THE SOLICITOR GENERAL UNBOUND: Amicus Curiae Activism and Deference in the Supreme Court*

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ABSTRACT

This article addresses the confluence of two phenomena characterizing litigation in the United States Supreme Court. The Solicitor General represents the United States in the Court, and the SG has been extraordinarily successful as a litigant, and in supporting other successful litigants through the filing of amicus curiae briefs. Likewise, many interest groups, and the United States and state governments, have increasingly filed amicus briefs in Court cases. The SG participates as a party or an amicus in well over half of the cases decided on the merits by the Court, especially significant given the Court's shrunken docket in recent decades. The Court often cites the SG's amicus briefs, and requests the SG to file such briefs at the certiorari and merits stages. Given the high quality of the SG's work in general, and the apparent helpfulness of the SG's amicus briefs, many observers seem to approve of the status quo, and applaud the SG filing numerous amicus briefs, and their influence on the Court.

This article challenges the conventional wisdom with a jurisprudential critique of the current practices of the SG and the Court, focusing on the SG's filing of amicus briefs in cases where the interests of the United States are attenuated, and on the Court's inconsistent deference to these briefs. The article argues that the SG should only file amicus briefs in cases where the interests of the United States, and particularly of the executive branch, are directly affected, as opposed to cases concerning the broader policy agenda of an administration. The article next examines the deference sometimes given the SG's amicus briefs in Supreme Court opinions. The Court has not been a model of consistency regarding this deference in certain categories

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*. With apologies to ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).

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of cases. In other cases it seems to treat the SG amicus brief as entitled to no greater deference than the amicus brief of any other interest group. Using as examples SG amicus briefs filed in recent Terms, the article proposes and applies criteria to constrain the SG in filing such briefs, and to guide the Court in giving appropriate deference to such briefs. Under these criteria the SG will still play a significant role in Supreme Court litigation, but that role will be limited to the particular interests of the executive branch.

I. INTRODUCTION

This article addresses the confluence of two phenomena characterizing a significant portion of litigation in the United States Supreme Court (the "Court") in recent decades. The Solicitor General ("SG") represents the interests of the United States in the Court, and the SG has been extraordinarily successful as a litigant, and in supporting other successful litigants through the filing of friend-of-the-court, or amicus curiae, briefs.[1] Likewise, many interest groups, and the United States and state governments, have increasingly filed amicus briefs in Court cases.[2] Every Term of the Court seems to present a case vying for the most amicus briefs ever filed. In the 2011 Term, that case was the constitutional challenge to the individual mandate of the Affordable Care Act,[3] with 136 amicus briefs filed.[4] The SG participates as representing a party or appearing as amicus in well over half of the cases decided on the merits by the Court,[5] especially significant given the Court's shrunken docket of recent decades.[6] The Court

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1. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 703–07 (5th ed. 2012) (documenting high success rate of the United States as a party and the SG as amicus curiae in the Supreme Court). For example, since 1980 the United States has won from 53% to 88% of the cases in which it was a party, and similarly supported the prevailing party from 53% to 85% of the cases in which it appeared as amicus curiae. *Id.* at 703, 706–07. *See generally* RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS (2012). The "success" referred to in the text means that the party backed by the SG prevailed, not that the SG's amicus brief was necessarily the reason for the party prevailing. For discussion of how to measure the SG's success, see *infra* Part II.B.

2. *See* EPSTEIN, *supra* note 1, at 721 (documenting increasing number of Supreme Court merits cases with at least one amicus curiae brief filed, from 21% in 1946 Term to 93% in 2001 Term); R. Reeves Anderson & Anthony J. Franze, *Commentary: The Court's Increasing Reliance on Amicus Curiae in the Past Term*, NAT'L L.J. (Aug. 24, 2011). *See generally infra* Part II.A.

3. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

4. Eric Lichtblau, *Groups Blanket Supreme Court on Health Care*, N.Y. TIMES, Mar. 25, 2012, at A1. For other examples of cases with large numbers of amicus briefs filed, see DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 232–33 (9th ed. 2011) discussing Grutter v. Bollinger, 539 U.S. 306 (2003) (107 amicus briefs filed) and Citizens United v. FEC, 558 U.S. 310 (2010) (over 100 amicus briefs filed); A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 102 (2012), http://www.virginialawreview.org/sites/virginialawreview.org/files/Howard_OutofInfancy.pdf (ninety-two amicus briefs were filed in Fisher v. Univ. of Texas, 133 S. Ct. 2411 (2013)).

5. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1353–54 (2010).

6. EPSTEIN, *supra* note 1, at 89–90 (documenting declining number of Court decisions on the merits from 1965 to 2009 Terms, from 128 to 81 respectively); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225

often agrees with the position taken by the SG as amicus and disproportionately refers to such briefs in its opinions.[7] The high regard in which the Court generally holds the SG, and its amicus work in particular, is also demonstrated by the Court's not infrequent practice of requesting the SG to file such briefs in cases at the certiorari or merits stages, calling for the views of the United States.[8] Due to the high quality and helpfulness of the SG's amicus briefs, coupled with the perception that the Court's decisions are, in general, aided by access to and reliance on the information found in amicus briefs, many observers treat benignly or applaud the SG's frequent amicus filings and their apparent influence on the Court.[9]

The conventional wisdom is due for a challenge. This article undertakes that challenge with a jurisprudential critique of the current practices of the SG and the Court, focusing on the SG's filing of amicus briefs in cases where the interest of the United States is attenuated, and on the Court's inconsistent deference to the briefs. It argues that the SG should only file amicus briefs in cases where the interests of the United States, and particularly of the executive branch, are directly affected, as opposed to cases concerning the broader policy agenda of the administration. Thus, in two recent high-profile examples, the SG was right not to file an amicus brief in the much discussed *Wal-Mart Stores, Inc. v. Dukes*,[10] concerning the propriety of a nationwide class action in an employment discrimination case, and should not have filed an amicus brief in the challenge to California's Proposition 8, forbidding same-sex marriage.[11] Rather, the SG

(2012). *See generally Statistics for the Supreme Court's October 1965 to 2009 Terms*, 81 U.S.L.W. 3018 (2012) (providing similar data and indicating that Court rendered seventy-five and sixty-five merits opinions in the 2010 and 2011 Terms, respectively).

7. BLACK & OWENS, *supra* note 1, at 24–27.

8. *Id.* at 51–54.

9. *See, e.g.*, Cordray & Cordray, *supra* note 5, at 1371 (footnote omitted) (expressing confidence that the SG's office "has confined its amicus participation in private cases to those in which the federal government has a direct and important interest"); Omari Scott Simmons, *Picking Friends From the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 211–14, 233 (2009) (praising the Court's use of amicus briefs, including those from the SG). *See generally* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315 (2008) (arguing standards for accepting amicus briefs should be lowered because they further constitutional and democratic values).

10. 131 S. Ct. 2541 (2011).

11. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). *See, e.g.*, Editorial, *Beyond Selma-to-Stonewall*, N.Y. TIMES, Jan. 28, 2013, at A16 (calling on President Obama to direct the Solicitor General to file a brief against Proposition 8); David Crary, *Gay Activists Applaud Obama Speech, Ready for Real Action*, STAR TRIBUNE (Jan. 23, 2013), http://www.startribune.com/politics/national/188043601.html (discussing whether Obama administration will file amicus brief in Proposition 8 case); Adam Liptak, *A Predicament on Gay Marriage*, N.Y. TIMES, Feb. 5, 2013, at A13 (same). The amicus brief the SG filed is discussed *infra* at notes 117–20 and accompanying text.

should generally file amicus briefs only in cases involving foreign affairs, national security, where the executive branch and federal agencies are expressly given authority to enforce federal law, and a few other areas of direct federal interest.

The article next examines the deference sometimes given the SG's amicus briefs by the Court. The influence of the SG's amicus briefs goes beyond mere statistical correlation between the position advocated by the SG and the holding of the Court. The Court often calls for the views of the SG ("CVSG") via amicus briefs, frequently cites or discusses the SG amicus brief, disproportionately more than other amicus briefs, and sometimes individual Justices will even lament that their decision making has been hindered by the failure of the SG to file an amicus brief.[12] But the Court has not been consistent regarding the doctrinal deference it generally gives the SG's briefs, particularly in certain categories of cases.[13] In other cases the Court sometimes goes out of its way to criticize the SG's brief, or simply ignores it, or treats it the same way it treats other amicus briefs.[14] Using as examples SG amicus briefs filed in recent Terms, the article

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12. BLACK & OWENS, *supra* note 1, at 51–54; J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring) (declining to modify personal jurisdiction doctrine "without a better understanding of the relevant contemporary commercial circumstances . . . [as] they might be presented in a case (unlike the present one) in which the Solicitor General participates") (referring to amicus brief filed by SG in a companion case). It is worth noting that Justice Breyer "has been an outspoken advocate of the informational benefits of amicus participation in particularly complex areas of law and in questions that implicate technical or scientific issues." Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1253 (2011) (footnote omitted). *See also* Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 586 (7th Cir. 2012) (Ripple, J., concurring) (arguing that consideration of case regarding preemption of state property law by recently-enacted federal law would have benefited from the amicus curiae participation of the United States, given the "public importance" of the private litigation).

13. *Compare, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1321 n.10 (2011) (observing that Court's holding "accords with the views of the SEC" as indicated by the SG's amicus brief, and noting that the SEC's views of the securities law issues are "entitled to consideration" (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 n.10 (1976))), *and* Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184, 1201–02 (2013) (giving weight to SG's amicus brief expressing views of the Department of Justice and the SEC), *with* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 n.8 (2011) (declining to address issue raised by the SEC via the SG's amicus brief, and noting that "we have previously expressed skepticism over the degree to which the SEC should receive deference regarding" the existence and scope of private rights of action under the securities laws, with no reference to *Matrixx*, decided over two months earlier).

14. *See, e.g.*, Ariz. Free Enter. Club v. Bennett, 131 S. Ct. 2806, 2824 (2011) (discussing "flaws" in the SG's amicus brief); Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2886–88 (2010) (devoting entire subsection of opinion to refuting position advanced in SG's amicus brief); Already, L.L.C. v. Nike, Inc., 133 S. Ct. 721, 732–33 (2013) (same); Evans v. Michigan, 133 S. Ct. 1069, 1078–81 (2013) (same). *See generally infra* Part III.A.

proposes and applies criteria to constrain the SG in filing such briefs, and to guide the Court in determining how much deference, if any, to give such briefs in certain cases. The Court can and should consider the views of the SG as amicus in any case, but it should only give deference to the briefs filed in cases involving certain aspects of foreign affairs and other areas where the executive branch possesses expertise on legal or relevant facts.

