs, but the influence of amici on Court decisions is variable).

20. Michael J. Harris, Note, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 *SUFFOLK J. TRIAL & APP. ADVOC.* 1 (2000) (expressing concern about "litigating amici").

21. FED. R. CIV. P. 11(b) requires attorneys and parties submitting to the court to certify "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

(1) [the paper presented to the court] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

Moreover, the amicus brief is an important part of “deliberative democracy,” a theory that favors fully informed debate as a condition to democratic society.<sup>22</sup>

In Part II of this Article, I survey the use and potential abuse of amicus participation. Then, in Part III, I will discuss the First Amendment values that amicus participation furthers. Next, in Part IV, this Article furthers a theoretical framework that places amicus participation in a democratic court system. Finally, in Part V, I suggest a standard for accepting amicus briefs that will both make it easier to file amicus briefs and also reduce some of the abuses that amicus participation might raise. As I will discuss, this Article argues for a liberalization of amicus standards because of the constitutional, ethical, and democratic implications of amicus participation.

The main tenet of this Article is that amicus participation plays an important role in the democratic process. This Article views the amicus brief not just as an element of interest group lobbying in today’s society—even though it might have that purpose or effect—but rather as an integral part of participatory democracy. A review of Judge Posner’s writings confirms that his suspicion of amicus briefs may be related to his theories regarding the nature of democracy.<sup>23</sup> Moreover, amicus participation, because it is rooted in the right to petition, is an integral part of social movements. For all these reasons, courts should be liberal in granting leave to file amicus briefs.

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- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
  - (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
  - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

*Id.*

22. Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. REV. 1875, 1877-78 (2006); David M. Estlund, *Who’s Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993); Ethan J. Lieb, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 904 (2006).

23. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 16-18 (2003) (arguing in favor of Schumpeterian democracy over deliberative democracy).

## II. FRIENDLY FIRE: DIFFERING APPROACHES TO AMICUS BRIEFS

A. *Federal Court Rules: "Does the Brief Add Anything New?"*1. *A Summary of Amicus Rules*

Although amicus participation dates to Roman law, court rules regulating *amici* are a relatively recent phenomenon.<sup>24</sup> Amicus rules vary in different courts, but a common theme is the requirement to avoid repeating arguments made by the parties.<sup>25</sup> Since promulgating its first amicus rule in 1937, the United States Supreme Court has increasingly placed limits on amicus participation but rarely ever rejects amicus briefs.<sup>26</sup> The number of amicus briefs filed in the U.S. Supreme Court began increasing in the 1980s.<sup>27</sup> In the 1989 *Webster v. Reproductive Health Services* case, over eighty amicus briefs were filed involving 5,469 groups and individuals.<sup>28</sup> In 2003, a total of eighty-two briefs were filed in the two cases arising from the University of Michigan's affirmative action policies, *Gratz v. Bollinger* and *Gutter v. Bollinger*.<sup>29</sup>

United States Supreme Court Rule 37 states that an amicus brief "that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."<sup>30</sup> All other briefs that do not serve to bring new, relevant matters to the Court are a burden and their filing is disfavored.<sup>31</sup> Supreme Court Rule 9 requires all filings, with the exception of certain

24. MCLAUCHLAN, *supra* note 3, at 3-5. McLauchlan notes that under Roman and English law, amici were often solicited by the court. *Id.* at 3. McLauchlan traces voluntary participation at least to 1695, when a Member of Parliament informed the court of his interpretation of a statute the court was construing. *Id.* at 4 (citing *Horton v. Ruesby*, Comb. (1686) 90 Eng. Rep. 326 (K.B.)); Krislov, *supra* note 9, at 695.

25. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (challenging race based admissions at the University of Michigan's College of Literature, Science and the Arts); *Gutter v. Bollinger*, 539 U.S. 306, 326 (2003) (challenging race based admissions at the University of Michigan's law school).

26. A Westlaw search in the Supreme Court database (SCT) of "reject! /3 amic!" yielded no results.

27. See MCLAUCHLAN, *supra* note 3, at 6.

28. 492 U.S. 490 (1989).

29. Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503 (2004) (discussing the roles of various amici—including the military, ethnic groups, the government, and professional organizations—and their influence in the Michigan cases). For a compilation of the numerous amicus briefs, see University of Michigan, Admissions Lawsuits, *Gutter* and *Gratz*: Amicus Briefs, <http://www.vpcomm.umich.edu/admissions/legal/amicus.html> (last visited Feb. 15, 2008).

30. SUP. CT. R. 37(1).

31. *Id.*

specified actions by prisoners, to be brought by a member of the Supreme Court bar.<sup>32</sup>

Amicus rules in the federal circuit courts of appeal generally follow the same pattern as the U.S. Supreme Court rules. Rule 29 of the Federal Rules of Appellate Procedure—which provides a template for the court rules of individual circuits—requires leave of court or the consent of all the parties to the filing of the brief.<sup>33</sup> The theory behind this rule seems to be that the actual parties in the lawsuit (plaintiffs, defendants, and intervenors) have a right to decide whether to allow an outsider to muddy the waters. Moreover, there would seem to be strong disincentives for the existing parties to litigation to consent to the filing of an amicus brief that is contrary to their positions, thus necessitating leave of court in most cases.<sup>34</sup>

Individual circuits can adopt variations to the rules.<sup>35</sup> The Ninth Circuit Court of Appeals, for example, discourages the filing of “multiple amici curiae briefs raising the same points in support of one party.”<sup>36</sup> Instead of filing briefs, parties are directed to file a “short letter” stating their agreement with factual or legal statements made

32. SUP. CT. R. 9(1). Admission to the Supreme Court bar is generally open to attorneys admitted to the bar of any state for at least three years and in good standing. SUP. CT. R. 5(1).

33. FED. R. APP. P. 29(a); David B. Smallman, *Amicus Practice: New Rules for Old Friends*, 25 LITIG. 25 (1999); Tony Mauro, *Court Gets a Tad Less Friendly to Amici*, LEGAL TIMES, Feb. 19, 1990, at 10.

34. Federal district courts have also seen an increase in the number of amicus briefs filed in recent years. Cf. Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?* 41 AM. U. L. REV. 1243, 1256 (1992) (noting that amicus participation “commonly” appears at all levels of the federal court system). State courts have varying rules for amicus briefs. See, e.g., CAL. R. CT. 8.204(b) (affidavit must state the nature of the applicant’s interest and set forth facts or questions of law that have not adequately been presented by the parties and their relevancy to the disposition of the case); ILL. ST. S. CT. R. 345, available at [http://www.state.il.us/court/SupremeCourt/Rules/Art\\_III/ArtIII.htm#345](http://www.state.il.us/court/SupremeCourt/Rules/Art_III/ArtIII.htm#345) (applicants must state their interest and how the brief will assist the court).

35. See, e.g., FED. R. APP. P. 29. D.C. CIR. LOCAL R. 29(a) (“The brief must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court.”); 3D CIR. LOCAL R. 29.1 (“Before completing the preparation of an amicus brief, counsel for an amicus curiae shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or re-statement of those arguments in the amicus brief.”); 5TH CIR. LOCAL R. 29.2 (“The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs.”); 5TH CIR. LOCAL R. 29.4 (“After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.”); 9TH CIR. R. 29-1, CIR. ADV. COMM. NOTE (“The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored.”); 10TH CIR. LOCAL R. 29.1 (“The court will receive but not file proposed amicus briefs on rehearing.”).

36. CIR. ADVISORY COMM., NOTE TO R. 29-1, available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/c9254affb51940d288257316006b454d/\\$FILE/FRAP\\_0707.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/c9254affb51940d288257316006b454d/$FILE/FRAP_0707.pdf).

in the other parties' briefs. Most of the other variations in circuit court rules simply caution amicus filers not to repeat arguments already made by the parties.<sup>37</sup>

Sometimes, courts reach out to experts to file amicus briefs.<sup>38</sup> The Federal Circuit, for example, maintains a list of bar and other associations which will be invited to file briefs when the court directs.<sup>39</sup> The Supreme Court regularly invites the Solicitor General of the United States to submit the views of the federal government in the form of amicus briefs, and no leave of court is required for the Solicitor General to file an amicus brief.<sup>40</sup> Often litigants file a brief on behalf of no party, but file instead for the court's benefit and to discuss the broader implications of the court's ruling.<sup>41</sup> Thus, amicus briefs can serve important functions for the courts.

State and federal trial courts have received an increasing number of amicus briefs in recent years, but they do not generally have separate rules on the acceptance of amicus briefs, and instead follow the rules of the appeals courts.<sup>42</sup> Perhaps because of the increasing number of briefs being filed, more and more district courts are taking their leads from appellate decisions such as those written by Judge Posner.<sup>43</sup> An increasing number of amicus briefs are being filed in state supreme courts and intermediate appellate courts as well. These courts generally have rules about the filing of amicus briefs that mirror the federal courts.<sup>44</sup>

37. See *id.* Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their "Friends"*, 24 LITIG. 24 (1998).

38. FED. R. APP. P. 21(b)(4) allows for federal courts of appeal to invite amicus curiae briefs from U.S. District Courts in mandamus proceedings. A recent example occurred in a case involving the criminal tax prosecution of KPMG. Brief of U.S. District Judge Lewis A. Kaplan as Amicus Curiae, *Stein v. KPMG, LLP*, 486 F.3d 753 (2d Cir. 2007), available at [http://taxprof.typepad.com/taxprof\\_blog/files/kaplan\\_brief.pdf](http://taxprof.typepad.com/taxprof_blog/files/kaplan_brief.pdf).

39. FED. CIR. R. 29(b) ("The clerk will maintain a list of bar associations and other organizations to be invited to file amicus curiae briefs when the court directs. Bar associations and other organizations will be placed on the list if they request. The request must be renewed annually not later than October 1.").

40. SUP. CT. R. 37(4). Leave of court is also not required for an authorized law officer of a state, county, city, or town. *Id.*

41. SUP. CT. R. 37(3)(a) (allowing amicus briefs to be filed on behalf of either party).

42. *Animal Prot. Inst. v. Martin*, No. CV-06-128 BW, 2007 WL 647567, at \*3 (D. Me. Feb. 23, 2007) (following Judge Alito's approach); *Triad Int'l Maint. Corp. v. S. Air Transp., Inc.*, No. 2:04-CV-1200, 2005 WL 1917512, at \*1-3. (S.D. Ohio Aug. 10, 2005) (applying Fed. R. App. P. 29 in a bankruptcy court appeal); *U.S. v. Alkaabi*, 223 F. Supp. 2d 583, 592-93 (D.N.J. 2002) (following the 3d Circuit's application of Fed. R. App. P. 29).

43. See *Cobell v. Norton*, 246 F. Supp. 2d 59, 62-63 (D.D.C. 2003) (rejecting an amicus brief by an Indian tribe on the ground that doing so would encourage other tribes to expand the already "extensive record in the case"); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 33 (D.D.C. 2002) (denying the ACLU's motion for leave to file an amicus brief in support of the government on the ground that the United States was "more than adequately represented").