One may question why this effort is necessary. The SG's office across different Presidential administrations enjoys a deservedly high reputation for almost all of its amicus work, legal probity, usefulness to the Court, and impartiality of the briefs. Moreover, some have argued that the Court does and should take into account the political signals and public opinion transmitted by the SG and interest groups in amicus briefs.[15] Why not leave well enough alone? The short answer is that there is much truth to these assertions, but a good thing has been taken too far. There is too much activism by the SG in filing amicus briefs, an activism which cloaks the sometimes politicized nature of the decision to file, or not file, such briefs. The inconsistent deference by the Court to such briefs, when they are filed, has been a source of doctrinal confusion. More generally, the critics of too many amicus curiae briefs argue that it undermines the adversary system, and the SG's frequent filing of such briefs plays into that criticism.[16] It may be unfair to the disfavored litigant for the SG to weigh in as amicus unless the interests of the United States are directly implicated. A more restrained role by the SG in filing such briefs, and more consistency by the Supreme Court in deferring (if at all) to them, will inure to the benefit of both institutions.

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15. *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 121–39 (2011) (discussing how the executive branch, via the SG and amicus briefs, sends signals of political support to the Court regarding certain cases); Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 72 (2005) (same); Ryan C. Black & Ryan J. Owens, *Looking Back to Move Forward: Quantifying Policy Predictions in Political Decision Making*, 56 AM. J. POL. SCI. 802, 806–09 (2012) (arguing that SG's Call for the Views of the Solicitor General (CVSG) briefs provide information and signals to the Court on likely response to a Court decision by other branches of government); Simmons, *supra* note 9, at 211–15 (arguing that the Court can support its institutional legitimacy by taking into account views of amicus briefs); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 588–89 (2005) (arguing that elected officials may sometimes welcome Supreme Court intervention to overcome political opposition, and giving example of Kennedy administration filing amicus briefs in reapportionment cases).

16. *E.g.*, Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 35–37 (2011) (arguing that the Court's frequent reference to information in amicus briefs undermines the adversarial system). For further discussion, see *infra* Parts II.A, II.D.

The article proceeds as follows. Part II summarizes the increasing filing of amicus briefs in the Supreme Court in all cases by many interest groups, and by the SG in particular. This part also considers reasons for the SG's success as amicus, the controversies that have occasionally attended the SG's filing of amicus briefs in abortion, school prayer, and other controversial cases, and suggests criteria that the SG should follow in filing amicus briefs with a narrower vision of the interests of the United States. Part III focuses on the use of such briefs by the Supreme Court. It begins by canvassing recent examples of the Court explicitly deferring to, relying on without deference as such, or disagreeing with, the position advanced by the SG. Drawing on administrative law principles, this part considers why the Court should ever defer in any case to a position advanced by the SG as amicus and, if so, what those categories of cases should be. Part IV concludes the article.

II. THE SOLICITOR GENERAL AS AMICUS CURIAE

A. Amicus Briefs in General

The filing of amicus curiae briefs in the Supreme Court is mainly a creature of the second half of the twentieth century.[17] Amicus briefs, or their functional equivalent, were first filed in the Court as early as 1823, but the Court formally institutionalized the practice by promulgating rules in 1939.[18] The rules require any person, interest group, or governmental entity to seek the permission of the parties or of the Court itself to file such briefs, save for the SG or state attorneys general, where no permission is needed.[19] In recent decades, all of these entities have increasingly filed amicus briefs in the Court, so much so that the vast majority of cases decided on the merits have at least one amicus brief filed.[20] Similarly, the Justices themselves are cognizant of the large number of amicus briefs filed, and have themselves increasingly cited or discussed such briefs in their

17. For overviews of the history of the filing of and use of amicus curiae briefs in the Court, see generally EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE (9th ed. 2007); PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2008); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

18. COLLINS, *supra* note 17, at 38–42.

19. The current rule is SUP. CT. R. 37.

20. GRESSMAN, *supra* note 17, at 740–41; Kearney & Merrill, *supra* note 17, at 751–56; EPSTEIN, *supra* note 1; Anderson & Franze, *supra* note 2.

opinions.[21] Numerous reasons have been advanced for the proliferation of amicus briefs, including the Court's liberally granting leaves to file the briefs, more interest groups paying attention to Court decisions, groups filing briefs to counter those filed by competing groups, and the perception of groups that the briefs can impact Court decisions.[22]

The rising tide and apparent influence of amicus briefs has not been without controversy. Originally, most amicus briefs were indeed thought to be friends of the *court*, not of the *parties*, and brought useful, disinterested arguments and information to a court's attention, in ways the parties would not or could not.[23] That's still true, and the value added by amicus briefs to the information flowing to the Court provides the most powerful justification for the filing and use of the briefs.[24] But it soon became apparent that many if not most amicus briefs were advocating a particular result, usually on behalf of one of the parties.[25] And many such briefs came to be filed by interest groups which routinely lobbied the other branches of government on public policy.[26] The political aura of these briefs, as part of the process that leads to ostensibly non-political and non-ideological

21. EPSTEIN, *supra* note 1, at 724; GRESSMAN, *supra* note 17, at 741; Anderson & Franze, *supra* note 2; Lisa S. Blatt, *In Front of the Burgundy Curtain*, 14 GREEN BAG 2d 9, 13–15 (2010); Kearney & Merrill, *supra* note 17, at 757–61.

22. For discussions of these reasons, see COLLINS, *supra* note 17, at 37–72; Paul M. Collins, Jr. & Kearney & Merrill, *supra* note 17, at 762–67. *See generally* Lisa A. Solowiej, *Interest Group Participation, Competition and Conflict in the U.S. Supreme Court*, 32 LAW & SOC. INQUIRY 955 (2007).

23. *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694, 694–95 (1963).

24. For discussion of the informational model and amicus briefs, see 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); Haw, *supra* note 12, at 1253–54. *See generally* James F. Spriggs & Paul H. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997).

25. Krislov, *supra* note 23, at 702–04.

26. The classic treatment of the shift in the nature of amicus briefs is Samuel Krislov, *supra* note 24. The shift is reflected in the Supreme Court's rules, which request that the brief on "its cover shall identify the party supported or indicate whether it suggests affirmance or reversal." SUP. CT. R. 37.3(a). Justices now routinely refer in opinions to a party and his or her amici. *E.g.*, Missouri v. McNeely, 133 S. Ct. 1552, 1564–67 (2013); Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2173 n.24 (2012); Perry v. New Hampshire, 132 S. Ct. 716, 727 (2012); Haw, *supra* note 12, at 1258 n.66 (giving other examples). Some argue that amicus briefs in the Supreme Court, the first of which were filed in the antebellum era, have never "acted as solely neutral bystanders; instead, the partisan role of the amicus has always been the norm." COLLINS, *supra* note 17, at 40.

judicial decisions, has led some observers to call for limits to[27] or even the banning of amicus briefs.[28]

Amicus briefs have been a matter of some controversy at the Supreme Court. While the Court's own rules permit the filing of such briefs, some Justices have privately worried that amicus briefs may present factual or legal issues irrelevant to the case as shaped by the adversarial parties.[29] Justice Felix Frankfurter argued that the new rules provided a too-convenient conduit for interest groups to lobby, which, he felt, could do damage to the image of the Court by suggesting that the Court was susceptible to such pressures.[30] Subsequently, some Justices have occasionally criticized in opinions the arguments in or usefulness of information found in particular amicus briefs,[31] but none has launched a systematic attack on the institution of the amicus brief. Quite the contrary, now all of the Justices frequently cite or distinguish such briefs.[32]

B. Solicitor General Success and Influence as Amicus Curiae

What is meant by the success and influence of the SG when filing amicus curiae briefs in the Court? Hard data provides one answer. As observed at the outset, the Court supports the SG at high levels, both when the SG represents the United States as a party, and supports a party as an amicus.[33] The latter role is the primary focus of this article, and ample

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27. The most prominent critic has been Judge Richard Posner, who has argued that permission to file amicus briefs should not be granted when they are only used to signal political preferences to a court. *See, e.g.*, Voices for Choices v. Ill. Bell Tel Co., 339 F.3d 542, 544 (7th Cir. 2003); Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

28. *See, e.g.*, Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 632 (1974). Kurland described this "lobbying" of the Court as "unseemly" and argued it should be eliminated. *Id.* For an overview of the criticisms of amicus briefs, see Simmons, *supra* note 9, at 326–33.

29. Gorod, *supra* note 16, at 36 n.154 (discussing debate between Justices Black and Frankfurter); Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143, 161–62 (same).

30. *See* Hutchinson, *supra* note 29, at 162.

31. *E.g.*, Gorod, *supra* note 16, at 37 (giving an example of criticizing the majority's reliance on an amicus brief).

32. *See supra* note 2.

33. *See supra* note 1. When the United States or an agency thereof is a party or appears as amicus, almost always the SG is the lead attorney. Sometimes the attorneys for that particular agency, rather than the SG, may appear before the Court or file an amicus brief. For convenience, all such instances will be referenced as the SG filing on behalf of the United States. For purposes of this discussion it is unnecessary to further differentiate these roles because it is relatively rare for the SG not to represent the United States and on the few occasions it does happen, the other attorneys usually consult the SG before filing a brief. Paul

evidence from nearly five decades supports the proposition that the Court frequently agrees with the recommendation of the SG, no matter the political affiliation of the President who appointed the SG, both regarding whether certiorari should be granted,[34] and the disposition of the case on the merits, once review is granted.[35] Beyond such data, which focus on the outcomes of cases, the SG's amicus briefs are also often considered to be influential in the shaping of doctrine by the Court as revealed in opinions. That influence may be revealed by citations to the SG's amicus brief in the Court's opinions,[36] or the Court can simply take into account the arguments or positions of the SG without citing to the SG's amicus brief.[37] The

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D. Clement, *Theory and Structure in the Executive Branch*, 2011 U. CHI. LEGAL F. 1, 5–6; Elliot Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1085 (2009). On the other hand, there can be conflicts between the SG's office and the attorneys in the agency, regarding the substantive positions sought to be advanced in the Supreme Court. Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 195. Likewise, when the SG is arguing on behalf of an agency, the Court is ostensibly deferring (if it defers at all) to the agency, not to the SG as such. *Id.* at 206 n.68. (One might imagine the opposite scenario, where the Court does not jurisprudentially defer to the view of an agency, yet nonetheless defers to the SG's arguments as amicus, given its respect for the SG in general.) That said, the principal focus of this article is on the role of and the deference due the SG, notwithstanding the possible intra-branch disagreements that may precede the filing of the SG's brief. *But see infra* Part III.C.2 (discussing Court deference to SG in preemption cases involving position of an agency).

34. *See* Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the U.S. Supreme Court*, 64 POL. RES. Q. 765, 775 (2011) (studying the influence of SG amicus briefs on certiorari issue in U.S. Courts of Appeals cases from 1970 to 1993 Terms).

35. BLACK & OWENS, *supra* note 1, at 51–55; Brett Curry et al., *"An Informal and Limited Alliance": The President and the Supreme Court*, 38 PRESIDENTIAL STUD. Q. 223, 240 (2008) (Court supports position adopted by the SG as amicus "at higher rates than their attitudes alone would suggest"); Barbara L. Graham, *Explaining Supreme Court Policymaking in Civil Rights: The Influence of the Solicitor General, 1953-2002*, 31 POL'Y STUD. J. 253, 266 (2003) (study of SG amicus briefs filed in civil rights cases); Lemos, *supra* note 33, at 189 n.14 (discussing data on success of SG as amicus); Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J. L. & PUB. POL'Y 541, 541 (2009) (Court ruled in favor of the position of the SG as amicus in 89% of cases from 2005 to 2007).