44. See, e.g., CAL. R. CT. 8.200(c)(1), 8.520(f)(1) ("any person" may file an application for amicus participation).

Many courts also have similar procedures for requesting permission to file amicus briefs.<sup>45</sup> The rules often require the amicus party to file a proposed brief so the court can evaluate it before deciding whether to allow the brief to be filed.<sup>46</sup> Some courts require the amicus party to obtain consent of all the parties before an amicus brief may be filed.<sup>47</sup> Most courts also require a statement of economic interests with all filings, to determine whether or not judges on the court have to recuse themselves.<sup>48</sup>

The current standard for most amicus briefs—whether the proposed brief provides duplicative material—is too vague and indeterminate to give enough guidance for amicus filers to know whether or not their filings are welcome. For judges to apply the current rules faithfully, they might need to comb through the briefs to determine whether the amicus briefs add anything new to the case. The problem is that the judge would need to go through the briefs in order to determine this, which seems like a waste of scarce judicial resources. Perhaps this is the reason that many amicus briefs are accepted for filing. As I will describe in Part V, a new standard is needed to make clearer when amicus briefs should be accepted and make it more likely that they will be accepted.

## 2. *Amicus Briefs and the Courts' Power to Sanction*

Federal judges have broad authority to regulate what is filed in their courts.<sup>49</sup> FRCP 11 provides for sanctions against parties, their attorneys, or both, when they file any “paper” in federal court that is frivolous.<sup>50</sup> It is unclear whether any attorneys have been sanctioned under Rule 11 for filing a frivolous amicus brief.<sup>51</sup> Further, it is likewise unclear whether the clients of amicus filers would even be considered “parties” within the meaning of the rules. Federal courts possess inherent authority to sanction amicus parties, but it is unclear that courts have ever sanctioned amicus parties using Rule 11.<sup>52</sup>

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45. Julie Gannon Shoop, *Too Many 'Friends': Appeals Judge Urges Limits on Amicus Briefs*, TRIAL, Dec. 1997, at 18; Tony Mauro, *Plenty of Friendly Advice*, LEGAL TIMES, July 23, 1990, at S25.

46. 11TH CIR. R. 35-8; FED. CIR. R. 29.

47. Marcia Coyle, *Amicus Disclosure Worries Some Amici*, NAT'L L. J. 1, Apr. 1996, at A14.

48. See, e.g., 9th CIR. R. 26.1 available at <http://www.ca9.uscourts.gov/ca9/Documents.nsf/FRAP+and+Circuit+Rules?OpenView> (requiring a corporate disclosure statement of parent corporations which are publicly held so that judges may evaluate their stock ownership).

49. 28 U.S.C. § 1927 (2000).

50. FED. R. CIV. P. 11.

51. A search of Westlaw and Lexis databases returned no results.

52. See *A. Hirsh, Inc. v. United States*, 948 F.2d 1240, 1250-51 (Fed. Cir. 1991) (“[A statute imposing sanctions] speaks to the ‘excess costs, expenses, and attorneys’ fees reasonably incurred . . .,’ [and] ordinarily the statute is referring to burdens a party imposes

Because of the broad guidelines for acceptance of amicus briefs, there seem to be few examples of federal judges rejecting the filing of amicus briefs. Often, the rejection of amicus briefs appears in state court cases and seems more related to the gamesmanship of the persons filing the amicus brief than the content of the brief itself. For example, in *Thalheim v. Town of Greenwich*,<sup>53</sup> an attorney filed a writ of error in the Supreme Court of Connecticut upon being sanctioned by a Connecticut appellate court for violating local rules of practice by filing an amicus brief in a case without first obtaining permission from court or filing an appearance in the case. Although not a party to the case, the attorney filed a direct appeal to a lower court decision.<sup>54</sup>

In *Thalheim*, the appellant challenged the constitutionality of the amicus rules, arguing that they infringed on his First Amendment right to “petition the government for redress of grievances.”<sup>55</sup> The court disagreed because the rules of practice did not *prohibit* the filing of an amicus brief, but instead required him to first obtain permission from court, and thus did not implicate the “right to petition the government” clause of the First Amendment.<sup>56</sup> In its holding, the court did not discuss the general implications of the First Amendment on amicus brief filings. The court noted that Appellant did not raise a claim under the “free speech” clause.<sup>57</sup>

The *Thalheim* case is a limited test of the constitutional claims of this Article, to be discussed in Part III. The *Thalheim* case, however, is of limited usefulness to the question of whether the right to file an amicus is granted by the petition clause of the First Amendment. First, as a state supreme court case, it has limited influence on the federal courts, where this issue will most often be raised. Second, the case may have been marked more by the gamesmanship of the attorney than a definitive ruling on the constitutional arguments about amicus briefs. Third, the court did not discuss the free speech implications of filing amicus briefs. Although other courts have followed *Thalheim*, the constitutional status of amicus briefs is an open question.<sup>58</sup>

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on the opposing party. Here, [petitioner] is not a party but an amicus.”). A search of FRCP 11 cases in the Westlaw database revealed no instances of sanctions being imposed on filers of amicus briefs.

53. 775 A.2d 947 (Conn. 2001).

54. *Id.* at 954.

55. *Id.* at 956.

56. *Id.* at 957.

57. *Id.*

58. See *State v. Ross*, 272 Conn. 577, 611-13 (Conn. 2005); *Witty v. Planning & Zoning Comm’n of Hartland*, 66 Conn. App. 387, 396 (Conn. App. Ct. 2001) (amicus brief cannot be partisan); see also *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2005) (order of the Illinois Supreme Court denying leave to file an amicus brief by the U.S. Chamber of Commerce). The Illinois Supreme Court has recently promulgated a rule that an amicus filer

*B. Diverging Views of Amicus Briefs in the Courts of Appeals*

Although courts do not often reject amicus briefs, one particularly influential appellate judge, Richard Posner of the Seventh Circuit, has expressed skepticism about the value of some amicus briefs.<sup>59</sup> Although these cases are somewhat isolated, Judge Posner's status as a prominent judge and intellectual means that his decisions rejecting amicus briefs may encourage other judges to reject amicus briefs.<sup>60</sup> Thus, a closer examination of these cases is warranted.

In *Ryan v. Commodity Futures Trading Commission*, Judge Posner, sitting alone, denied the Chicago Board of Trade leave to file an amicus brief in a disciplinary proceeding brought by the Commission in the Seventh Circuit. Judge Posner refused to accept the brief, stating that "[a]fter 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion."<sup>61</sup> Judge Posner elaborated on the standard he would use in the future:

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.<sup>62</sup>

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that fills its legal brief with legal arguments duplicative of those made by the parties may be sanctioned and ordered to pay the reasonable costs of the other parties. ILL. S. CT. R. 345, available at [http://www.state.il.us/court/SupremeCourt/Rules/Art\\_III/ArtIII.htm#345](http://www.state.il.us/court/SupremeCourt/Rules/Art_III/ArtIII.htm#345); see Ex Ante, *Inamicable*, 9 GREEN BAG 104 (2006) (discussing the Supreme Court of Illinois' revised Rule 345).

59. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997).

60. See *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 83 (D. N.J. 1993) (rejecting amicus brief); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D. N.J. 1985) (allowing amicus brief); cf. *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004) (denying intervention and opining that the party seeking to intervene does not even justify amicus status: "Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed."); *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (time spent preparing amicus briefs was not compensable); see also Martha Minow, *Religion and the Burden of Proof: Posner's Economics and Pragmatism in Metz v. Leininger*, 120 HARV. L. REV. 1175, 1185-86 (2007); Francesco Parisi & Ben W.F. Depoorter, *Private Choices and Public Law: Richard A. Posner's Contributions to Family Law and Policy*, 17 J. CONTEMP. HEALTH L. & POL'Y 403, 404-05 (2001); David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735 (2007) (reviewing RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006)).

61. *Ryan*, 125 F.3d at 1063.

62. *Id.*

Any amicus brief not meeting the above criteria, Judge Posner concluded, should be denied.<sup>63</sup>

In 2000, Judge Posner was part of a panel of three judges that denied leave to file an amicus brief in *National Organization for Women v. Scheidler*,<sup>64</sup> a case with a long litigation history that included several trips to the Supreme Court.<sup>65</sup> The case involved abortion clinic protests and whether the Hobbs Act, which prevents robbery or extortion, would support an injunction against the protests.<sup>66</sup> The court denied the amicus briefs of Priests for Life, Life Legal Defense Foundation, and the Southern Christian Leadership Conference in support of antiabortion activists.<sup>67</sup> The court reiterated the three conditions for the acceptance of amicus brief discussed above in *Ryan*.<sup>68</sup> The court justified these standards on three grounds, generally that (1) it would be irresponsible to accept a brief “and then not read it (or at least glance at it, or require our law clerks to read it)”; (2) amicus briefs are often an attempt by parties to evade a court’s page limitations; and (3) “[a]micus curiae briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal.”<sup>69</sup> The court denied the motion of the three putative amicus parties, though amicus briefs from other filers were allowed by the court in the subsequent appeal on the merits.<sup>70</sup>

Three years later, in 2003, Judge Posner denied a motion for leave to file an amicus brief in *Voices for Choices, Inc. v. Illinois Bell Telephone Co.*<sup>71</sup> The briefs in that case were presented by state officials and a labor union on the grounds that the parties in the case, a consumer group and a large telephone utility company, did not represent all viewpoints.<sup>72</sup> Judge Posner, sitting alone, rejected the briefs on the following grounds: (1) the existing parties were adequately represented; (2) the amici had no direct interest in another case that may be materially affected by decision in this one; (3) the amici had no distinct perspective or additional information; and (4) the viewpoint of state officials was no different than that of party Southwestern

63. *Id.*

64. *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000).

65. *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9 (2006); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

66. *Scheidler*, 547 U.S. at 13-14.

67. *Scheidler*, 223 F.3d at 616-17.

68. *Id.* at 617.

69. *Id.* at 616-17.

70. *See, e.g.*, Brief for James Serritella et al., as Amicus Curiae Supporting Appellant, *Nat'l Org. For Women v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (Nos. 99-3336, 99-3892, 99-3891, 99-3076-01-2050).

71. 339 F.3d 542 (7th Cir. 2003).

72. *Id.* at 543-44.

Bell Corporation.<sup>73</sup> Judge Posner acknowledged that under court rules the State of Illinois could file a brief without leave of court, but the legislators were not purporting to speak on behalf of the state.<sup>74</sup> “Essentially, the proposed amicus briefs merely announce the ‘vote’ of the amici on the decision of the appeal. But, as I have been at pains to emphasize in contrasting the legislative and judicial processes, they have no vote,” wrote Judge Posner.<sup>75</sup>

In a related context, the Eleventh Circuit Court of Appeals denied the attorney’s fees that a successful party sought for the time spent reading and responding to amicus briefs. In *Glassroth v. Moore*, the court was concerned that compensating for work done in connection with supporting amicus briefs would only encourage more amicus briefs, which the court was “loathe to do.”<sup>76</sup> The court stated, however that a reasonable amount of time spent reading and responding to opposing amicus briefs would continue to be compensable.<sup>77</sup>

Although Judge Posner is an influential jurist and academic, not all appellate judges have followed his decisions on amicus briefs. In an opinion on the Third Circuit Court of Appeals before his appointment to the United States Supreme Court, Judge Samuel Alito considered Judge Posner’s amicus decisions in *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*.<sup>78</sup> *Neonatology Associates* was an appeal from a tax court decision where five physicians sought leave to file an amicus brief in support of the Commissioner of Internal Revenue.<sup>79</sup> The taxpayer appellants, two professional medical corporations, were defending against a government prosecution for erroneous deductions and back taxes. The taxpayers argued that the court should not accept the brief because the doctors were not “impartial,” and did not have a “pecuniary interest” in the outcome.<sup>80</sup> The doctors argued that their amicus brief should be filed because they wanted to preserve certain factual findings to connect the Commonwealth of Pennsylvania to findings in the tax court below. They also wanted to question the application of the Employee Retirement Income and Security Act (ERISA) to the case.<sup>81</sup> The doctors

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73. *Id.* at 545-46.

74. *Id.* at 545.

75. *Id.*

76. *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (“[A]micus briefs are often used as a means of evading the page limitations on a party’s briefs.” (citing *Voices for Choices*, 339 F.3d at 544)).

77. *Id.*

78. 293 F.3d 128 (3d Cir. 2002).

79. *Id.* at 130.

80. *Id.*

81. *Id.*

thus did not seem very interested in whether or not the medical corporations had taken proper deductions.<sup>82</sup>

Judge Alito considered Judge Posner's line of decisions regarding amicus filings and ultimately allowed the amicus brief to be filed. As to impartiality, Judge Alito decided that this conception of the amicus curiae became "outdated long ago."<sup>83</sup> Judge Alito wrote that the idea that a friend of the court cannot also be a friend of the party is "contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making."<sup>84</sup>

In *Neonatology Associates*, Judge Alito considered an earlier Third Circuit case that seemed to limit the ability of parties to file amicus briefs. In *American College of Obstetricians & Gynecologists v. Thornburgh*, a case that ultimately went to the Supreme Court regarding the constitutionality of abortion restrictions, the Third Circuit denied the motion of a group of law professors to file an amicus brief because the professors did not "represent any individual or organization with a legally cognizable interest in the subject matter at issue . . . only their concern about the manner in which this court will interpret the law . . . ."<sup>85</sup> Judge Alito did not decide whether the *American College* court accurately interpreted the "interest" requirement, but he felt that doctors in the case had adequately showed an interest in the outcome and allowed their brief.<sup>86</sup>

Judge Alito's decision to allow the amicus brief in *Neonatology Associates* may or may not be a bellwether for how he will treat amicus briefs as a Justice on the U.S. Supreme Court. His opinion shows the difficulties judges face in determining the degree of interest a party filing an amicus brief has, and whether some parties have too great a vested interest in the outcome of the matter. While the court decisions denying leave to file amicus briefs are a small sample of the large number of amicus briefs that are accepted for filing, they represent a trend that might make it more difficult to file amicus briefs.

Despite the split between the circuits, a number of district court judges have followed Judge Posner's reasoning.<sup>87</sup> Perhaps as a reaction to an increasing number of amicus briefs in high profile cases,

82. *Id.*

83. *Id.* at 131.

84. *Id.*

85. 699 F.2d 644, 645 (3d Cir. 1983); see *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (ruling on the constitutionality of various provisions of the Pennsylvania Abortion Control Act).

86. *Neonatology Assocs.*, 293 F.3d at 133.

87. *Hughes v. White*, 388 F. Supp. 2d 805, 817 n.3 (S.D. Ohio 2005); *Dow Chem. Co. v. U.S.*, No. 00-CV-10331-BC, 2002 WL 33012185, at \*1-2 (E.D. Mich. May 24, 2002).

some trial court judges have sought demanding showings of why a particular amicus brief would add to the arguments of the parties.<sup>88</sup>

### C. Recent Controversies Involving Amicus Participation

Recent briefs filed by law professors, retired judges, and members of Congress have sparked controversy and may lead to judicial sentiment against amicus status and more frequent denials of amicus briefs.<sup>89</sup> In some cases, legislators have filed amicus briefs to draw attention to certain parts of legislative history to influence the courts' interpretation of legislation. When the Supreme Court was considering a major case involving court jurisdiction to hear habeas corpus claims, *Hamdan v. Rumsfeld*, Senators John Kyl and Lindsey Graham filed an amicus brief to argue that Congress intended to strip the courts of jurisdiction.<sup>90</sup> Some argued that the senators misled the court in coloring the legislative history to deprive the court of jurisdiction.<sup>91</sup>

In another case related to the U.S. detention facility at Guantanamo, a group of former judges sought leave to file an amicus brief in support of greater due process for the detainees.<sup>92</sup> The court denied leave to file the brief because the former judges identified themselves as judges.<sup>93</sup> The court's brief order, joined by Judge Sentelle and Judge Randolph, cited an advisory opinion of the Judicial Conference of the United States, that states: "Judges should insure that the title

88. *Abu-Jamal v. Horn*, No. CIV.A. 99-5089, 2000 WL 1100784, at \*3-5 (E.D. Pa. Aug. 7, 2000) (amicus rejected in high profile case in part to avoid the potential onslaught of more amicus filings).

89. The recent criminal prosecution and sentencing of I. Lewis "Scooter" Libby involved an amicus brief. A group of law professors filed a nine page motion for leave to file an amicus brief in support of Libby. Motion for Leave to File Brief as Amici Curiae and Brief of Law Professors Vikram Amar et al., *United States v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007) (No 05-394). In handing down Mr. Libby's sentence, Judge Reggie Walton stated that the professors' brief had little value in his decision: "With all due respect, these are intelligent people, but I would not accept this brief from a first year law student. I believe this was put out to put pressure on this court in the public sphere to rule as you wish." John W. Dean, *Scooter Libby's Appeal: The Focus Shifts to the Highly Political U.S. Court of Appeals for the D.C. Circuit*, FINDLAW'S WRIT, June 15, 2007, <http://writ.news.findlaw.com/dean/20070615.html>.

90. Brief for Sen. Graham and Sen. Kyl as Amicus Curiae Supporting Respondents, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (holding that the military commissions for detainees at Guantanamo Bay violate the Constitution); see also David L. Hudson, *Detainees Have Some Powerful Friends*, 2 No. 45 A.B.A. J. E-Rep. 1, Nov. 14, 2003.

91. Emily Bazelon, *Invisible Men*, SLATE, Mar. 27, 2006, <http://www.slate.com/id/2138750>; John W. Dean, *Senators Kyl and Graham's Hamdan v. Rumsfeld Scam: The Deceptive Amicus Brief They Filed in the Guantanamo Detainee Case*, FINDLAW'S WRIT, July 5, 2006, <http://writ.news.findlaw.com/dean/20060705.html>.

92. Adam Liptak, *Appeals Court Rejects Brief Submitted by Ex-Judges*, N.Y. TIMES, Dec. 30, 2006, at A15.

93. *Id.*

‘judge’ is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to describe accurately a person’s status at a time pertinent to the lawsuit.<sup>94</sup> In dissent from the court’s order, Judge Rogers stated that even if the former federal judges had used their judicial titles, this was not a reason to reject the brief.<sup>95</sup>

These recent cases illustrate that nonparties are increasingly using amicus briefs to participate in the courts in ways similar to other democratic forums. As with all facets of the democratic process, there is potential for abuse by citizens, and, in some cases, legislators. Such abuses may make judges less willing to accept amicus briefs. These incidents also raise important questions about the role of judges and legislators in a democratic system, which I will address below.

#### D. *Amicus Participation as Interest Group Activity*

One of the most frequent objections to amicus briefs is that they are a nefarious form of interest group activity.<sup>96</sup> With the rising influence of moneyed interests in politics, there is growing concern about governmental decisions being made under the sway of these interests.<sup>97</sup> Special interest influence exists in the courts because those who have sufficient resources can engage in extensive litigation.<sup>98</sup> Interest groups have utilized the current amicus rules to file an increasingly larger number of briefs. Although amicus briefs do not require vast resources, groups with greater resources are more likely to file them.<sup>99</sup> If well-heeled interest groups file amicus briefs unimpeded, the arguments of groups with lesser resources might be lost.

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94. Judicial Conf. of the U.S., Comm. on Codes of Conduct, Advisory Op. 72 (Feb. 2, 1982), available at <http://www.uscourts.gov/guide/vol2/72.html>.

95. *Boumediene v. Bush*, 476 F.3d 934, 935 (D.C. Cir. 2006) (Rogers, J., dissenting).

96. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. No. 4 1109, 1111 (1988); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953); Alexander Wohl, *Friends with Agendas: Amicus Curiae Briefs May Be More Popular than Persuasive*, 82 A.B.A. J. 46, 46-48 (1996).

97. See, e.g., JOHN R. MCARTHUR, *THE SELLING OF FREE TRADE: NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2000) (describing how powerful interests lobbied for the passage of the North American Free Trade Agreement).

98. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 787 n.146 (2000) (discussing how resources reflect the extent of amicus participation).

99. See generally Gregg Ivers & Karen O’Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982*, 9 LAW & POL’Y 161 (1987) (illustrating the impact of two organizations with resources).

There are immediate difficulties with characterizing amicus activity as “interest group politics.” First, interest group politics are at the heart of a representative democracy.<sup>100</sup> Second, amicus participation can serve to level the playing field by providing a relatively low cost option for groups to band together and influence governmental policy. Third, because the Solicitor General can often file briefs on behalf of the government, the ability of nongovernmental groups to have broad access to the courts adds to the voices heard in the decisionmaking process. Finally, while amicus participation raises concerns relating to the imbalance of resources that may skew amicus participation toward the wealthy, these concerns are no different than in any other area of litigation, and should be a reason for greater access to justice resources, rather than limiting amicus filings.<sup>101</sup>

Judge Posner’s concerns about the infiltration of interest group politics in the litigation process coincides with his views supporting Schumpeterian democracy, which idealizes democracy as a clash between organized interests.<sup>102</sup> Joseph Schumpeter was an early twentieth century Austrian economist, positing that those with ample wealth have access to the democratic process.<sup>103</sup> In Posner’s book *Law, Pragmatism, and Democracy*, he describes deliberative democracy as a competing philosophy to his own Schumpeterian philosophy.<sup>104</sup> Of course, Judge Posner’s theory is primarily intended for legislative politics; a preference for Schumpeterian politics need not dictate the judicial process.

The pragmatist view that Judge Posner espouses as the preferred mode of adjudication works better with a more open attitude toward amicus briefs. Pragmatic solutions will most likely come from a greater number of voices in the decisionmaking process. Economic theory, which favors the role of information, also supports greater access for amicus filers to the courts than Judge Posner seems to allow. Often, amicus parties can provide needed information to judges, as in scientific and technical areas.<sup>105</sup> For example, in a recent antitrust

100. See ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 1 (1982) (noting that independent organizations are highly desirable in a democracy, even though they also present the opportunity to do harm).

101. But see Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974) (showing the value of repeat player status); Donald Songer et al., *Why the Haves Don’t Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged*, 53 *POL. RES. Q.* 537 (2000).

102. POSNER, *supra* note 23, at 14.

103. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (4th ed. 1976); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. ECON.* 875 (1975).

104. POSNER, *supra* note 23, at 192-93.

105. James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 *POL. RES. Q.* 365, 366 (1997).

case in the U.S. Supreme Court, a group of economists filed an amicus brief supporting a rule that would not hold retail minimum pricing agreements per se illegal in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>106</sup> In the opinion for the Court, Justice Kennedy cited the economists' view as a reason for the overruling of a ninety-year-old antitrust precedent: "Respected economic analysts . . . conclude that vertical price restraints can have precompetitive effects."<sup>107</sup> In this case, the views of amici seemed to have more weight than the principle of stare decisis.

The antitrust case discussed above suggests that powerful interests can use amicus briefs to influence court decisions.<sup>108</sup> The concern about wealthy, powerful interests having a louder voice may be assuaged by the ability of smaller groups to form coalitions and have their voices heard. This is not much different, however, than the ways that small nonprofits form coalitions to pass legislation. In fact, an amicus standard that makes it easier to file briefs may serve to narrow existing power imbalances between powerful interests in society that regularly litigate and those that are only able to file amicus briefs.