36. Anderson & Franze, *supra* note 2 (SG amicus briefs were cited "a remarkable 79% of the time."); Kearney & Merrill, *supra* note 17, at 767–87 (general discussion of influence of amicus briefs); Juliano, *supra* note 35, at 558 (in more than half the cases from 2005 to 2007 in which the SG filed an amicus brief, at least one opinion mentioned the SG or cited the brief).

37. As is often observed, merely because an amicus brief is cited does not mean it was particularly influential, and no citation does not mean it wasn't influential. For prominent examples of the latter phenomenon, consider Brown v. Bd. of Educ., 347 U.S. 483 (1954) and Baker v. Carr, 369 U.S. 186 (1962), in which the SG filed what are generally regarded as very influential amicus briefs. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 328 (2004) (discussing influence of SG amicus brief in *Brown*); Michael E. Solimine, *Congress, the Solicitor General, and the Path*

influence is also reflected in the Court's practice of occasionally requesting the SG to submit amicus briefs on the issue of whether the Court should grant certiorari in cases.[38] The Court frequently follows the suggestion of the SG in this regard.[39]

What accounts for the success of the SG as amicus? The conventional answer is that the SG's office brings considerable expertise to the briefs it files, enjoying a bi-partisan reputation for excellence and credibility built up over decades of many administrations, given the SG's status as a classic repeat player in the Court with financial and other resources unavailable to most litigants.[40] Many distinguished lawyers have served as the SG, and many have gone on to serve in the federal judiciary (including the Supreme Court) or in other high-profile positions in the legal profession.[41] It is an elite legal institution within the federal government, and the SG draws on that reservoir of reputation and acumen when drafting amicus briefs, as no doubt do the readers of the briefs on (and off)[42] the Court.[43]

Other explanations for the SG's amicus success have been advanced, including that the ideological position of a SG amicus brief may resonate

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of Reapportionment Litigation, 62 CASE W. RES. L. REV. 1109, 1122–23 (2012) (discussing influence of SG amicus brief in *Baker*).

38. For discussion of this practice, see generally Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859 (2013); Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIS. 35 (2010); David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237 (2009). *See also* Black & Owens, *supra* note 15, at 807 (of 851 CVSGs issued from the 1971 to 2010 Terms, 300 led to Court granting review).

39. Thompson & Wachtell, *supra* note 38, at 276 (from 1998 to 2004 Terms, the Court followed the SG's recommendation to grant certiorari in 75% of cases, and a recommendation to deny certiorari in 80% of cases).

40. Cordray & Cordray, *supra* note 5, at 1335–37.

41. BLACK & OWENS, *supra* note 1, at 16–20; *see also* Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 74–79 (2010).

42. The SG's amicus briefs and the participation of the SG in oral argument as an amicus in the Court is regularly referred to in the press. *See, e.g.*, Adam Liptak, *Admissible Evidence, or a Backdoor Ploy? Justices Ask*, N.Y. TIMES, Dec. 6, 2011, at A21; Adam Liptak, *Supreme Court Hears Case on Patents for Individualized Medicine*, N.Y. TIMES, Dec. 7, 2011, at B3; Richard Wolf & Mary Beth Marklein, *Supreme Court Debates Affirmative Action Case*, CINCINNATI ENQUIRER, Oct. 11, 2012, at A2; Adam Liptak, *Custody Case in Scotland Goes Before U.S. Justices*, N.Y. TIMES, Dec. 5, 2012, at A23.

43. BLACK & OWENS, *supra* note 1, at 72–79; JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 163–64 (2012) ("In an age when the reputations of many government agencies have suffered, the office of the solicitor general has remained a symbol of excellence: small, elite, and deeply respected by its most important audience, the justices.")

with the policy preferences of the Court or individual Justices; that the positions taken by such briefs are influenced by the perceived reception by the Court; or that the Court is deferring to the position taken by the SG for the political support it may offer.[44] It takes no great insight to conclude that these various explanations are not mutually exclusive, and probably some or all of them are at work in any given case, or in the overall work of any given SG.[45]

C. The Solicitor General and the Amicus Curiae Wars

For many decades, the SG has been filing amicus briefs, and taking controversial positions, in what were then or later regarded as high-profile, contentious cases in the Supreme Court. For example, the SG in the Truman and Eisenhower administrations filed briefs arguing against state-sanctioned racial discrimination.[46] These cases notably included *Shelly v. Kraemer*,[47] regarding racially restrictive covenants in private contracts, and *Brown v. Board of Education*,[48] regarding segregation in public schools. The SG in the Kennedy Administration filed amicus briefs against malapportioned

44. For overviews of these alternative explanations, see BAILEY & MALTZMAN, *supra* note 15, at 124 (SG amicus briefs may serve as signals of support from the executive branch); COLLINS, *supra* note 17, at 105–07 (ideological convergence between the Court and the SG as amicus); Black & Owens, *supra* note 15, at 806–09 (the Court uses CVSG briefs as informational signals); Juliano, *supra* note 35, at 559–64.

45. BAILEY & MALTZMAN, *supra* note 15, at 125 (describing "a hybrid explanation of solicitor general influence that depends on both expertise and ideology").

46. *See* RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 70–80 (2003) (discussing SG amicus briefs filed in cases involving racial discrimination in the Truman and Eisenhower administrations); Seth Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1305–09 (2000) (same); James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 686–87 (1990) (same). *See generally* Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987) (interviewing former assistant to SG on SG's amicus brief involvement in civil rights litigation during Truman era).

47. 334 U.S. 1 (1948).

48. Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).

legislative districts, and in support of the one-person, one-vote standard.[49] Similar examples can be found in subsequent Presidential administrations.[50]

The amicus curiae filings of the SGs in the Reagan administration attracted particular attention and criticism in some quarters. That administration took a stronger interest than past ones in using the amicus filings of the SG to advance a conservative social policy agenda.[51] Rex Lee and Charles Fried, the Solicitor Generals under Reagan, filed briefs in several high-profile cases arguing, among other things, in favor of school prayer, against abortion rights, and against racial preferences on behalf of minorities.[52] The purported amicus activism of the Reagan SGs was attended by an upsurge in scholarly discussion of the proper role of the SG.[53]

Some argued that the SG as amicus should be in effect a "Tenth Justice," serving to protect the institutional interests of the Court, without regard to and indeed independent of the policy agenda of a particular administration. Under this vision, the SG is uniquely positioned to provide the Court with valuable and unbiased legal arguments and information regarding the

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49. The Kennedy administration filed amicus briefs in support of the Court's decisions in Baker v. Carr, 369 U.S. 186, 209 (1962), holding that reapportionment cases were not non-justiciable political questions, and in Reynolds v. Sims, 377 U.S. 533, 558 (1964), and its companion cases, applying the one-person, one-vote standard to determine the constitutionality of the population of districts. For a discussion of the SG's briefs in these and other reapportionment cases, see Solimine, *supra* note 37, at 1120–30. *See also* PACELLE, *supra* note 46, at 81–88 (discussing SG amicus briefs filed in Kennedy administration).

50. PACELLE, *supra* note 46, at 93–141 (discussing SG amicus briefs filed in racial discrimination cases in the Johnson, Nixon, Ford and Carter administrations).

51. For general discussions of the amicus activity of the SGs in the Reagan administration, see PACELLE, *supra* note 46, at 144–69; REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 134–45 (1992). For the views of the SGs in the Reagan administration regarding the advancement of the social policy of the administration, see Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 599 (1986); *see generally* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991).

52. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Appellants at 2, Thornburgh v. Am. Coll. of Obstetricians, 476 U.S. 747 (1986) (Nos. 84-495, 83-1379), 1985 WL 669705, at *2 [hereinafter SG Brief in *Thornburgh*] (arguing that Roe v. Wade, 410 U.S. 113 (1973) should be overruled); Brief for the United States as Amicus Curiae Supporting Petitioners at 6, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340), 1985 WL 669739, at *6 [hereinafter SG Brief in *Wygant*] (arguing in favor of a color-blind interpretation of the Equal Protection Clause regarding state action); Brief for the United States as Amicus Curiae Supporting Appellants at 7, Wallace v. Jaffree, 472 U.S. 38 (1985) (Nos. 83-812, 83-929), 1984 WL 564160, at *7 [hereinafter SG Brief in *Wallace*] (arguing in favor of state statute providing for a mandatory moment of silence in schools).

53. For an excellent overview of the scholarly debate generated during and in the wake of the SG's amicus filings in the Reagan administration, see Cordray & Cordray, *supra* note 5, at 1360–66.

practical effect of decisions.[54] A second model posited that the SG should be an advocate for the federal government as an institution. Under this view, the SG should not advocate for either the Court itself or the Presidency, but rather for the federal government as a whole. This would suggest that pursuing a broader policy agenda with amicus briefs should not be given a high priority.[55] Finally, a third model suggested that the SG as a Presidential appointee is indeed the voice of the President, with no particular responsibilities to the Court or the federal government as a whole, and should be able to advance the legal and policy goals of the Chief Executive.[56] The last model was said, in some quarters, to be an innovation of the Reagan administration, and characterized the activism of its amicus filings. Others argued that the criticism was overblown, and that prior administrations had indeed advocated broader social policies in those briefs, albeit in a less overt way than in the 1980s.[57]

Experience demonstrates that most SGs follow some mix of the models in their general activities and in their amicus filings.[58] Consider some representative examples from post-Reagan administrations. The Clinton Administration filed an amicus brief arguing against the constitutionality of a state ban on partial-birth abortion,[59] the administration of the second President Bush filed amicus briefs in cases supporting challenges to voluntary affirmative action programs in higher[60] and secondary education,[61] and the Obama administration filed amicus briefs in favor of

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54. *Id.* at 1360–62.

55. *Id.* at 1361–63.

56. *Id.* at 1363–65.

57. For criticisms of the SG in the Reagan administration, see generally LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987). For a defense of the third model, see, e.g., John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802–06 (1992) (reviewing FRIED, *supra* note 51). For overviews and critiques of the debate, see Cooper, *supra* note 46, at 677–90; Cordray & Cordray, *supra* note 5, at 1360–65; David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 166–76 (Winter 1998).

58. Cordray & Cordray, *supra* note 5, at 1365–66.

59. Brief for the United States as Amicus Curiae Supporting Respondent at 5, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340108, at *5 [hereinafter SG Brief in *Stenberg*].

60. Brief for the United States as Amicus Curiae Supporting Petitioner at 10, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635, at *10; Brief for the United States as Amicus Curiae Supporting Petitioner at 12, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 151258, at *12.