Even with an increase in the number of amicus briefs filed by interest groups, there are democratic reasons why we should not be concerned about the increased filings of amicus briefs. In fact, as I will argue below, amicus participation is integral to a democratic court system.

### III. SITUATING AMICUS PARTICIPATION IN THE CONSTITUTION

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right . . . to petition the Government for a redress of grievances."<sup>109</sup> Litigation has been used for expression throughout history, and as a form of petition for the redress of grievances. This Part applies these principles to amicus participation on the theory that the First Amendment is considered one of the legal underpinnings of a democratic society. At the same time, the First Amendment's tension with egalitarian principles has been debated by schol-

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106. 127 S. Ct. 2705 (2007); *see also* Brief for Economists as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173681.

107. 127 S. Ct. at 2710, 2714-15 (citing the Brief of Amici Curiae Economists).

108. Numerous interests filed amicus briefs in *Leegin*, including the American Petroleum Institute. *See* Brief for Am. Petroleum Inst. as Amicus Curiae Supporting Petitioner, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 160781.

109. U.S. CONST. amend. I.

ars.<sup>110</sup> Nevertheless, if we are to evaluate the democratic need for amicus participation, the principles underlying the First Amendment should be examined.

### A. *Freedom of Speech*

Amicus briefs, like all briefs, are a form of speech.<sup>111</sup> There are limits, however, to free speech in the litigation context.<sup>112</sup> Courts have inherent authority to sanction lawyers who violate ethical rules or engage in fraudulent speech.<sup>113</sup> Litigation is rarely analyzed in the same ways as other types of speech, where close attention is paid to the type of speech and the location in which the speech takes place.<sup>114</sup> For example, political speech generally has stronger protection than other types of speech, such as commercial speech.<sup>115</sup> While one can make a political speech quite freely on a public sidewalk, one cannot make the same speech from the audience in a courtroom, or the gallery of a legislature, without being removed from the chambers.

The categorical approach to whether speech is protected by the First Amendment begins by identifying the place in which speech occurs.<sup>116</sup> This is called forum analysis. Speech that occurs in some locations—such as the town square or the public sidewalk—that have been used for speech since time immemorial have been afforded the strong protection of the traditional public forum.<sup>117</sup> In a designated public forum, by contrast, the government may impose reasonable time, place, and manner restrictions on the speech, provided there

110. See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT* (1997); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

111. Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 *UCLA L. REV.* 705, 791 (2004) (“Litigants have the free speech right to participate in . . . decisions that will bind them.”).

112. *Id.* (“[T]he value of participation necessitates both freedom of speech and constraints on that freedom.”).

113. See 28 U.S.C. § 1927 (2000).

114. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (discussing how in traditional and designated public forums, the government may regulate the time, place, and manner of speech as long as the restrictions are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”).

115. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

116. Compare *United States v. Grace*, 461 U.S. 171 (1983) (statute prohibiting the carrying of any “public notice” in front of the U.S. Supreme Court was deemed unconstitutional) with *Cox v. Louisiana*, 379 U.S. 559 (1965) (statute prohibiting picketing “near courthouse” was constitutional).

117. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

are other avenues for communication.<sup>118</sup> It is difficult to place litigation generally and amicus participation specifically into a forum analysis. For one thing, courts are multilayered forums for speech. Witnesses are controlled in what they can say by the rules of evidence and perjury cases, but otherwise they have wide berth to say whatever they want, whether it helps them or hurts them. Lawyers are even more controlled in the presentation of evidence, but they also have significant control over their opening and closing statements.<sup>119</sup> In briefs, outside of sanctions for clearly frivolous behavior, there are wide areas of legitimate advocacy in which lawyers are free to speak.<sup>120</sup>

As discussed above, treating litigation as a public forum is highly dependent on the context in which the speech takes place.<sup>121</sup> Identifying a public forum as traditional, such as sidewalks, parks, and areas that have been treated as open for time immemorial, gives the speech a high form of protection.<sup>122</sup> The characterization of a place as a non-public forum will lead to lesser speech protection, whether it is political or nonpolitical speech.<sup>123</sup> Even in a traditional or designated public forum, there can be time, place, and manner restrictions as long as there are reasonably adequate alternatives for the speech.

The foregoing shows that First Amendment forum analysis does not apply well to the filing of briefs. Indeed, recent decisions of the Supreme Court suggest that litigation may be a separate category of speech deserving of special analysis.<sup>124</sup> There is only one forum in which litigation takes place: the courts. Whether or not classified as a traditional, limited purpose or nonpublic, forum analysis makes little sense in the context of litigation.

While the litigants may argue that there are no equally adequate alternatives to court filings to get their message to the judges in a court, the fact is that placing such arguments in the media and other avenues may be an equally good way to get their messages out. At the same time, the time, place, and manner regulations that are now utilized may fail the “reasonableness” test if they are vague enough to prevent litigants from knowing exactly which speech is being pro-

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118. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998).

119. JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003).

120. See Jules Lobel, *Courts as Forums for Protest*, 52 *UCLA L. REV.* 477 (2004).

121. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

122. *Hague*, 307 U.S. at 515.

123. See *Greer v. Spock*, 424 U.S. 828 (1976) (holding that a federal military reservation was not a public forum, and regulations relating to distributing leaflets and speeches were not unconstitutional).

124. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-49 (2001).

scribed.<sup>125</sup> For these and other reasons that I will describe below, the right to file in court is more often premised on the First Amendment Right to Petition.

### B. *The Right to Petition*

The First Amendment prohibits government interference with “the right of *the people* . . . to petition the government for a redress of grievances.”<sup>126</sup> The United States Supreme Court recently held in *BE & K Construction Co. v. NLRB* that the right to petition protects even ill-motivated lawsuits as long as they are reasonably based in fact or law.<sup>127</sup> Thus, the right to file a lawsuit is constitutionally protected.<sup>128</sup> Indeed, one commentator has called the right to petition “nearly absolute.”<sup>129</sup> Despite the breadth of the Petition Clause, the question of whether the filing of an amicus brief is protected by the Petition Clause has yet to be decided by a federal court.

A textual reading of the First Amendment suggests a narrow view of what the Petition Clause protects. The text of the First Amendment presupposes protection for a grievance to be redressed.<sup>130</sup> Like the concept of standing under Article III of the Constitution, the scope of the Petition clause would be narrowly constricted if it only applied to petitions for relief from a redressable harm. Unless a lawsuit has been filed, the filing of a brief would not likely be protected. By analogy, this narrow reading would exclude much of the petition activity, such as testifying before legislative bodies and at adminis-

125. Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605 (1999) (analyzing the role of amici in two First Amendment cases).

126. U.S. CONST. amend I. (emphasis added) (incorporated to apply to the states in *Gitlow v. New York*, 268 U.S. 652, 666 (1925)).

127. *BE & K Const. Co. v. NLRB*, 536 U.S. 516 (2002); see generally Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (evaluating how lawsuits are constitutionally protected though the courts have made institutional distinctions).

128. See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) (arguing that the right exists to petition the court but as it currently extends only to winning claims, it should be expanded); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998) (arguing that the right to petition has been historically significant, though it has recently collapsed into other First Amendment rights); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997) (arguing for a very liberal interpretation of the petition clause).

129. Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154 (1986).

130. See generally Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 740 (1999) (“Put simply, the constitutional right to petition the government for a redress of grievances is precisely—for want of a better phrase—the right to petition the government for a redress of grievances.”).

trative hearings, where the threshold for participation is a bare interest in the outcome.<sup>131</sup>

The problem with this narrow view of the Petition Clause is that it excludes a large amount of activity that has historically been considered part of the Petition Clause.<sup>132</sup> A broader, citizen participation view of the Petition Clause, which is advanced in this Article, would encompass the filing of amicus briefs, based on whether the party filing the brief had merely an interest in the outcome, a standard that is synonymous with the threshold for amicus briefs in the federal courts of appeal.<sup>133</sup> The right to petition may be, and should be, protected by the Petition Clause of the First Amendment.<sup>134</sup>

It is not clear that the standing requirement of Article III should be applied to amicus filers since they are not parties to which the “case or controversy” requirement of Article III was meant to apply.<sup>135</sup> If the parties to the original litigation have standing, it would be odd to prevent amicus parties from weighing in on a live case or controversy. Indeed, even the most restrictive decisions on amicus briefs allow amicus filings as long as the amicus filer has “an interest in the outcome;” the only problem is that select judges tend to construe that interest very narrowly.<sup>136</sup>

Because lawsuits are protected by the First Amendment and are subject to a great degree of court control, the question of whether amicus briefs are constitutionally protected does not answer how the courts should regulate them. Nevertheless, amicus participation has many of the same constitutional implications as litigation, most clearly seen in cases involving the meaning of constitutional provisions. In many cases, amicus participation is used not only as a way of making views known to the tribunal hearing the case, but also as a way of making views known to the group’s constituents and to the general public. In this way, amicus participation serves an expressive function in a democratic system. While there remain many ways

131. For an analysis of the protection afforded “public comment,” see, for example, *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187, 206 (D. Conn. 2005), where a citizen alleged the town of Somers violated her right to speak at a board of selectmen meeting when it did not allow her to speak regarding a town employee.

132. See Leo Pfeffer, *Amici in Church-State Litigation*, 44 LAW & CONTEMP. PROBS. 83 (1981) (examining the increase in amici filings regarding the establishment clause after World War II); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727 (2001) (evaluating how the Court agenda determines certiorari and its effects); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) (describing the history of the Petition Clause).

133. *Jaffee v. Redmond*, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting).

134. See Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 524 (2005) (allowing aggrieved nonparties to appeal would “enhance the coherence of our law”).

135. U.S. CONST. art. III., § 2, cl. 1.

136. See, e.g., the decisions of Judge Posner, discussed *supra* Part II; *supra* note 59.

to express one's views, filing an amicus brief is an important way to show an organization's commitment to an issue. In sum, amicus participation is often about more than simply communicating to the court; it is often part of a campaign about important political and social issues.

#### IV. AMICUS PARTICIPATION IN THE FRAMEWORK OF A DEMOCRATIC SYSTEM

Besides the constitutional implications of restrictive rules for amicus activity discussed above, amicus participation plays an important role in a democratic court system. Amicus briefs open a dialogue between the people and the legislative branches. Additionally, amicus briefs are a way for citizens to provide input into questions of constitutional law. Finally, there is a deliberative purpose to amicus participation. In this Part, I will discuss several ways in which amicus participation enhances the functioning of the American democratic system.

##### A. *The "Notice and Comment" Function of Amicus Participation*

In statutory cases dealing with the work of executive branch agencies, amicus briefs can serve as an opportunity for interested parties to provide comment on administrative rulemaking. Often, these cases are litigated by the agency on behalf of the person who was actually victimized by the violation of law. These cases often deal with statutes that have been passed subject to the notice and comment procedures of the Administrative Procedure Act, where interested parties testify before administrative agencies on the impact of proposed rulemaking.<sup>137</sup> Amicus participation can perform a similar function in cases interpreting statutes.<sup>138</sup>

Labor and employment law cases in particular raise the issue of administrative agencies representing the interests of individuals who are the victims of statutory violations.<sup>139</sup> The United States Supreme

137. 5 U.S.C. § 553(c) (2000).

138. See, e.g., Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 623 (2006) (arguing about the importance of the notice and comment process to the development of environmental law); David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1169.

139. See Catherine L. Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in LABOR LAW STORIES 399, 423-24 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (telling the story of the Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)); Robert B. Moberly, *The Story of Electromation: Are Employee Participation Programs a Competitive Necessity of a Wolf in Sheep's Clothing*, in LABOR LAW STORIES 315, 334-35 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (discussing amicus participation by labor law professor Charles Morris in a case involving the "com-

Court case *Hoffman Plastic Compounds, Inc. v. NLRB* provides an excellent example of the need for amicus participation.<sup>140</sup> In *Hoffman*, the evidence showed that a plastics company fired an undocumented worker in retaliation for his union organizing activities.<sup>141</sup> As a result of the firing, the National Labor Relations Board (NLRB) brought an unfair labor practice charge against the employer and sought full back pay for the worker.<sup>142</sup> Back pay is the amount that would have been earned from the time of the unlawful firing to the present. In *Hoffman*, the question before the Supreme Court centered on whether an undocumented worker was entitled to the same remedies as citizen workers.<sup>143</sup>

The NLRB argued that back pay should be awarded because such a remedy would serve as a deterrent for similarly situated employers.<sup>144</sup> Many groups weighed in on all sides of the issue, including immigrant rights groups and employer groups.<sup>145</sup> The amicus briefs argued about the effects of limiting the available remedies for undocumented immigrants who were fired in violation of labor law.<sup>146</sup> The Supreme Court held that back pay could not be awarded to the undocumented worker because such a remedy would “trench upon

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pany union” provision of the NLRA); Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status – Fertile Delta or Bermuda Triangle?* in *LABOR LAW STORIES* 353, 381-82 (discussing amicus participation in support of the NLRB’s decision finding charge nurses at a health care facility to be employees).

140. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

141. *Id.* at 140.

142. *Id.* at 140-41.

143. *Id.* at 140-42.

144. See Recording and Transcript of Oral Argument, *Hoffman*, 535 U.S. 137, available at [http://www.oyez.org/cases/2000-2009/2001/2001\\_00\\_1595/argument/](http://www.oyez.org/cases/2000-2009/2001/2001_00_1595/argument/) (Paul Wolfson, arguing on behalf of the NLRB, stated: “Congress without question recognized when it enacted IRCA that this was a many-faceted problem, and one aspect of the problem was that there was a natural magnet in drawing illegal, undocumented workers here in the wage differential, and that employers were willing to give jobs, and that it should not be cheaper for an employer to hire an undocumented alien than it is to hire [an authorized worker].”). The Supreme Court rejected the deterrence argument: “We have deemed such ‘traditional remedies’ sufficient to effectuate national labor policy regardless of whether the ‘spur and catalyst’ of backpay accompanies them.” *Hoffman*, 535 U.S. at 152 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984)); see also *Sure-Tan*, 467 U.S. 883, 904 n. 13, (“This threat of contempt sanctions thereby provides a significant deterrent against future violations of the [NLRA].”); *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, 237 F.3d 639, 642 (arguing that not allowing backpay would encourage violations of the labor code).

145. See, e.g., Brief for Am. Civil Liberties Union Found. & Make the Road By Walking, Inc. as Amici Curiae Supporting Respondent, *Hoffman*, 535 U.S. 137 (No. 00-1595), 2001 WL 1631648; Brief for Am. Fed’n of Labor and Cong. of Indus. Orgs. as Amicus Curiae Supporting Respondent, *Hoffman*, 535 U.S. 137 (No. 00-1595), 2001 WL 1631720; Brief for Employers and Employer Orgs. as Amicus Curiae Supporting Respondent, *Hoffman*, 535 U.S. 137 (No. 00-1595), 2001 WL 1631729; Brief for States of New York et al., as Amici Curiae Supporting Respondent, *Hoffman*, 535 U.S. 137 (No. 00-1595), 2001 WL 1636790.

146. See sources cited *supra* note 145.

explicit statutory prohibitions critical to federal immigration policy.”<sup>147</sup>

Although the Supreme Court did not decide in favor of the social movement groups that weighed in on behalf of the worker in *Hoffman*, the presence of the voices of social movement organizations were important parts of the dialogue in a case that was more about broad questions of immigration control than it was about back pay.<sup>148</sup> Moreover, since the statute being interpreted by the Court was more than seventy years old, the need for a continuing dialogue was even more important. Given the fact that interest group activity in litigation is inevitable and frequently desirable, there is reason to think that it is both unreasonable and undesirable to demand that judicial decisions be unaffected by the views of interested groups.

The “notice and comment” view echoes the tradition of legal realism, which suggests that legal decisions are affected by the times in which they are rendered. Legal realists believed that there was little difference between the advocacy needed to change the law in the legislature and in the courts.<sup>149</sup> In the tradition of early legal realist Louis Brandeis, they often filed “Brandeis briefs” with the courts that were filled with policy arguments and social science evidence to sway the views of the judges.<sup>150</sup> Amicus briefs can serve an important function in bringing social science evidence to the attention of the courts. There might be concerns about the improper use of social science evidence, as discussed in Part V, but these concerns should be dealt with through the new standard advocated later in this Article.

### B. Social Movement Dialogues

Social movement groups have utilized amicus briefs for many years. Amicus briefs have played an important role in communicat-

147. *Hoffman*, 535 U.S. at 138.

148. Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J. L. REFORM 737, 737-41 (2003); Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 333 (2006).

149. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 1-2 (1995).

150. The most famous example of this was Brandeis's brief in *Muller v. Oregon*, 208 U.S. 412, (1908). See DIANA KLEBANOW & FRANKLIN L. JONAS, PEOPLE'S LAWYERS: CRUSADERS FOR JUSTICE IN AMERICAN HISTORY 70-71 (2003) (describing Brandeis's representation of the state of Oregon in defending different limits on the working hours of men and women). In *Muller*, Brandeis attempted in his brief to show the “real or substantial relation to public health [and] welfare.” The brief contained only a few pages of legal argument but more than a hundred pages of data drawn from experts testifying to the connection between safety and morals and the limitation of women's hours. For a critique of *Muller* from a feminist perspective, see, for example, Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986).

ing the views of social movements to the courts in numerous cases.<sup>151</sup> The NAACP began its campaign against legal segregation by filing amicus briefs in a 1950s case involving the Westminster School District in Orange County, California.<sup>152</sup> Plaintiffs in *Westminster School District of Orange County v. Mendez* successfully challenged the segregation of Mexican-American children.<sup>153</sup> Thurgood Marshall and Robert L. Carter, among other NAACP and ACLU lawyers, filed an amicus brief on behalf of the children, arguing that the school district's policies violated the Equal Protection Clause of the Fourteenth Amendment.<sup>154</sup> The brief outlined some of the initial data that would be used in *Brown v. Board of Education*.<sup>155</sup>

Social movement organizations use amicus briefs to communicate to their constituencies and the general public. The Society of American Law Teachers, for example, has filed amicus briefs in several high profile cases.<sup>156</sup> Sometimes, as in the case of the NAACP, organizations have used amicus briefs to test the water for broader victories, such as the *Brown* decision. Indeed, utilizing amicus briefs to

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151. See, e.g., SUZANNE U. SAMUELS, *FIRST AMONG FRIENDS: INTEREST GROUPS, THE U.S. SUPREME COURT, AND THE RIGHT TO PRIVACY* (2004) (examining the influence of interest groups as amici); Caroline Bettinger-Lopez & Susan P. Sturm, International Union, U.A.W. v. Johnson Controls: *The History of Litigation Alliances and Mobilizations to Challenge Fetal Protection Policies*, in CIVIL RIGHTS STORIES 12-14 (Myriam Gilles & Risa Goluboff eds., 2007) (discussing how the litigation-centered movement against fetal protection policies was both effective and incomplete); Suzanne Uttaro Samuels, *Amici Curiae and the Supreme Court's Review of Fetal Protection Policies*, 78 JUDICATURE 236 (1995) (arguing that the diverse amicus participation surrounding *U.A.W. v. Johnson Controls* contributed to the Court's decision); Madeleine Schachter, *The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest*, 28 FORDHAM INT'L L.J. 88, 110 (2004) (discussing the importance of amicus briefs in bringing media attention to the case).

152. *Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774, 775 (9th Cir. 1947).

There is argument in two of the amicus curiae briefs that we should strike out independently on the whole question of segregation, on the ground that recent world stirring events have set men to the reexamination of concepts considered fixed . . . For reasons presently to be stated, we are of the opinion that the segregation cases do not rule the instant case and that is reason enough for not responding to the argument that we should consider them in light of the amicus curiae briefs.

*Id.* at 780.

153. *Id.* at 781.

154. Motion and Brief for the Nat'l Ass'n for the Advancement of Colored People as Amicus Curiae at 16, *Westminster Sch. Dist. of Orange County*, 161 F.2d 774, (No. 11310) (on file at the Los Angeles County Law Library); see also Gilbert Gonzalez, *Richard Kluger's Simple Justice: Race, Class, and United States Imperialism*, 44 HIST. OF EDUC. Q. 140, 142 (2004).

155. 347 U.S. 483 (1954).

156. See Society of American Law Teachers: Amicus Briefs, <http://www.saltlaw.org/library> (last visited Feb. 15, 2008).

test theories may be less ethically freighted than filing lawsuits to check the receptiveness of the courts to various theories.<sup>157</sup>

### *C. Amicus Participation as a Professional Duty*

Amicus advocacy is an important aspect of the role that lawyers play in a democratic society.<sup>158</sup> This is another reason why amicus participation should not be unreasonably blocked by the courts. A lawsuit may not always be the most effective way to represent a particular client. In some cases, attorneys may fulfill their duty of diligence and competence by filing an amicus brief. Often, a client may have an interest in litigation that is not being adequately represented by the parties in a lawsuit, but they may not have the ability to join the lawsuit.

The Federal Rules of Civil Procedure allow persons or groups to join ongoing litigation as interveners. FRCP 24 requires the court to grant intervention in certain limited circumstances, such as when a statute grants a right to intervene, or when property or a transaction is at issue and the existing parties to a lawsuit cannot adequately protect the interest.<sup>159</sup> Rule 24(b) allows the court to grant intervention (1) if a statute grants a conditional right to intervene; or (2) when the person seeking to intervene can point to common questions of law and fact in the ongoing litigation.<sup>160</sup> Although intervention may be available for many amicus filers, there are a number of reasons why amicus filers would rather not invest the time and expense in being a party and would rather have their voice heard through amicus filing. Often, the court will allow a party who is unable to intervene to participate in a case as an “amicus ‘plus,’” with a greater role than simply filing a single brief.<sup>161</sup> Thus, the amicus brief may provide a valuable way for clients to make their arguments known to the court in a cost effective way. For that reason, amicus participa-

157. See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, in *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 114 (Susan D. Carle ed., 2005) (discussing the test case strategy of the NAACP within the context of legal ethics concepts).

158. MODEL RULES OF PROF'L CONDUCT preamble ¶6 (2003).

159. FED. R. CIV. P. 24(a)(1), (2). Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. *Id.*

160. FED. R. CIV. P. 24(b). The Rule allows the court to refuse intervention if the intervention would “unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.*

161. *Liberty Res. Inc. v. Phila. Hous. Auth.*, 395 F. Supp. 2d 206, 209-10 (E.D. Pa. 2005) (denying intervention but allowing “amicus plus” status, including the right to argue—with leave of the court—at court hearings).

tion may play an important role in lawyers' fulfillment of their ethical duties.

One of the criticisms of amicus briefs is that parties might misrepresent facts and evidence to support their position. This would be a violation of the ethical rules, but it is no more a danger with amicus briefs than any other briefs. Even though judges retain the authority to sanction attorneys for unlawful filings, it appears that judges rarely sanction attorneys for violations in amicus briefs.<sup>162</sup> In any case, sanctions are always available for egregious conduct by attorneys who file amicus briefs.