61. Brief for the United States as Amicus Curiae Supporting Petitioner at 6, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908), 2006 WL 2415458, at *6.

affirmative action programs in public employment and college admissions.[62] By the same token, one can easily find examples of administrations declining to file amicus briefs in high-profile cases that might have been thought to have attracted the SG's attention.[63] Indeed, two leading scholars of the Supreme Court's docket and the SG's office, Margaret and Richard Cordray, argued that the SG in recent administrations had limited its amicus participation to cases where the "federal government ha[d] a direct and important interest."[64] According to these observers, the SG had typically only filed amicus briefs in cases involving the interpretation or enforcement of federal statutes, while sitting out cases involving private arbitration agreements, bankruptcy, or maritime law.[65]

While recent SGs may not especially be activists when filing amicus briefs, the Court's shrunken docket of the last two decades might suggest that the SG should not be reticent in such filings. Some argue that whatever the reasons for the smaller docket,[66] a depleted docket may leave important issues of federal law undecided, and may suggest that the Court is isolated and out of touch with the typical legal issues that affect people and are litigated in the lower courts.[67] Moreover, a depleted docket might lead to the excessive influence of a small number of parties, groups, lawyers, or law

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62. Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 4, Ricci v. DeStefano, 557 U.S. 557 (2009) (No. 08-328), 2009 WL 507014, at *4; Brief for the United States as Amicus Curiae Supporting Respondents at 5, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3418588, at *5. *See generally* Joel Wm. Friedman, *The Impact of the Obama Presidency on Civil Rights Enforcement in the United States*, 87 IND. L.J. 349, 359–63 (2012); Karen Swenson, *President Obama's Policy Agenda in the Supreme Court: What We Know So Far From the Office of the Solicitor General's Service as Amicus Curiae*, 34 S. ILL. U. L.J. 359, 362–71 (2010).

63. To mention just two recent examples, the SG in the Obama administration declined to file amicus briefs in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2544 (2011), involving a nationwide class action in an employment discrimination case and Snyder v. Phelps, 131 S. Ct. 1207, 1210 (2011), involving the First Amendment rights of protestors at military funerals. Perhaps curiously, the SG did file an amicus brief in a lower court case involving the constitutionality of a state law restricting picketing near military funerals, in part because the decision would implicate similar federal statutes. Brief for the United States as Amicus Curiae Supporting Appellants at 1–2, Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013) (No. 10-3076), 2010 WL 5484484, at *1–2.

64. Cordray & Cordray, *supra* note 5, at 1371.

65. *Id.* at 1371–72 (discussing examples from the 2007 and 2008 Terms).

66. Various reasons have been advanced including the near-statutory abolition of mandatory appellate jurisdiction; the use of the certiorari pool by most of the Justices; greater ideological agreement between the Supreme Court and lower courts; and the appointment of more Justices who desire a lessened role for the Court. For an overview, see Owens & Simon, *supra* note 6, at 1263–69.

67. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 429–36; Owens & Simon, *supra* note 6, at 1251–56.

firms.[68] Indeed, it has been argued that the apparent increased influence of the SG is a prime example of this phenomenon.[69] In short, the political economy of the generation of the smaller docket suggests that the current Court, when deciding cases, receives comparatively less information from fewer players than before. In this environment, it might be argued, the SG's office should be sharing its expertise by filing more, rather than fewer, amicus briefs.[70]

D. Curbing Solicitor General Activism as Amicus Curiae

If the careful assessment by the Cordrays was conclusive then there would be little need to suggest limits on the SG filing amicus briefs. While it is true that the SG has not been reckless in filing amicus briefs, in my view the SG still has been, historically and recently, too active in filing such briefs. There are several interrelated reasons that support this conclusion. The first and most important is that the SG's office has always had an overly expansive view of the "interests of the United States." In the post-New Deal world, the reach of the federal government in American society is so vast that, it would seem, there is some federal interest in virtually any case where the United States is not a party. Some SGs have attempted to cabin their discretion when filing amicus briefs. For example, Rex Lee suggested that the cases where the SG might file amicus briefs fell into two categories. The first, the "easier one" for him, consisted of cases that "involved direct federal law enforcement interests," where a private litigant was enforcing a federal statute that the executive was also authorized to enforce, or criminal cases that might impact the enforcement of federal criminal law.[71] The second category, a "harder one," were those cases involving an administration's "broader agenda," such as "abortion, obscenity, and freedom of religion."[72] The federal interest in these cases, Lee seemed to concede, was less direct, but it was nonetheless appropriate,

68. Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 89 (2009); Owens & Simon, *supra* note 6, at 1256–58.

69. Owens & Simon, *supra* note 6, at 1258–60.

70. This reasoning might be seen as undermining the argument in the 1980s that the Reagan administration was inappropriately filing amicus briefs. *See supra* notes 49–51 and accompanying text. But the criticism of the Reagan era SG amicus briefs came at a time when the Court's docket was not shrunken, and it was primarily concerned with the content of those briefs, not their number or their submission in cases with limited federal interests.

71. Lee, *supra* note 51, at 599.

72. *Id.*

at least sometimes, to make the President's views "known to those who have final decision authority in those areas."[73]

The SG's amicus briefs in Lee's second category have historically been the most controversial. The controversy is reflected in the strained efforts of the SG to justify the filing of the brief. For example, in some of the second category cases mentioned before, different SGs have unconvincingly argued (in the "Interest of the United States" section of the brief) that a state moment of silence statute[74] or state statutes restricting abortion,[75] have implications for federal law. More persuasive are assertions that the resolution of employment discrimination cases would impact the enforcement of those statutes by federal authorities.[76]

But even if the SG was to limit or eliminate the filing of amicus briefs in the second category, the first category—"direct federal interests"—has been expansively applied by SGs. Consider some examples from recent Terms of the Court. In several cases the SG filed briefs that would fall into the core of Lee's first category, for example, cases involving private enforcement of federal statutes that are also enforceable by the federal government,[77] such

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73. *Id.* For similar views by Kenneth Starr, the SG for the first President Bush, see Samuel A. Alito, Jr., et al., *The Inaugural William French Smith Memorial Lecture: A Look at Supreme Court Advocacy with Justice Samuel Alito*, 35 PEPP. L. REV. 465, 481–82 (2008) (remarks of Kenneth Starr).

74. SG Brief in *Wallace*, *supra* note 52, at 2 (arguing that case will impact whether Congress has "authority to allow periods for silent prayer or meditation in schools [run by the federal government]"). The brief added that the SG had previously participated as a party or amicus in numerous Religion Clause cases. *Id.* SG Fried spent much of his time in oral argument in *Wallace v. Jaffree* discussing the purported federal interest. Cooper, *supra* note 46, at 694 n.102.

75. SG Brief in *Stenberg*, *supra* note 59, at 1–3 (arguing that constitutionality of state statute prohibiting partial-birth abortion impacts certain aspects of Medicaid and Medicare programs, and the constitutionality of proposed federal statutes); SG Brief in *Thornburgh*, *supra* note 52, at 1 (arguing that the Court's abortion decisions have a "direct impact upon the ability of the country's elected representatives--both state and federal--to deal with this important question of great public import and heated political debate"). *Cf.* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1208 n.127 (2012) (arguing that federal interests advanced in the latter brief were not convincing).

76. SG Brief in *Wygant*, *supra* note 52, at 1 (observing that "the government has the responsibility for enforcing numerous statutes prohibiting [racial] discrimination," and that the SG has frequently participated as party of amicus "in cases presenting constitutional and statutory claims of racial discrimination").

77. *E.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 1, Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013) (No. 11-1085), 2012 WL 4467617, at *1 ("[M]eritorious private securities-fraud actions, including class actions, are an essential supplement to criminal prosecutions and SEC enforcement actions . . . ."); Brief for the United States as Amicus Curiae in Support of Neither Party at 1, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 3864279, at *1; Brief for the United States as Amicus Curiae at 1, First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) (No. 10-708),

actions that might be preempted by federal law,[78] or effect foreign policy,[79] or state criminal proceedings likely to effect the enforcement of federal criminal law.[80] In contrast, less convincing as indicative of federal interests were filings in such myriad cases involving state taxes,[81] the right to counsel

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2011 WL 4957380, at *1 (arguing that private enforcement of federal law "provides an important supplement to the federal government's own administrative and enforcement actions"); Brief for the United States as Amicus Curiae Supporting Respondents at 1, Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011) (No. 09-1156), 2010 WL 4624148, at *1 (reporting views of SEC on private enforcement of the federal securities laws); Brief for the United States as Amicus Curiae Supporting Respondent at 1, Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) (No. 09-525), 2010 WL 4339892, at *1 (same); Brief for the United States as Amicus Curiae Supporting Petitioner at 1, Thompson v. N. Am. Stainless, LP., 131 S. Ct. 863 (2011) (No. 09-291), 2010 WL 3535057, at *1 (reporting views of EEOC in Title VII action); Brief for the United States as Amicus Curiae Supporting Petitioner at 1, Kasten v. St.-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3007906, at *1 (reporting views of the Department of Labor on private enforcement of the Fair Labor Standards Act).

78. *E.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 1, Mutual Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013) (No. 12-142), 2013 WL 1462056, at *1 (reporting United States' interest in resolution of whether federal law preempts state-law tort claim regarding dangerous drug approved by FDA); Brief for the United States as Amicus Curiae Supporting Respondents at 1, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) (No. 09-1501), 2011 WL 741927, at *1 (reporting views of FDA in products liability action); Brief for the United States as Amicus Curiae Supporting Petitioners at 1, Chamber of Comm. v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 3501180, at *1 (preemptive impact of federal immigration law on state employment law); Brief for the United States as Amicus Curiae Supporting Petitioners at 1, Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011) (No. 08-1314), 2010 WL 4150188, at *1 (reporting views of Department of Transportation in products liability action).

79. *E.g.*, Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 1, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290 at *1 [hereinafter SG Brief in *Kiobel*] (scope of Alien Tort Statute); Brief for the United States as Amicus Curiae Supporting Affirmance at 1, Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (No. 11-88), 2012 WL 362808, at *1 (interpretation of Torture Victim Protection Act).

80. *E.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 1, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207), 2013 WL 50686, at *1 (reporting the SG's view that the United States has an interest in the constitutionality of collecting and maintaining a DNA database); Brief for the United States as Amicus Curiae Supporting Respondent at 10, Williams v. Ill., 132 S. Ct. 2221 (2012) (No. 10-8505), 2011 WL 5094932, at *10 (Confrontation Clause and submission of DNA evidence); Brief for the United States as Amicus Curiae Supporting Petitioner at 1, Missouri v. Frye, 132 S. Ct. 1399 (2011) (No. 10-444), 2011 WL 1536720, at *1 (right to counsel during plea bargains); Brief for the United States as Amicus Curiae Supporting Petitioner at 1, Michigan v. Bryant, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 1848212, at *1 (scope of Sixth Amendment Confrontation Clause).

81. Brief for the United States as Amicus Curiae Supporting Petitioner at 1, CSX Transp., Inc. v. Ala. Dep't. of Revenue, 131 S. Ct. 1101 (2011) (No. 09-520), 2010 WL 3300019, at *1. This case involved the preemptive effect of the Railroad Revitalization Act and Regulatory Reform Act of 1976, and the claimed interest of the United States was that federal agencies

in juvenile[82] cases, or the application of federal statutes involving habeas corpus proceedings by state prisoners.[83]

As one recent example of the latter cases, consider *Turner v. Rogers*,[84] where the Court held that due process requires certain procedural safeguards be followed in child support cases involving indigent defendants. The Court in its opinion drew heavily on the analysis of and recommendations found in the SG's brief, observing that the "Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders."[85] While Congress has indeed legislated in this area,[86] child support, like other family law topics, is largely governed by state law and state institutions, and seems a peripheral area of federal concern. In *Turner* and other cases, a federal interest is not absent, but it is so attenuated from an impact of the executive branch's enforcement of federal law so as not to justify the filing of an amicus brief. A full canvass of SG filings from earlier Terms of the Court is beyond the scope of this article. What this limited review does suggest, however, is that recent SGs have frequently filed amicus briefs in cases that approach the outer boundaries of federal governmental interests, however one might define that term.

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oversee rail safety, and that there was an "interest in the proper application of this statute." *Id.* Notably, the Court had requested that the SG file an amicus brief. *Id.* at 2.

82. Brief for the United States as Amicus Curiae Supporting Respondent at 1, J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (No. 09-11121), 2011 WL 491088, at *1. The brief concedes that "States adjudicate most violations of law committed by juveniles," but the asserted United States interest was that the federal government brings proceedings against some juveniles under the Federal Juvenile Delinquency Act. *Id.*

83. Brief for the United States as Amicus Curiae Supporting Respondents at 1, Wood v. Milyard, 132 S. Ct. 1826 (2012) (No. 10-9995), 2012 WL 273127, at *1 (application of time limits of federal habeas statute); Brief for the United States as Amicus Curiae Supporting Respondent at 1, Gonzalez v. Thaler, 132 S. Ct. 641 (2012) (No. 10-895), 2011 WL 4520533, at *1 (same); Brief for the United States as Amicus Curiae Supporting Respondent at 1, Martinez v. Ryan, 132 S. Ct. 1309 (2012) (No. 10-1001), 2011 WL 4071911, at *1 (application of federal habeas statute regarding ineffective assistance of counsel claim by state prisoner). The asserted United States interest in all of these cases was that there were parallel issues under habeas corpus statutes for federal prisoners.

84. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

85. *Id.* at 2519. This echoes the federal interest posited by the SG. *See* Brief for the United States as Amicus Curiae Supporting Reversal at 1–2, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 108380, at *1–2 ("The United States has a substantial interest in the effective and equitable operation of [federal statutes dealing with child support]."). The majority in *Turner* relied on the position advanced by the SG, even though it had not been raised in the courts below. *Turner*, 132 S. Ct. at 2525 (Thomas, J., dissenting); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 693 (2012).

86. *Turner*, 131 S. Ct. at 2525 n.4 (Thomas, J., dissenting) (listing statutes).

A second set of reasons to curb SG activism derives from the institutional imperatives of the SG in particular, and of the executive branch in general, to file such briefs. The SG and the lawyers who work in that office are undoubtedly aware of the respected history of that office, and like any other bureaucracy, seek to protect and advance their power and prestige.[87] In this environment, it seems likely that the SG's office as a whole will not hesitate to file amicus briefs that are welcomed by and sometimes cited by the Court, even when the federal interest is not strong. More generally, the executive branch as a whole, and the President in particular, is not averse to using the SG's amicus briefs to advance policy objectives.[88] To be sure, the connection between the SG and President in this regard can be overstated. Studies demonstrate that the SG takes into account a variety of legal (e.g., the applicable legal principles and precedent), political (e.g., the policies of the President), and administrative (e.g., resources available to the SG) factors when filing amicus briefs.[89] And the SG has incentives not to excessively file amicus briefs, lest the reputation of the office be depreciated in the eyes of the Court.[90] It is only a subset of cases where the President directly intervenes in the SG's filing of amicus briefs.[91]

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87. Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 538–41 (2012); *see generally* TODD A. CURRY, A BUREAUCRATIC MODEL OF JUDICIAL SUCCESS IN THE OFFICE OF THE SOLICITOR GENERAL (2010) (prepared for presentation at annual meeting of the Western Political Association, April 1–3, 2010) (on file with author).

88. *See* Heather A. Larsen-Price, *The Right Tool for the Job: The Canalization of Presidential Policy Attention by Policy Instrument*, 40 POL'Y STUD. J. 147, 147 (2012) (discussing Presidential messages, legislative proposals, amicus briefs, and executive orders as ways to advance Presidential policy); Stephen S. Meinhold & Steven A. Shull, *Policy Congruence Between the President and the Solicitor General*, 51 POL. RES. Q. 527, 527 (1998) (demonstrating congruence between Presidential statements and positions advanced by SG amicus briefs). The SG's decision to file an amicus brief and its content can even play a role in presidential elections. *See, e.g.*, Peter Schmidt, *Texas Lawsuit Complicates Presidential Race*, CHRON. HIGHER ED. (July. 30, 2012), *available at* http://www.texastop10.princeton.edu/Publications/ut%20case.pdf (discussing strategies by 2012 Presidential candidates on the positions they will take on college affirmative action case then-pending in the Court, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013)).

89. *See generally* Chris Nicholson & Paul M. Collins, Jr., *The Solicitor General's Amicus Curiae Strategies in the Supreme Court*, 36 AM. POL. RES. 382 (2008) (study of SG's amicus filings in 1953 to 1999 Terms).

90. Lee, *supra* note 51, at 599; Strauss, *supra* note 57, at 173.

91. Richard L. Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 JUDICATURE 317, 324 (2006). There are examples, albeit few in number, where the President or his closest associates personally intervened in the decision to file an amicus brief or participated in the drafting of the brief. *See, e.g.*, Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 370–72 (2003) (discussing filing of SG briefs in *Grutter* and *Gratz*); Albert Lawrence, *Herbert Brownwell, Jr.: The "Hidden Hand" in the Selection of Earl Warren and the Government's Role in* Brown v. Board. of Education, 37 J.

Nonetheless, when considered together, the history of the SG's practice in filing amicus briefs suggests that, to varying degrees, the process is or is perceived to be a political one, undermining the view that the SG as amicus is a disinterested "Tenth Justice." The filing of amicus briefs without a solid foundation from a meaningful federal interest can only exacerbate that perception. Unless there is a meaningful federal interest, the SG's position as amicus will be freighted (rightly or wrongly) with political significance. Indeed, there is evidence that the Court is less inclined to follow the recommendations of the SG as amicus, when the SG takes what are perceived to be overtly political positions, as measured by the congruence between the SG's position and the ideology of the President.[92]

A third argument in favor a more modest role for the SG in filing amicus briefs is the potential for distortion of the adversarial process. The SG as amicus has a powerful influence on the Court, so the SG should take care when attempting to influence the outcome of litigation where the United States is not a party. Recently, Ryan Black and Ryan Owens have documented this extraordinary influence, and it is not due simply to the fact that the SG's office enjoys superior resources and attorney experience. When matched with the experiences at the Court of similarly credentialed and resourced attorneys, the SG still has a superior success rate. This suggests that the SG's influence is based in part on the built-in advantage of the reputation and credibility of the SG's office, which other lawyers and parties have great difficulty in matching.[93] The SG, then, can overwhelm the efforts of the legal representation of other litigants.

The prospect of disproportionate influence of the SG, as party or amicus, may be welcome to some observers, perhaps even including the Justices, if they feel the SG on the whole has earned such influence and most decisions

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S. CT. HIST. 75, 81–86 (2012) (discussing Eisenhower's involvement in SG brief filed in *Brown*). The President may also become personally involved in a decision by the SG *not* to file an amicus brief. *See, e.g.*, KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 172–79 (2011) (discussing political and other considerations that President Nixon and his advisors considered in decision not to file an amicus brief in Roe v. Wade, 410 U.S. 113 (1973)); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 YALE L.J. 2028, 2058–59 (2011) (same).

92. Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224, 224 (2009) (study of SG's amicus briefs filed in 1961 through 2003 Terms). That said, the Court is likely not oblivious to the political forces that may encourage the SG to file amicus briefs in social agenda cases, and may react by discounting those briefs, while taking seriously the briefs filed in lower profile cases.

93. BLACK & OWENS, *supra* note 1, at 72–91; Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RES. Q. 454 (2013).

would benefit from that influence. But that influence, especially as a non-party amicus, is in tension with conventional models of the adversarial process. One need not call for the abolition of amicus briefs to observe that it is an elemental aspect of due process for any case to primarily rise and fall on the efforts of the parties and their attorneys, and not depend on the efforts of amici or others outside of the litigation.[94] To put the same point another way: promoting modesty on the part of the SG in filing amicus briefs is a corollary of the pursuit of judicial modesty in resolving legal controversies. Two principal models of dispute resolution compete in American jurisprudence in general and in the federal courts in particular. The dispute resolution model posits that courts should focus on the resolution of concrete disputes by parties directly affected by the controversy, so courts will not intrude on the prerogatives of the other branches of government.[95] The law declaration model, in contrast, posits that federal courts have a special function of declaring and enforcing the law, "independent of the task of resolving concrete disputes over individual rights."[96] Amicus curiae briefs can fit comfortably within both models but have the most resonance in the latter model. It is a matter of some dispute regarding which model is ascendant in recent Supreme Court decisions.[97] Whichever model is deemed superior, the excessive filing of SG amicus briefs outlined here goes beyond the bounds of either model.[98]

The dangers of excessive politicization and disruption of the adversarial process might be said to attend the filing of *any* amicus brief by the SG. But those costs are tolerable or perhaps unavoidable when the SG is asserting a strong and direct federal interest. The costs loom larger when the federal interest asserted by the SG is attenuated. Put another way, amicus briefs should supplement, rather than drive or overwhelm, the normal litigation

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94. *See* Devins & Prakash, *supra* note 38, at 861–62. Professors Devins and Prakash observe that while "[e]xpertise has its rightful advantages," if the Court routinely and openly seeking advice from the "Chamber of Commerce in business cases or the ACLU in First Amendment cases," would raise troubling questions, then so should "the obvious and outsized influence that the solicitor general wields upon the Court." *Id.* at 885 (footnote omitted).

95. RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73 (6th ed. 2009).

96. *Id.* (footnote omitted).

97. Evidence for the primacy of the dispute resolution model can be found in decisions, which in recent decades have emphasized greater restrictions on standing, implied fewer private rights of action, and limited the imposition of equitable remedies. *Id.* at 74–75. Evidence for the primacy of the law declaration model can be grounded in the extensive use of amicus curiae briefs, the Court setting its own agenda through certiorari, and the Court freely limiting or rewriting questions upon which certiorari is sought. Devins & Prakash, *supra* note 38, at 863; Monaghan, *supra* note 85, at 668–69.

98. *See* Devins & Prakash, *supra* note 38, at 881–86 (making similar argument with regard to the CVSG practice).

process.[99] And there is no strong reason why the SG's amicus briefs should be an exception to that principle. The process can become unseemly when private parties openly lobby the SG to file amicus briefs in their favor,[100] or when the Court sometimes seems to excessively rely on such briefs unfiltered by the adversarial process.[101] Indeed, so many amicus briefs are now filed that they should more than compensate for the small number of cases where the SG should forebear in filing the briefs.