Lawyers have duties of competence and diligence in representing their clients.<sup>163</sup> The lawyer can fulfill these duties in a variety of ways, including filing amicus briefs. When a client's interests might be affected by litigation to which he is not a party, a lawyer may be representing their clients most diligently and competently by filing amicus briefs in relevant litigation. Thus, the rules should not unreasonably limit the lawyers' fulfillment of their ethical duties.

For lawyers to fulfill their roles as public citizens, sanctions should not be imposed lightly. Judges should reserve sanctions for only the most egregious actions. In this way, lawyers are better able to fulfill their role in a democratic society that the American Bar Association calls for in its rules.<sup>164</sup> Lawyers would also be more willing to file amicus briefs when necessary on behalf of their clients if they did not fear discipline for their briefs.

#### *D. Citizen Amicus Participation*

Citizens may also use amicus briefs to let their voices be heard in the courts, even if they are not represented by attorneys. Court rules may also allow pro se litigants acting without attorneys to file amicus briefs. In the recent California Supreme Court cases on the San Francisco Mayor's authority to process gay marriages, briefs were filed pro se by individual citizens attempting to influence the court's decision. One of the amicus briefs opposing the Mayor's actions was filed by Divine Queen Mariette Do-Nguyen.<sup>165</sup> The sixteen-page document, a collection of biblical verses and moralist philoso-

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162. See *supra* note 52 and accompanying text.

163. MODEL RULES OF PROF'L CONDUCT R. 1.1-1.3.

164. MODEL RULES OF PROF'L CONDUCT preamble ¶6 ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.")

165. Brief for Divine Queen Mariette Do-Nguyen, as Amici Curiae Supporting Petitioner, *Lockyer v. City & County of S.F.*, 95 P.3d 459 (2004) (Nos. S122923, S122865), available at <http://www.courtinfo.ca.gov/presscenter/briefs/DIVINAC.PDF>.

phy, was not cited at all in the court's final decision.<sup>166</sup> Even though judges may not utilize pro se briefs in their decisions or deliberations, those who file these briefs at least have a voice in the judicial process.

The possibility of pro se litigants flooding the courts with frivolous amicus briefs is a threat to the workability of my proposed standard, but it should be remembered that Rule 11 sanctions would apply equally to attorneys as to parties without attorneys. Indeed, it is not clear that the current rule has kept many amicus briefs from being filed. The risk of vexatious filings is balanced by the benefits of democratic participation in the court system.

Moreover, the right to appear without a lawyer is protected both by the Constitution and by statutes.<sup>167</sup> The right to appear without a lawyer dates to the Judiciary Act of 1789,<sup>168</sup> where Congress provided that in all federal courts, "the parties may plead and conduct their own cases personally or by counsel."<sup>169</sup> In a May 2007 United States Supreme Court decision involving the right of parents to represent themselves in proceedings about the appropriateness of their disabled children's education, the definition of a "party aggrieved" was central to the court's interpretation that a federal statute conferred that right.<sup>170</sup> Justice Scalia, in a partial dissent, would have held that the statute only gives "parties" the right to challenge the appropriateness of the individual education plans, but defines a "party aggrieved" from *Black's Law Dictionary* as a person whose "personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment."<sup>171</sup> This narrow conception of party status may limit the ability of pro se litigants to file amicus briefs since their person or property may not be directly affected by the court's outcome. While this limitation on nonparties may make sense from the perspective of Article III standing, since Article III standing requires an injury redressable by the court, it makes less sense for pro se amicus filing, or amicus filings generally, as I have argued above. Indeed, courts should view the re-

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166. *Lockyer*, 95 P.3d at 495-97 (discussing arguments set forth by city and amici curiae).

167. This is true except in the limited areas of corporations appearing without a lawyer. *Advanced Sys. Tech. Inc. v. United States*, 69 Fed. Cl. 355, 358 (Ct. Cl. 2006) (corporation cannot appear as amici without a lawyer). In *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 519-20 (2002), Justice O'Connor wrote that the NLRB was really trying to deal with sham litigation. The right to Petition, she said, is one of the "the most precious of liberties safeguarded by the Bill of Rights" and the right of access to the courts is one aspect of the right to petition. *Id.* at 524.

168. 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.).

169. 28 U.S.C. § 1654 (2000).

170. *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2003 (2007).

171. *Id.* at 2007 (Scalia, J., dissenting) (quoting BLACK'S LAW DICTIONARY 1154 (8th ed. 2004)).

quirement of an “interest in the outcome” in the litigation broadly, in keeping with the normative commitments furthered in this Article.

### *E. Amici and Popular Constitutionalism*

Increased use of amicus briefs might lend support to constitutional scholars who argue that the constitutional law should better reflect the will of the people. Dean Larry Kramer has been one of the main proponents of this view.<sup>172</sup> The popular constitutionalist view also has been espoused by other scholars such as Mark Tushnet and Sanford Levinson.<sup>173</sup> While popular constitutionalism focuses specifically on the proper way of interpreting the Constitution, the theory also envisions a broader involvement in the courts than is currently practiced.<sup>174</sup> The idea is that the “people themselves” create constitutional law, not the courts. While not going as far as popular constitutionalism, U.S. Supreme Court Justice Stephen Breyer’s concept of “active liberty” also envisions an active role for citizens in their government, which includes the courts and constitutional interpretation.<sup>175</sup>

Popular constitutionalist theory focuses largely on the proper institutional arrangements for constitutional decisionmaking, but the theory can also be applied to statutory interpretation cases as well. If the interpretation of the constitution should ultimately rest with the people, it is not a great leap that the people should also engage in statutory creation, or, in Ethan Leib’s words, a “popular branch” of government.<sup>176</sup>

The difficulty of measuring public opinion and its relevance to deciding constitutional law cases are only two of the problems inherent in popular constitutionalist theories. The merits of popular constitutionalism will continue to be debated.<sup>177</sup> That debate is not the point of this Article, however. All of this merely shows that active participation in government, including the courts, is increasingly viewed as essential to the functioning of a democratic system. That participa-

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172. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

173. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 194 (1999) (describing popular constitutionalism as a process of deciding what the Constitution means).

174. Philip Pettit, *Depoliticizing Democracy*, 17 *RATIO JURIS* 52 (2004).

175. See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

176. ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 121-23 (2004) (arguing for interest group pluralism).

177. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719, 719-21 (2006); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 *HARV. L. REV.* 4, 16-34 (2001).

tion can take a variety of forms, including filing amicus briefs. Thus, the standards for filing such amicus briefs should not be unreasonably high.

#### F. *Amicus Participation as Democratic Deliberation*

Perhaps the best argument for liberal standards for the filing of amicus briefs is the argument for making the courts a forum for discussion in a democratic system. As discussed above, amicus participation has provided needed cues and support to social movements and has given social movements a stake in the rule of law.<sup>178</sup> Deliberative democracy presents a view of democracy that, in its purest form, requires democratic decisions to be made by consensus. The version of deliberative democracy that I am using here is simply the idea that democratic decisionmaking is improved by a greater number of voices in the process.<sup>179</sup>

Ethan Lieb has applied deliberative democracy concepts to the initiative process.<sup>180</sup> Amy Gutmann and Dennis Thompson have written at length on this subject.<sup>181</sup> Judge Richard Posner has also analyzed and contrasted his approach—Schumpeterian—with deliberative democracy.<sup>182</sup> Schumpeterian democracy views the democratic process as largely a competition between elites for power.<sup>183</sup> The Schumpeterian view may be an accurate description of the reality of the American political system, but this may not be the ideal. In my view, a system with fewer barriers to entry is more democratic than one controlled by elites.

One might ask whether the courts are the best place for democratic deliberation. Those who are skeptical of deliberative democracy may be especially concerned about seeing the courts as the forum for deliberation. The legislature or public meetings, the skeptics might argue, are the proper venues for such deliberation. The function of

178. See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 134 (2004) (describing deliberative democracy as a process of “seeking, not just any reasons, but mutually justifiable reasons, and reaching a mutually binding decision . . . [for] those reasons.”); see also Ruben J. Garcia, *Transnationalism as a Social Movement Strategy: Institutions, Actors, and International Labor Standards*, 10 U.C. DAVIS J. INT’L L. & POL’Y 1, 3 (2003). See generally Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 107, 107-32 (Samantha Besson & José Luis Martí eds., 2006); Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 164, 164-81 (Austin Sarat & Stuart A. Scheingold eds., 2006).

179. Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215 (Cornell W. Clayton & Howard Gillman eds., 1999).

180. LEIB, *supra* note 176, at 12-29.

181. GUTMANN & THOMPSON, *supra* note 178.

182. POSNER, *supra* note 23, at 16, 204-05.

183. *Id.* at 14.

the courts in this view is to make decisions about the law with a minimal amount of interference. While this might be an ideal vision of courts, a legal realist appraisal of the courts accepts that judges will be influenced by a number of different factors in their decision-making. The virtue of greater amicus participation is that these influences are visible to those who wish to know them.

As described in his book, *Law, Pragmatism, and Democracy*, Judge Richard Posner criticizes deliberative democracy as a mode of legislation and adjudication.<sup>184</sup> Posner believes that “neither deliberative democracy on the left nor public choice theory on the right represents a pragmatic theory of lawmaking.”<sup>185</sup> Instead, Posner favors economist Joseph Schumpeter’s vision of democracy, where elites compete for votes and represent the interests of people who have neither the time nor the ability to focus on matters of democratic governance.<sup>186</sup> Posner believes that Schumpeterian democracy is both normatively superior to other theories of democracy and the most accurate description of American democracy today.<sup>187</sup> Posner’s pragmatist views of lawmaking and adjudication eschews grand theory for practical consequentialist theories.<sup>188</sup>

Posner’s views of democracy align with his views toward amicus participation. Posner’s questioning of the value of more amicus parties to judicial decisionmaking is consistent with his critique of deliberative democracy and public choice theories. As I have argued above, both deliberative democracy and interest group theories add something of value to judicial decisionmaking. Moreover, it is hard to characterize American democracy as any one kind of democracy; it is a blend of elite competition, public choice, and deliberative democracy. Finally, it is difficult to see the application of Schumpeterian theory to federal adjudication without elevating unelected judges to a kind of super elite status that not even legislators have. Thus, especially in the federal context, amicus participation can provide an important channel of communication with the judiciary.

In summary, amicus participation can be viewed from a number of different democratic perspectives, including participatory democracy, popular constitutionalism, and deliberative democracy. As described above, amicus participation can also be part of interest group politics. The point of this Article, however, is to show that amicus participation can be a part of other visions of democracy as well.

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184. *Id.* at 161.

185. *Id.* at 198.

186. *Id.* at 16-17.

187. *Id.* at 192-93 (describing Schumpeterian democracy as “competitive democracy”).

188. See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) (highlighting Posner’s pragmatist viewpoint).

## V. LET'S BE FRIENDS: BALANCING SCARCE JUDICIAL RESOURCES AND ROBUST AMICUS PARTICIPATION

Having established above that amicus participation plays an important role in a democratic system, the question remains whether the current rules concerning amicus briefs do enough to foster amicus participation. There is no debate that caseloads in the federal court system will continue to increase.<sup>189</sup> As a result, many judges might wish for a more stringent standard than the one that is currently in place to limit the number of filings that they must sort through. As discussed above, judges may impose additional requirements that are not specifically in the amicus rule in order to limit the number of amicus briefs filed.<sup>190</sup> On the other hand, the text of the rule places a minimal standard on the filing of amicus briefs that does not give much guidance to the court or the parties in terms of what is acceptable.