E. Direct Federal Interests as a Predicate for the Solicitor General's Amicus Briefs

The costs of excessive amicus briefs by the SG do not call for a radical reworking of the SG's amicus practice. Rather, only relatively mild changes to the SG's practice are necessary, which would likely result in a slight diminution of cases in which the SG files amicus briefs. The focal point should be a more modest conception of the "interests of the United States" that are, or should be, necessarily present for the SG to seriously consider filing a brief. Defining the term will largely depend on the expansiveness of the role or roles that the SG should adopt for the office.[102] Calling for a more modest conception of "federal interests" in this regard necessarily

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99. See *supra* notes 26–28 and accompanying text for criticisms of excessive reliance on amicus briefs. Despite the proliferation of such briefs, the Court has rightly recognized limits on their use. For example, the Court will generally not consider issues raised for the first time by an amicus, whether filed by the SG or others. *See* Turner v. Rogers, 131 S. Ct. 2507, 2525 (2011) (Thomas, J., dissenting) (citing sources).

100. For an extensive and unapologetic description of such lobbying by a previous member of the SG's office, see generally Patricia A. Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support From the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209 (2009). There is some evidence that in filing amicus briefs, the SG favors better-resourced parties, or parties which already have substantial amicus support. Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 160–62 (2013); Shane A. Gleason, Litigant Status and the Solicitor General's Amicus Briefs (March 5, 2012) (unpublished manuscript) (on file with author).

101. *See* Gorod, *supra* note 16, at 37 (excessive reliance on amicus briefs for extra-record fact-finding is difficult to square with the Court's "purported commitment to an adversarial system of justice."); Haw, *supra* note 12, at 1248–49 (arguing that the Court's excessive reliance on arguments advanced in amicus briefs in antitrust cases moves process away from traditional Article III cases and towards administrative law-like rulemaking); *see generally* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) (arguing that the Court routinely relies in its opinions on facts not found in the record or briefs (including amicus briefs), and arguing that such "in-house" fact-finding should be curtailed or augmented by public participation).

102. Strauss, *supra* note 57, at 170–71 (discussing roles of the SG in conjunction with the filing of amicus briefs).

calls for addressing the proper role of the SG. As discussed earlier,[103] different models of the appropriate role of the SG affects the expansiveness of the SG's amicus practice. A definitive selection of the appropriate model(s) for all aspects of the SG's work (notably, when the SG represents the United States as a party) is unnecessary for purposes of this article. Rather, the view advanced here is that the costs outlined in the prior section argue in favor of a more limited role for the SG as amicus, no matter the role a particular SG purports to follows. That limited role is framed by the requirement that there should be a direct federal interest in a case before the SG considers filing an amicus brief. Typically, such a federal interest should focus primarily on how litigation to which the United States is not a party will nonetheless affect and impact the enforcement of federal law by the executive branch.

Prior practice can be the guide to cabin the scope of a federal interest. Consider first Rex Lee's first category of direct federal interests. He argued that such cases were typically ones where the case could have an impact on the executive branch's enforcement or application of federal law.[104] This category is appropriate, if understood to mean that the case will or may have a perceptible effect on the enforcement of federal law by some part of the executive branch, or where there has been a tradition of expertise centered in the executive branch (e.g., foreign affairs). It is not simply some amorphous and diluted federal interest but one based in the executive branch, which the SG represents. Congress, the other non-judicial branch of the federal government, might have its own interests in cases, and it should more frequently file its own amicus briefs, rather than have that role fully captured by the SG.[105] If the federal interest is not clear or pulls in different directions, then the general (albeit rebuttable) presumption should be *against* the filing of such briefs. In this regard, consider *Wal-Mart Stores v. Dukes*, an important Title VII case. The EEOC had filed amicus briefs in the lower courts in the case, but the SG declined to file in the Supreme Court. It is true that the SG has frequently filed amicus briefs in

103. *See supra* notes 54–58 and accompanying text.

104. *See supra* note 71 and accompanying text.

105. As argued in Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012). To be sure, the SG has a far easier time filing amicus briefs than Congress, since for the latter, multiple members must agree to file a brief. The fewer the members of Congress join in such a brief, or if multiple briefs are filed advancing inconsistent positions, the less weight the brief or briefs will be given, as opposed to the SG's amicus brief. Curry, *supra* note 35, at 241; Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as Amicus Curiae*, 29 LEGIS. STUD. Q. 591 (2004).

employment discrimination cases,[106] since the EEOC and other agencies are statutorily authorized to enforce many employment discrimination laws. But the federal government can also be sued under these laws, and whatever side the SG supports in a given case can place the government in a conflict-of-interest like dilemma.[107] Given that tension, the SG was appropriately reticent in filing an amicus brief in *Wal-Mart*, and should be so in other cases involving statutes where the federal government can sue or be sued.

Consider, too, Lee's second category, those cases advancing the broader social agenda of an administration. Efforts to define a federal interest in those cases have largely been unconvincing, as was Lee's unelaborated suggestion that the Justices should officially know the President's position in cases involving important social issues.[108] Well, why? It seems little more than an overt effort to advance the political agenda of the administration and, indeed, to overtly exert political pressure on the Court. Some who argue that the Court historically does or should follow public opinion, broadly defined, would presumably have little trouble with and might even applaud such efforts, since they might provide useful signals of information to the Court in that regard.[109] But others might be troubled by the signals

106. *See, e.g.*, *supra* notes 62 and 76–77. For further citations to and data regarding such filings, see Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 387–91 (2010); Jeffrey A. Segal & Cheryl D. Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 W. POL. Q. 553 (1988).

107. Tony Mauro & Marcia Coyle, *Class Warfare*, NAT'L L.J., Mar. 16, 2011, at 13 (commenting on absence of the SG in *Wal-Mart*). *See also* Editorial, *The Dukes of Business Hazards*, WALL ST. J., Feb. 17, 2011, at A18 (urging the SG to file an amicus brief in favor of Wal-Mart or remain silent). I am not arguing for a bright-line rule against the SG filing briefs in a case involving causes of action that might be brought against the federal government, only that the SG should give pause before appearing as amicus. The highly unusual facts of *Wal-Mart*, involving a proposed nationwide class action of several million, suggests that an SG appearance was inappropriate. To be sure, it is unlikely that employees of the United States would bring such an action, and that might reduce the potential for a conflict of interest posited in the text. But several reasons suggest why the SG did not file an amicus brief in the Supreme Court. The EEOC's brief in the lower courts only dealt with the issue of punitive damages; the Supreme Court did not CVSG; it was not clear how the sociological evidence advanced by the plaintiffs (on the class action requirement of commonality) might be useful or applied in other cases; and the EEOC might have thought it best to stay out if it contemplated suing Wal-Mart (or similarly situated employers) in subsequent actions. E-mail from Marcia McCormick, Professor, St. Louis Univ. Sch. of Law, to Michael E. Solimine, Professor, Univ. of Cincinnati Coll. of Law (Mar. 30, 2011, 10:46 CST) (on file with author).

108. *See supra* notes 72–73 and accompanying text.

109. *See* sources cited *supra* note 15. For differing views on whether the Court, by and large, does (at least eventually) take into account public opinion in rendering decisions, see generally BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 104.

sent by the President and his SG in such briefs, as it could lead to the perception that the briefs are (and perhaps should be) the proximate cause of the Court's decision. One need not be oblivious to Legal Realism to conclude that the SG should also be reticent in filing briefs in the "social agenda" cases, in the absence of an articulable federal interest. Thus, the filing of briefs in such cases should be relatively rare events and not done as a matter of course.

As illustrations of the application of this more modest agenda for the SG, consider some past and present SG amicus briefs in high-profile social agenda cases. The SGs of two administrations filed amicus briefs in *Brown v. Board of Education*, and the brief, supporting the plaintiffs, is often credited with persuading the Court to hold that public school desegregation was unconstitutional.[110] The federal government had been grappling with racial desegregation of the military, and desegregation of other public institutions was on the national agenda at the time. But what precisely was the *federal* interest in this particular litigation, since local state schools were involved? Given that at the time the executive branch had little statutory authority to enforce civil rights in general, there was "little federal institutional interest in a ruling against segregation,"[111] at least in this context. It is thus difficult to contest David Strauss' conclusion that the SG's amicus brief in *Brown* was instead "the result of a moral commitment and a political calculation."[112] Better grounds to support the SG's filing in the case are the arguments in the brief concerning the deleterious effects on America's foreign policy during the Cold War by the continuing practice of public racial segregation, even at the local level.[113] The SG's concern with foreign policy is a distinct federal interest that justifies the filing of an amicus brief.

There was also the SG's amicus brief in *Baker v. Carr*, which is likewise credited with aiding the Court in reaching the conclusion that reapportionment cases, challenging the drawing of state legislative district boundaries, could be brought in federal court.[114] Here, again, the federal interest was not clear.[115] The SG argued that there was federal interest in the integrity of the election process and advancing the right to an equal vote.[116]

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110. *See supra* notes 46–48 and accompanying text.

111. Strauss, *supra* note 57, at 171.

112. *Id.* It should be noted that Strauss nonetheless firmly supports the SG having filed the brief.

113. As discussed in MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 14–17 (2000).

114. *See supra* note 49 and accompanying text.

115. Strauss, *supra* note 57, at 171.

116. Solimine, *supra* note 37, at 1128–30.

But it is not difficult to conclude that the SG was advancing the broader policy agenda of the Kennedy administration, and indeed many observed, then and now, that urban voters were likely to benefit from the litigation and were more likely to vote Democratic.[117] In these circumstances, the SG should not have filed amicus briefs in *Baker* and subsequent reapportionment cases.[118]

Finally, consider the Supreme Court regarding the constitutionality of state restrictions on same-sex marriage. Given the concurrent litigation on federal restrictions on same-sex marriage (not to mention President Obama's public support for such marriages announced in the spring of 2012), it might have seemed a foregone conclusion that the SG would file an amicus brief when it reached the Supreme Court. Perhaps that is true, but the *Hollingsworth v. Perry* litigation[119] was not an appropriate vehicle for the SG to file a brief. The case did not involve a federal constitutional right to same-sex marriage. Rather, it concerned the much narrower issue of whether a referendum can reverse a decision of the state supreme court that held there was such a right under the state constitution.[120] That indeed is an issue of federal constitutional law, but it is one with little if any institutional

117. *Id.* at 1121, 1135. Still, it was hardly clear that most urban voters would automatically support the Democratic party, given the wide demographic variation of urban residents in the United States (then and now).

118. In contrast, in later cases involving the Voting Rights Act of 1965, some of which also involved reapportionment issues, the SG *was* justified in filing amicus briefs, since the Act empowered the Justice Department to enforce certain aspects of the law. *Id.* at 1128–29. In more recent election law cases challenging the constitutionality of state laws regulating campaign financing, the SG has filed amicus briefs arguing that the resolution of those cases will affect the legality of similar federal laws. *Id.* at 1126–28. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 1–2, Ariz. Free Enter. Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239), 2011 WL 639369, at *1–2. For that reason, it is perhaps surprising that given the considerable controversy (including criticism by President Obama) surrounding *Citizens United v. FEC*, 558 U.S. 310, 311 (2010) (striking down federal limits on independent campaign contributions by corporations and labor unions), in which the United States was a party, the SG did not file an amicus brief in the subsequent case of *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam), which addressed similar issues arising in a challenge to a state law.

119. *See supra* note 11.

120. *See* Perry v. Brown, 671 F.3d 1052, 1064, 1076 (9th Cir. 2012) (discussing narrowness of the issues raised by the case), *vacated by* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

interest of the executive branch.[121] In those circumstances, the SG should not have filed an amicus brief.[122]

F. Amicus Curiae Activism and Deference

Whether the SG should file amicus briefs is related to the issue of what deference, if any, the Court should give such briefs, the subject of the next Part of the article. If the SG is filing amicus briefs in areas where I argue there is limited federal interest, it suggests that the SG's expertise is attenuated and the Court should for that reason not give such a brief any particular deference. The inquiries are not identical, because even under my suggested analysis for the filing of briefs, the Court should not necessarily defer as such to the briefs, even when appropriately filed. Likewise, even if my analysis suggesting a more modest role for SG amicus filings is not followed, there remains the analytical question of deference.

Another way to approach the linkage of activism and deference is to consider the roles of the respective institutional actors. So far, I have focused on the SG's office. But if the Court itself becomes concerned with the proliferation of amicus filings, by the SG or anyone else, it possesses tools to restrain or channel that growth. For example, rather than the relative freedom in which the SG and other entities are permitted to file the briefs, it could create more formidable hurdles to the filing of the briefs.[123] Similarly,

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121. Much of the *Perry* litigation concerned the application of the somewhat similar case of *Romer v. Evans*, 517 U.S. 620 (1996), involving a referendum which added a provision to the Colorado state constitution, limiting the ability of that state to protect the rights of homosexuals. There seems little if any federal interest in the outcome of that suit, and the SG was correct in not filing an amicus brief in the case. The same conclusion follows in the *Perry* litigation.

122. The SG's amicus brief in *Hollingsworth* does not give convincing reasons why it was filed. It states that the United States has an interest given the parallel litigation in *United States v. Windsor*, 133 S. Ct. 2652 (2013), involving the constitutionality of the Defense of Marriage Act. It also states that the President and Attorney General have determined that sexual orientation should be subject to strict scrutiny, and that the United States "has participated as amicus curiae in other cases to address the level of scrutiny to be applied to a particular classification for equal protection purposes." Brief for the United States as Amicus Curiae Supporting Respondents at 1–2, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 769326, at *1–2. Taken alone or together, these reasons do not implicate any interest peculiar to the enforcement of federal law by the executive branch. Instead, it is the SG advancing the policy agenda of the President, which this article argues is not enough to justify the SG filing an amicus brief.

123. For example, the Court could require that all prospective amicus filers receive permission from the Court, and it could more rigorously insist that the SG and other potential amici have an interest. Once filed, the Court could also institute procedures that lessen the influence of all amicus briefs filed outside the adversarial process. *See supra* note 99 (discussing such steps). Among other things, the Court could consider permitting the parties to file briefs in response to those filed by amici. Finally, the Court could consider curtailing or even eliminating

the Court could be clearer on the deference it sometimes purports to give such briefs, particularly by the SG. If it limits the topics on which it will give explicit deference to the SG's views as amicus, as I argue, the SG will presumably have fewer incentives to file such briefs.

III. THE SUPREME COURT'S DOCTRINAL DEFERENCE TO THE SOLICITOR GENERAL AS AMICUS

The SG's amicus briefs have been considered highly influential on the Supreme Court, as measured by such factors as congruence of Court decisions with the position recommended by the SG, or by the citation of the briefs in Court opinions. Influence can be overstated; correlation is not causation, and a few spare citations to an amicus brief by the Court should not without more be invested with great significance. But the SG can also affect the development of doctrine by the Court, as revealed by the substantive content of the Court's opinions. There are case studies of how the SG's brief was used by the Court, or individual Justices, as authority to shape a particular opinion or a body of law.[124] However, little scholarly attention has been devoted to considering in a more systematic way those occasions when the Court gives express deference in its opinions to the position advanced by the SG as amicus,[125] or when the Court *should* give

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its use of the CVSG process, which has quietly bestowed considerable influence on the SG. *See* Devins & Prakash, *supra* note 38, at 885–86 (arguing that the CVSG process is unconstitutional, since when the Court seeks legal advice from nonparties, it goes outside the proper bounds of Article III). Any of these steps are not cost-free, as all would entail considerable work by the Court itself, to screen the briefs or to take steps to acquire the information typically provided by amicus briefs. For these reasons, the Court will likely be reluctant to change the status quo.

124. *See, e.g.*, Devins, *supra* note 91, at 376–77 (discussing influence of amicus briefs in *Grutter v. Bollinger*).

125. The otherwise considerable literature on the Court's deference to the positions of the executive branch usually does not differentiate between the United States as a party in a case, as opposed to appearing as an amicus, or as opposed to neither. *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 681 (2000) (discussing when SG's amicus briefs was entitled to deference in foreign affairs case); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1112–13 (2008) (same with respect to preemption cases); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1175 n.9, 1200 (2007) (discussing deference in foreign affairs cases and referring to decisions where the United States was a party or appeared as an amicus); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1729–34 (2010) (discussing deference the Court should give to rules issued by the EEOC, in case where the EEOC did not participate as party or amicus). The present article more explicitly focuses on the deference, if any, due the United States as an amicus.

deference to those briefs.[126] This part of the article preliminarily undertakes that task, with a particular focus on decisions from the recent Terms which refer to the SG's amicus briefs.

A. The Court's Continuum of Deference to the Solicitor General's Amicus Briefs

By any conventional measure, Supreme Court decision making and the content of its opinions have been influenced by the SG's amicus briefs. The Court can be considered deferential to or influenced by the SG's amicus briefs, even when they are not cited, as in *Brown* and *Baker v. Carr*. Influence can also be reflected in deference that the opinions give to the SG's amicus briefs. But in the latter cases, the Court has not been a model of clarity when it comes to such deference. Sometimes the Court will explicitly state it is giving deference to the SG's amicus brief. At other times the brief will be cited but does not appear to have been particularly influential, and on still other occasions the Court will expressly disagree with, or note a lack of deference to, the SG's amicus brief.

First, consider some examples of express deference by the Court as a whole or by individual Justices. Deference can be revealed by use of that word or similar language showing heightened considerations for the views of the United States.[127] Particularly noteworthy examples of such deference are in cases dealing with foreign affairs, such as the interpretation of a treaty to which the United States is a signatory,[128] or the scope of a private action against foreigners that involves the interpretation of a federal statute.[129]

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126. For a similar effort to address when, if ever, the Court should doctrinally give deference to the views expressed in the amicus briefs by state attorneys general, often jointly filed in federalism cases, see Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 358 (2012).

127. I use "deference" for convenience, conceding that neither courts nor the scholarly literature uses the term with precision. As Peter Strauss has observed, "'deference' is a highly variable, if not empty, concept. It is sometimes used in the sense of 'obey' or 'accept,' and sometimes as 'respectfully consider.'" Peter L. Strauss, "*Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145 (2012). *See also* Wos v. E.M.A. *ex rel.* Johnson, 133 S. Ct. 1391, 1403–04 (2013) (Breyer, J., concurring) (expressing difficulty in precisely measuring the degree of deference under *Chevron*, *Skidmore* and other cases).

128. *E.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (declaring that executive branch's views on interpretation of treaties are entitled to "great weight"); Sumitomo Shoji Am. v. Avagiano, 457 U.S. 176, 184–85 (1982) (same).

129. *E.g.*, Samantar v. Yousuf, 130 S. Ct. 2278, 2283 & n.3 (2010) (private suits under the Foreign Sovereign Immunities Act (FSIA) could not be filed against foreign governmental officials). *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004) (in recognizing "new private causes of action for violating international law," courts should be "particularly wary of

Others are cases involving state-law based causes of action, where defendants claim that federal statutes or regulations issued by federal agencies preempt the cause of action.[130] Still other examples are cases involving actions by private parties under federal law, where the Department of Justice or agencies of the executive branch are statutorily empowered to bring suit to enforce the statutes.[131]

A second set of cases are those that don't cite the SG's amicus brief at all, or cite it in a non-deferential way, seemingly treating it like any other amicus brief that might be filed. While the SG's amicus briefs as a whole are cited far more often than other amicus briefs, there is a significant fraction of cases where there is no citation, or even when cited, no particular deference is afforded the brief. Indeed, the majority of cases where the SG filed an amicus brief can be safely said to fall into this category.[132]

A third set of cases are those where the Court, or individual Justices, seem to go out of the way to not show deference, or expressly disagree with

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impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."); Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1384–85 (2013) (Ginsburg, J., dissenting) (deferring to SG amicus brief regarding geographic scope of the Copyright Act).

130. *E.g.*, Williamson v. Mazda Motor Co., 131 S. Ct. 1131, 1139 (2011) ("agency's own views should make a difference"); Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2261 (2011) ("we defer" to the views of the FCC); Chase Bank USA, NA v. McCoy, 131 S. Ct. 871, 880 (2011) (defer to Federal Reserve Board's interpretation of regulations); Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1086 (2011) (Breyer, J., concurring) (giving "significant weight" to the views of the Department of Health and Human Services).

131. *E.g.*, Matrixx Initiatives Inc. v. Siracusano, 131 S. Ct. 1309, 1321 n.10 (2011) (SEC's views of securities law [via an amicus brief] are "entitled to consideration") (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 n.10 (1976)); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335–36 (2011) (giving weight to EEOC position as amicus regarding private enforcement of the Fair Labor Standards Act); Morse v. Republican Party of Va., 517 U.S. 186, 231–32 (1996) ("attach[ing] significance" to the SG's amicus position that private litigants have standing to sue to enforce the Voting Rights Act); Allen v. State Bd. of Elections, 393 U.S. 544, 557 n.23 (1969) (same). *But see* Vance v. Ball State Univ., 133 S. Ct. 2434, 2449–50 (2013) (discounting position of EEOC as amicus).

132. There are here at least two categories of cases. One is where the SG's amicus brief is cited in support along with other authorities, but there is no explicit deference. *E.g.*, Lozman v. City of Riviera Beach, FL, 133 S. Ct. 735, 743–44 (2013) (definition of a "vessel" under admiralty law); L.A. Cty. Flood Control Dist. v. NRDC, 133 S. Ct. 710, 713 (2013) (scope of Clean Water Act); Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1520–21 (2012) (legality of strip search under Fourth Amendment). A second category is not explicit deference, but the SG's amicus brief is cited and apparently given significant weight, albeit without express deference as such. *E.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011) (finding there is a right to counsel in state child support actions, and arguing that the government's views expressed in the SG amicus brief "draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders."); Astra USA, Inc. v. Santa Clara Cty., Cal., 131 S. Ct. 1342, 1349 (2011).

the position of the SG as amicus.[133] To be sure, these latter occasions might be regarded as a form of deference; the Court is taking the courtesy, one might say, of explaining why it disagrees with the SG, rather than being silent as it is of course entitled to do.[134] Confusingly, some of these anti-deference cases are those involving foreign affairs[135] or other categories[136] where the Court has otherwise expressly given deference to the SG.