While Judge Posner's concerns about the negative effects of amicus briefs may be present in some cases, most of those who file amicus briefs merely want to have their voices heard. However, there is still a need for a more flexible standard for dealing with amicus briefs than the current one. In this Part, I propose a new but familiar standard that I think will better balance the interests at stake.

The controversial cases discussed above seem to lend support to Judge Posner's concerns about amicus briefs being used as interest group activity. Despite these recent examples, however, most courts will likely continue to accept amicus briefs for filing without much hesitation. Nevertheless, the continuing importance of amicus briefs in the Supreme Court will heighten the tension between a relatively open attitude toward amicus briefs and the more restrictive view espoused by Judge Posner. Because amicus filings are within the discretion of the trial court, the most likely sanction for an untoward amicus brief is simply that it will not be accepted for filing. This, coupled with the lack of sanctions imposed against attorneys for filing amicus briefs, suggests the need to look at the standard to make it both easier to file meritorious amicus briefs and to punish the filing of frivolous amicus briefs.

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189. See generally MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987) (examining the significance of the NAACP's litigation campaign against segregated schools and its impact upon the theory and practice of public interest law).

190. Compare Roy T. Englert, Jr., *In Favor of Friends: Courts Find Gold in Those Amicus Briefs*, *LEGAL TIMES*, Aug. 25, 2003, at 50, with Leslie T. Thornton, *With Friends Like These . . . the Weight of 90-plus Amicus Briefs in the Michigan Cases Ought to Influence the Court*, *LEGAL TIMES*, Mar. 31, 2003, at 70.

### A. A Familiar Standard

The standards in FRCP 11 should be used to provide a better threshold for the acceptance or rejection of amicus briefs.<sup>191</sup> FRCP 11 allows federal judges to sanction parties for briefs that are without factual or legal support, brought in bad faith, or meant to harass. The text of FRCP 11 could be applied to require amicus filers to certify that:

- (1) [their brief] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.<sup>192</sup>

The four elements of FRCP 11 above would place a substantive limitation on amicus briefs that is more understandable than the current rule. The first clause takes care of amicus filers who have improper purposes, and emphasizes that an amicus brief cannot harass or cause unnecessary delay or needless increase in the cost of litigation.<sup>193</sup> This goes to the substantive motivations of the persons filing the briefs. The second clause of the rule deals with the threat of meritless filings. The factual allegations that are made by amicus filers should be testable by the court or the parties.<sup>194</sup>

Under this new standard, the Graham-Kyl brief discussed earlier might have been rejected for putting forth false evidence about the legislative debate surrounding the Guantanamo detainees.<sup>195</sup> The requirement in FRCP 11(a)(4) that litigants certify that denials of factual contentions are warranted will not often be relevant to amicus

191. One commentator has recognized the need for reform of amicus rules to balance ethical advocacy with vigorous amicus participation. See Nancy Bage Sorensen, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY'S L.J. 1219, 1262-63 (1999). Sorensen's focus was on the ethical duty to disclose the financial supporters of amicus briefs toward greater transparency in Texas appellate practice. *Id.* While the proposal articulated here is broader than Sorensen's, her proposal is also in keeping with the greater democratic transparency supported above.

192. FED. R. CIV. P. 11(b)(1)-(4).

193. *Id.* 11(b)(1).

194. *Id.* 11(b)(2).

195. See *supra* note 90 and accompanying text.

filers, since such filers do not generally deny factual contentions made by the parties. Nevertheless, the court would have the inherent discretion to decide whether or not cause exists to sanction amicus filers.

The standards of FRCP 11 provide a sensible threshold for the filing of amicus briefs, although there has been some concern about the negative consequences of FRCP 11 for parties to litigation. FRCP 11 has been criticized for creating a litigation process that is sometimes used by parties as a cudgel against their counterparts.<sup>196</sup> This concern is not pertinent to the standard that I propose here. Under this standard, if an amicus brief lacks factual or legal support, the brief will not be received by the court. The court could use its inherent discretion to decide whether to sanction parties in addition to refusing their filings, but my use of the FRCP 11 standard does not presuppose that all parties whose briefs are rejected would also be sanctioned. In practice, most parties whose amicus briefs are rejected would probably not be sanctioned, except for those that are truly egregious or vexatious.<sup>197</sup>

Some might be concerned that a Rule 11 type standard will encourage gamesmanship and the satellite litigation that FRCP 11 has spawned.<sup>198</sup> In other words, parties and other amicus filers might exhaust all their energies trying to prevent other parties from filing amicus briefs. The response to this concern is that the current system also encourages a certain amount of gamesmanship on the question of whether the proposed amicus brief adds anything new to the case.<sup>199</sup> Also, Rule 11 may encourage such gamesmanship because of the potential for attorneys' fees awards for successful moving parties—something that the proposal that I envision would not automatically contain, but which is certainly possible at the judge's discretion.<sup>200</sup>

While application of my proposed standard may force inquiry into the motive of those filing amicus briefs, that inquiry is possible even

196. See generally Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 vis-à-vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645 (2004).

197. Many states could also use the standard advocated here. For a good study of state amicus rules, see Sarah F. Corbally & Donald C. Bross, *A Practical Guide for Filing Amicus Curiae Briefs in State Appellate Courts* 6 tbl. 1 (2001), available at <http://www.naccchildlaw.org/documents/amicuspracticalguide.pdf>.

198. See, e.g., George Cochran, *The Reality of "A Last Victim" and Abuse of the Sanctioning Power*, 37 LOY. L.A. L. REV. 691, 693 (2004) (discussing how the possibility of fee shifting under Rule 11 creates incentives for satellite litigation).

199. See, e.g., *Hammond v. Junction City*, No. 00-2146-JWL, 2001 WL 1665374, at \*1-2 (D. Kan. Dec. 17, 2001) (granting the National Employment Lawyers Association's request to participate as amicus curiae over the objections of the defendants that the brief "adds nothing" and is "duplicative" of the plaintiff's efforts).

200. See Hart, *supra* note 196, at 658.

under the current standards. Indeed, the point of this standard is to discourage judges from too eagerly searching for bad motives on the part of litigants. The standard is meant to look something like the “vexatious litigant” standard familiar to many judges. If amicus briefs are not vexatious or plainly meritless, then they should probably be accepted for filing. While this might result in more amicus briefs being filed, it is unlikely to significantly change the workload of federal judges because, under the current rules, judges are still required to determine whether an amicus brief adds anything to the arguments of the parties. Under the standard I propose here, there may be more briefs filed but judges would spend less time going through them to determine whether they “add anything new” to the arguments already made by the parties; judges would simply be on alert for any activity that suggests bad faith, which would not likely be onerous.

The use of a FRCP 11-type standard for amicus briefs will clarify what is expected of amicus filers. Other common parts of the rules on amicus participation may serve important purposes and should be retained. The rule that requires disclosure of any contributions or payment of fees from the parties to the amici is important to prevent parties with a greater number of resources from overpowering the other parties in the litigation. There should not necessarily be a right for wealthy parties to increase their already loud voices in the litigation if they are able to pay allies to appear as amici. Thus, the rules on disclosure need not be eliminated.<sup>201</sup>

Without having to show that a brief adds anything new, there might be more amicus briefs filed. The magnitude of the increase is uncertain, but an empirical question remains as to whether amicus filings would increase markedly as a result of a change in the standard. It is far from clear that the current rules are preventing many amicus briefs from being filed, but there is a chance that amicus filings might increase.

This is not to say that courts cannot seek more information about those who file amicus briefs. The identity of those who fund amicus briefs in some cases might be necessary for judges to know whether they need to recuse themselves, and many courts have this sort of rule for parties.<sup>202</sup> The U.S. Supreme Court and some federal appellate courts require disclosure of whether the amici are receiving

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201. See Sorensen, *supra* note 191, at 1257-58.

202. See, e.g., 2D CIR. R. 29, available at <http://www.ca2.uscourts.gov/Docs/Rules/LR29.pdf> (“The Court ordinarily will deny leave to file a brief for an amicus curiae where, by reason of a relationship between a judge who would hear the proceeding and the amicus or counsel for the amicus, the filing of the brief would cause the recusal of the judge.”).

compensation from any party to the lawsuit for filing the brief.<sup>203</sup> This rule allows the courts to know the full extent of “interest group activity” and to know whether the judges have a financial interest in the litigation or a connection to one of the parties. There may be other ways in which judges can know exactly who is funding litigation, such as at the filing of the complaint, but all of this transparency would serve to blunt much of the criticism of amicus briefs as interest group activity. In many ways, amicus briefs are more transparent than traditional forms of lobbying.

### *B. Concerns About Scientific Evidence*

There might be a concern that amicus filers will try to introduce evidence, sometimes social science evidence, which has not been vetted through the trial court. Indeed, some of the most notable uses of amicus briefs have brought social science evidence to the attention of the court. The question of whether judges will be beguiled by false social science evidence is a concern, but judges give little weight to social science evidence not presented to the trial court. Some attorneys may use amicus briefs as an end-run around the stricter evidence rules mandated by the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>204</sup> In *Daubert*, the United States Supreme Court set the parameters for the admission of scientific evidence in the trial courts. Basically, the trial court must first determine whether the expert’s opinion constitutes scientific knowledge, and then determine whether the opinion logically advances a material aspect of the offering party’s case.<sup>205</sup> The question of whether improperly vetted evidence will be relied upon by appellate courts is a persistent one and is a larger question than just having to do with amicus briefs.

There is certainly the possibility for the use of scientific evidence in amicus briefs. A recent example of this was the Supreme Court decision in *Gonzales v. Carhart*.<sup>206</sup> This case tested the constitutionality of the Congressional ban on partial birth abortion, which the Court upheld by a 5-4 vote.<sup>207</sup> The Court deferred to congressional findings about the intact dilation procedure, in order to hold that the procedure was never medically necessary.<sup>208</sup> In his opinion for the Court, Justice Anthony Kennedy pointed to another reason for the ruling,

203. SUP. CT. R. 37(6); see also Tony Mauro, *High Court’s New Rules Address Critics’ Privacy Concerns*, LEGAL TIMES, July 18, 2007, available at <http://www.law.com/jsp/article.jsp?id=1184663196330>.

204. 509 U.S. 579 (1993).

205. *Id.* at 597.

206. 127 S. Ct. 1610 (2007).

207. *See id.*

208. *Id.* at 1638.

which he could apply to all abortions: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>209</sup> For this proposition, Justice Kennedy cites the amicus brief of Sandra Cano and others filed by the Justice Foundation, a conservative group.<sup>210</sup>

The evidence provided for “abortion trauma syndrome” in Cano’s amicus brief is at best anecdotal, and the American Psychiatric Association recognizes no such disorder.<sup>211</sup> It is also notable that evidence of this condition was not submitted in the lower courts.<sup>212</sup> The Court nonetheless seemed to endorse as an alternative reason a scientific conclusion for which there is considerable doubt. The submission of scientific evidence of doubtful validity could have a negative impact on the ability of other parties to present empirical evidence, but courts should instead scrutinize such submissions carefully to determine whether further information is needed.<sup>213</sup>

While the amicus brief in *Gonzales* likely did not play a dispositive role in the outcome, it lent some support to the result that the Court reached. In fact, Justice Kennedy had dissented from the Court’s decision in *Stenberg v. Carhart* seven years earlier, where the Court struck down Nebraska’s partial birth abortion statute because it did not have an exception for the health and safety of the mother.<sup>214</sup> Nevertheless, the amicus brief in *Gonzales*, containing over a hundred pages of one-paragraph affidavits from a number of women who in most cases were identified only by their initials, supports the central premise of this Article toward greater public participation in the courts.

There have been other recent examples of amicus briefs that have included the voices of many people affected by the decision. In the University of Michigan affirmative action cases, a brief was filed by 13,922 law students from around the country in support of the law

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209. *Id.* at 1634.

210. *Id.*

211. In dissent, Justice Ginsburg called abortion trauma syndrome an “antiabortion shibboleth,” even while acknowledging that regret may be part of any woman’s decision to have an abortion. *Gonzales*, 127 S. Ct. at 1648 (citing to numerous authorities refuting the existence of the syndrome); Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL’Y REV. 3, 8 (2006); Nada L. Stotland, M.D., Letter to the Editor, *The Abortion Issue: Who Decides*, N.Y. TIMES, May 28, 2007, at A14.

212. See *Planned Parenthood Fed’n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006); *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N. D. Cal. 2004).

213. See Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 9 (1991); see also Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici Before the Supreme Court*, 78 WASH. U. L.Q. 789, 797-802 (2000).

214. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

school's affirmative action program.<sup>215</sup> This sort of brief seems to be more along the lines of a petition but it did communicate to the Court that a large number of individuals would be affected by the decision. The students' amicus brief was not cited by any of the justices in their opinions in the case.<sup>216</sup> Nevertheless, the Court held that the University of Michigan law school's efforts to enroll a critical mass of diverse students did not violate the Constitution's Equal Protection Clause.<sup>217</sup>

In contrast, the amicus brief discussed above in *Gonzales* was seeking to use the affidavits of the women who regretted having abortions to argue for the existence of a medical condition that had little relevance to the central issue in the case—whether the intact dilation procedure was ever medically necessary.<sup>218</sup> Unlike the students' brief in the University of Michigan cases, the Justice Foundation's brief was cited favorably by Justice Kennedy.<sup>219</sup> Studies of the effect of social science evidence in the courts show that judges most often seek information from amici in the scientific fields.<sup>220</sup> One study of a state supreme court showed that the justices took sixty percent of their citations to empirical research from the record, briefs, and amicus briefs.<sup>221</sup>

With respect to amicus briefs in the trial courts, there is always the opportunity for the judge to seek testimony from experts who submit amicus briefs in court, which would presumably be tested in accordance with the *Daubert* standard discussed above. In the appellate courts, judges can exercise considerably wider discretion to decide when scientific evidence is credible or not. Thus, if some “junk science” comes into an appellate decision through an amicus brief, it is primarily the fault of the judge or the parties in failing to debunk

215. See Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at [http://www.vpcomm.umich.edu/admissions/legal/gru\\_amicus-usssc/um/LSDHE-gru.pdf](http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-usssc/um/LSDHE-gru.pdf).

216. In contrast, the amicus briefs of corporations and educational associations were amongst those cited more than ten separate times by Justice O'Connor in her majority opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

217. For a discussion of the social science evidence marshaled by amicus filers to support the diversity rationale in the Michigan cases, see Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 796-97 (2006).

218. *Gonzales v. Carhart*, 127 S.Ct. 1610, 1634 (2007).

219. *Id.*

220. See generally ROSEMARY J. ERICKSON & RITA JAMES SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS 32 (1998); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993); J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 136 (1990).

221. Monahan & Walker, *supra* note 220, at 487 n.35.

it. As a result, a fear of junk science is not a reason to limit the ability of parties to raise scientific studies in their briefs.

### C. *The Duties of Judges in Handling Amicus Briefs*

A more liberal standard for accepting amicus briefs might place a greater burden on judges and encourage them to be selective in which briefs they read. This effect should be treated with concern, but this concern should not be overstated. After all, the current rules leave room for judges to pick and choose among different parties' briefs. Under Canon 3 of the ABA Model Code of Judicial Conduct, "[a] judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law."<sup>222</sup> The rule suggests that if a judge grants leave to file an amicus brief, the brief should be given the same attention that any other properly filed brief is given.

Despite the best efforts of judges to fairly evaluate all amicus briefs, there will be limits to how much attention they can give a flood of amicus briefs. In denying leave to file the amicus briefs, Judge Posner correctly pointed out that "[i]t would [be improper] for [a judge] to permit the filing of an [amicus] brief and then not read it . . . (or [leave it to] clerks to read it)."<sup>223</sup> In the end, however, it would be up to writers of the briefs to make a convincing case early on in the brief as to why their arguments should be given attention.

Although amicus filers are unlikely to file constitutional challenges if their amicus briefs are rejected, there are constitutional due process dimensions to the denial of leave to file an amicus brief. While judges may have ethical obligations to parties, judges do not have due process obligations to amicus filers. This is because the due process clauses of the Fifth and Fourteenth Amendments require procedural due process only for those whose "life, liberty, or property" is under threat of deprivation.<sup>224</sup> Despite this, there are First Amendment dimensions to amicus participation that warrant attention. Moreover, the question of whether nonlawyers have a right to file amicus briefs also raises important constitutional issues.

The more liberal standard for allowing the filing of amicus briefs in this Article is not intended to place unreasonable burdens on judges or the courts. Nor is it intended to give clerks inordinate power.<sup>225</sup> Instead, this Article seeks to extend the minimal due proc-

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222. See, e.g., CAL. R. CT. 8.200(c), 8.520(f) ("any person" may file an application for amicus participation).

223. Nat'l Org. for Women, Inc. v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000).

224. U.S. CONST. amends. V, XIV.

225. See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33 (2004).

ess consideration afforded party litigants to amicus filers. While some might argue that a more liberal standard for amicus briefs would place an unreasonable burden on the courts, the claim must be evaluated in terms of the burden that currently exists on judges to decide whether the amicus brief presented for filing adds anything new to the arguments already presented by the parties. The standard favored in this Article would actually lessen the burden on judges to make the determination of whether anything new was added by the amicus briefs. This standard probably represents the current reality because most amicus briefs are accepted for filing. Thus, the standard proposed here should not markedly increase the burden on the courts.

Of course, some judges might already use sorting techniques to allocate their scarce time to read briefs. A recent analysis of Justice Sandra Day O'Connor's decisions, for example, shows that she cited most often to the briefs of prestigious professional associations, the Solicitor General, and the states.<sup>226</sup> Another study suggests that the Justices might favor the amicus briefs of large institutional players.<sup>227</sup>

In the end, judges will use a variety of methods to deal with their increasing workloads. In a recent article, former Supreme Court clerks acknowledged that justices often separate amicus briefs based on their authors.<sup>228</sup> Justice Ginsburg, for example, has stated that her chambers divides piles of briefs between "must-read," "skim," and "skip" categories.<sup>229</sup> There is a good chance that other Supreme Court justices and federal judges use similar sorting techniques. There is also a chance that some judges will use denial of leave to file as a sorting technique.

One of the most prominent objections to a more liberal standard toward amicus briefs is the institutional burden more amicus briefs would place on the courts. Justice Ginsburg's "pile system" suggests that judges will find ways to deal with any increase in briefs filed. Some might rightfully be concerned that this would lead judges to discriminate even more than they already do based on the persons or entities filing the briefs. There are several responses to this argument. First, it seems unlikely that even a different standard for accepting amicus briefs will markedly increase the number of amicus briefs filed. Second, judges are likely to use various techniques to sort information similar to those used to sort briefs filed by parties, such

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

227. See Kearney & Merrill, *supra* note 10, at 749-50.

228. Lynch, *supra* note 225, at 52-54.

229. Tony Mauro, *Bench Pressed*, AM. LAWYER, Apr. 15, 2005, available at <http://www.law.com/jsp/article.jsp?id=1113296708400>.

as the reputation of the lawyers filing the briefs or the viewpoint of the party filing the briefs. This is not a reason to limit the number of participants to litigation, but rather to encourage judges to give a fair hearing to all parties.

Increased amicus participation will have a democratizing influence on the litigation process because, as stated above, it is often more cost effective for social movements to make their voices heard as amicus parties than as parties bringing litigation.<sup>230</sup> The question of whether more amicus briefs would lead judges to give less attention to the briefs filed by parties if more amicus briefs are filed remains unanswered. While there are institutional limits on the number of briefs that courts can handle, the focus should be on the minimal attention that judges give litigants. This points us to the minimal due process standards that should be afforded to all litigants. Even under the current amicus rules, there will be a limit to the patience of judges regarding a large number of amicus briefs.

If the standard proposed in this Article is adopted, there might be an increase in the number of amicus briefs that are filed. If that occurs, the need for self-regulation of the profession will be more important.<sup>231</sup> As a strategic matter, it is in the interest of amicus filers to form coalitions to maximize their impact before the court. Thus, any increase in amicus filings will probably be offset by the increased coalition building among large and small groups such as We Make the Road by Walking, Inc., a social service group for immigrants on which filed an amicus brief in *Hoffman Plastic Compounds, Inc. v. NLRB*, discussed above.<sup>232</sup>

## VI. CONCLUSION

Because American courts are the locus for decisions with vast political, social, and economic implications, it is understandable that there is increasing pressure for the public's voice to be heard in the judicial process. As this occurs, there will likely be pressure to regulate and limit the number of amicus filings to ensure that judges are not unduly burdened by a large number of briefs, and to screen out frivolous arguments. The current system, which largely allows individual judges to decide which briefs to accept, will need to be modi-

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230. This can be seen in the number of smaller groups that have filed amicus briefs in the Supreme Court in recent years, such as Make the Road by Walking, a social service group for immigrants on Long Island, New York, which filed an amicus brief in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

231. See generally Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003) (exploring possible changes in lawyer regulation and concluding that legislative oversight would be most effective).

232. See *supra* Part IV.A.

fied to provide guidelines that will maximize democratic participation without being unduly burdensome for judges. In this Article, I argue for a new standard based on the Federal Rules of Civil Procedure that would be more in keeping with both pluralist and deliberative conceptions of democracy.

The standard that I propose here balances concerns about an increase in amicus briefs with the important implications for the American democratic system. The new amicus rule I propose, borrowed from the Federal Rules of Civil Procedure, still gives judges the opportunity to reject amicus briefs that are frivolous or filed in bad faith. I believe this standard will better serve the goals of broader participation in the legal system. More amicus participation may also increase the faith in the judicial system that is eroding in some quarters today. With a more liberal standard, litigants will continue to band together in groups and associations in order to maximize their impact on the court.

Amicus participation likely will continue to increase, irrespective of the rules applied to amicus briefs. As amicus participation increases, I predict that the rules on amicus participation, which thus far have been minor obstacles to the filing of most amicus briefs, will be used as gatekeepers more frequently. Ultimately, in my view, judges will continue to be the gatekeepers and filters. Current amicus rules can be modified to limit only the most vexatious participation. A new standard for the acceptance of amicus filings in this respect would be more in keeping with both pluralist and deliberative conceptions of democracy.

The continually increasing caseloads of the federal courts will sharpen the tension between the need for greater access to the courts for nonparties and the prevention of diluted adjudication. As with many current controversies, these tensions should be resolved with some overarching democratic principles in mind. On one hand, amicus filers may burden the courts. Yet, amicus participation is an important part of the democratic process, as I have argued above. This is why I argue for a different standard for courts to use in deciding whether to accept amicus briefs for filing. I think this standard will be both easier to apply and also focus in on the real concerns—frivolous filings. Debates about deliberative democracy will continue. The role of litigation and the judiciary in defining the contours of our democracy will continue to be part of this discourse.