B. Why Defer?

The Court has not articulated a general theory of why the SG's amicus brief is due some level of deference at all, or at least in some circumstances, but not in other seemingly similar circumstances. Perhaps this is nothing more than the well-known proclivity of the Court to modulate deference, even when the United States is a party to the suit.[137] But as argued in Part II, the Court should not so easily equate the position of the United States (or

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133. *E.g.*, Evans v. Michigan, 133 S. Ct. 1069, 1078–81 (2013); Already, LLC v. Nike, Inc., 133 S. Ct. 721, 732–33 (2013); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2824 (2011).

134. *See* Ruth Colker, *Justice Sandra Day O'Connor's Friends*, 68 OHIO ST. L.J. 516, 531, 536–38 (2007) (suggesting this as an explanation for when Justice O'Connor would cite but nonetheless disagree with the SG's amicus brief).

135. *E.g.*, Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2886–88 (2010) (entire subsection of majority opinion devoted to refuting position of SEC on proper extraterritorial scope of the federal securities laws); Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (in a case involving the FSIA, "[w]hile the United States' views [as expressed via an amicus brief, on an issue of statutory interpretation] are of considerable interest to the Court, they merit no special deference."); Zschernig v. Miller, 389 U.S. 429, 443 (1968) (Stewart, J., concurring) (disagreeing with SG as amicus on whether treaty preempted state statute, since resolution of that issue should not "vary from day to day with the shifting winds at the State Department"); Abbott v. Abbott, 130 S. Ct. 1983, 2007 (2010) (Stevens, J., dissenting) (arguing that reason for giving "great weight" to the government's interpretation of treaties was not clear, and discounting the SG's amicus position on interpretation of a treaty in part because it was "possibly inconsistent" with the government's previous position).

136. *E.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2575 n.3 (2011) ("Although we defer to the agency's interpretation of its regulations, we do not defer to an agency's ultimate conclusion about whether state law should be pre-empted."); Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 n.8 (2011) (expressing "skepticism over the degree to which the SEC [via an amicus brief] should receive deference regarding" the existence and scope of private rights of actions under the federal securities laws). For other examples, see Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 210 n.3 (2000) (Scalia, J., dissenting) (discounting weight to be given SG amicus brief regarding standing of private party to enforce environmental laws, since there was not a "long and uninterrupted history of Presidential acquiescence and approval," but rather was simply "approval by a single administration"); Solimine, *supra* note 37, at 1127 n.97.

137. *See* Eskridge & Baer, *supra* note 125, at 1099 (chart outlining different levels of deference used by the Court).

any amicus) with that of a party. The deference, if any, due amicus briefs is entitled to separate, if ultimately related, analysis.

Two related arguments, drawn from federal courts doctrine and administrative law, suggest that SG amicus briefs are indeed entitled to deference, at least under some circumstances, beyond that accorded any other amicus filing. One argument is the venerable political question doctrine, where the Court has stated that it will not decide cases that raise "political questions," which it has variously defined as those where there is a "textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicial discoverable and manageable standards for resolving it."[138] One prominent area that has sometimes qualified as a non-justiciable political question has been cases involving foreign relations or the war-making power of the executive branch,[139] though even here the Court has been careful to not abandon the field.[140] The argument here is by analogy, since successful invocation of the political question doctrine results in a court dismissing the case; in contrast, I argue that successful invocation of the doctrine can result in the Court expressly deferring to the views of the SG as amicus.

The other argument draws on cases where federal courts give deference to the interpretation of federal law by federal administrative agencies. The lodestar case here is *Chevron U.S.A. v. Natural Resources Defense Council*,[141] which held that federal courts should defer to an agency's permissible interpretation of an ambiguous statute if the agency has been statutorily charged with administering the statute.[142] *Chevron* deference is predicated on both formalist and functional considerations, positing that when Congress leaves open gaps in statutes for agencies to fill, unelected federal judges should defer to the policy choices of other branches of government that are more expert and more accountable.[143]

Deference to the government under the political question or *Chevron* doctrines can take place either when the government is a party, or when it

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138. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

139. For an overview of these cases, see FALLON, *supra* note 95, at 243–47.

140. For example, the Court recently held that the doctrine didn't apply to a suit that involved the President's refusal to recognize the status of the capital of Israel, despite a federal law that called on him to recognize that status. The Court held that the interpretation and constitutionality of the law was susceptible to judicial resolution. *Zivotofsky*, 132 S. Ct. at 1430. *Cf. id.* at 1437–39 (Breyer, J., dissenting) (arguing that foreign policy implications of suit required dismissal as a political question).

141. 467 U.S. 837 (1984).

142. *Id.* at 843.

143. *Id.* at 865–66.

appears as an amicus.[144] Indeed, recent studies suggest that up to one-third of Supreme Court decisions concerning *Chevron* deference involve cases where the SG appears as amicus.[145] The argument for deference to the SG as amicus is, again, by analogy, since I am not suggesting that these doctrines should apply in full force, as they do when the government is a party to the suit. To treat the status of the SG when representing a party or simply appearing as an amicus as irrelevant raises the costs from politicization and harm to the adversarial process of freely filing such briefs outlined in Part II of this article. Put bluntly, the SG and the United States should not automatically gain the benefit of *Chevron*-like deference when it is not a party to the litigation.

Nonetheless, the rationales for deference provide a firmer jurisprudential basis for the assertion that the SG's amicus briefs should be afforded deference, not simply on the bald political basis that the President desires some result in a case in which the United States is not a party. These doctrines also provide a basis for calibrating deference. If the case involves an issue where the government as a party is typically afforded deference, then that should typically also follow when the SG appears as amicus. Rather than the near-mandatory deference of *Chevron*, however, the Court should evaluate the amicus brief under so-called *Skidmore* deference for the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[146] In contrast, if the SG files an amicus

144. As previously noted, deference can also take place when the United States is neither party nor amicus. Bradley, *supra* note 125, at 681. *Smith v. City of Jackson*, 544 U.S. 228, 239–40 (2005), involved extensive discussion of how much *Chevron* deference, if any, should be afforded EEOC regulations where the EEOC did not appear as a party or amicus. A concurring opinion appeared to be more willing to give *Chevron* deference in such situations when the agency had previously, in other litigation, appeared as an amicus to advance and defend its views of the statute. *Id.* at 244 n.1 (Scalia, J., concurring). *See also* Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 450 (2013) (discussing levels of deference due to agency interpretations advanced as parties in litigation as compared to amicus briefs).

145. Eskridge & Baer, *supra* note 125, at 1094, 1112 & n.108 (indicating that of 1014 Supreme Court cases dealing with *Chevron* in empirical study, 314 involved the United States appearing as amicus).

146. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169 (2012) (quoting United States v. Mead Corp., 533 U.S. 218, 228 (2001)). As *Christopher* illustrates, the decision to give deference may not always be sharply different from an evaluation of the persuasiveness of the arguments advanced in a SG amicus brief. *See Christopher*, 132 S. Ct. at 2169. In *Christopher*, in determining whether agency's interpretation of its own regulations, brought to the Court's attention in a SG amicus brief, the Court relied on such factors as where the interpretation was inconsistent with the regulation; when the agency did not give fair and considered judgment to the matter; and when the agency interpretation conflicted with an earlier

brief in a case where the government is typically not afforded deference, the Court should in turn not do so. In those circumstances, the Court should only give the SG's amicus brief such weight as it might find persuasive, like it would do with any other brief.[147]

C. Optimal Deference

Existing deference doctrines and the Court's own practice, inconsistent though it is, on giving weight to SG amicus briefs, suggest several types of cases where some level of deference may be appropriate for the SG's amicus brief, beyond that accorded any other given amicus. In what is not meant to be an exhaustive survey, some of these areas are explored below.

1. Foreign Relations

Drawing on the political question doctrine, the Court has frequently given deference to the government's views, as expressed by the SG in an amicus brief, to cases involving or impacting the foreign relations of the United States. These cases include such varied matters as the interpretation of treaties,[148] private suits against foreign entities,[149] and the preemption of state laws dealing with the actions of foreign countries.[150] The deference is attributed to the unique responsibilities and expertise of the executive branch regarding the conduct of foreign relations, which most agree exceeds that of the institutional capabilities of the federal courts.[151]

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interpretation. *Id.* at 2166. Having decided that deference to the agency position was not due, the Court proceeded to determine whether the agency position was "persuasive in its own right," *id.* at 2170, based on *Skidmore* factors. *Id.* at 2167–68. *See also* Decker v. Nw. Env't. Def. Ctr., 133 S. Ct. 1326, 1337–38 (2013) (discussing level of deference due to agency interpretation advanced in amicus brief). For overviews of the *Chevron* and *Skidmore* doctrines, see Eskridge & Baer, *supra* note 125, at 1100–09; Strauss, *supra* note 127, at 1143.

147. Which is not to say that the Court cannot or should not carefully evaluate a SG amicus brief on a topic where the Court has not expressly given deference in prior cases. *See, e.g.*, Mayo Collaborative Serv. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1303–04 (2012) (spending six paragraphs explaining why the Court in patent case declines to adopt the position of the SG's amicus brief).

148. *See* cases cited *supra* note 128.

149. *See* cases cited *supra* note 129.

150. *E.g.*, Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 413–14 (2003).

151. *See generally* Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507 (2011); Bradley, *supra* note 125, at 701–07; Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 1006–09 (2012).

But deference does not mean that the Court has always bowed to the position of the SG.[152] A notable recent example of the Court expressly departing from the SG's amicus position was *Morrison v. National Australia Bank Ltd*.[153] There, the Court held that the federal securities laws had no extraterritorial effect, in a private action by foreign plaintiffs against American and foreign defendants, for misconduct on securities traded on foreign exchanges.[154] In the course of reaching that result, the Court (per Justice Antonin Scalia) spent a subsection of the opinion rejecting the position of the SG as amicus.[155] The Court said the SG's brief was not entitled to deference, since the SG's proposed test to determine extraterritorial effect lacked "textual support" in the statutes; that the policy reasons advanced by the SG were not convincing on their own terms or had no basis in Congressional action; and that the position of the Securities and Exchange Commission, advanced by the SG, was not reasonable, since it was based on erroneous readings of earlier cases.[156]

Morrison should not be read for the proposition that the Court was rejecting a long-standing deference to the SG as amicus in cases with foreign relations implications. A full discussion of that case, and an exploration of whether the majority was correct in rejecting the SG's arguments, is beyond the scope of this article. But the Court's opinion usefully illustrates the proper approach to considering the SG's amicus brief on a topic where deference is usually afforded. The opinion took the SG's brief seriously and discussed at length the reasons for its disagreement with the positions advanced by the SG.[157] This is preferential to the extremes of the Court simply ignoring the brief[158] or giving it a passing reference, or giving mandatory, *Chevron*-like deference to the SG's position.

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152. See cases cited *supra* note 135 for earlier examples.

153. 130 S. Ct. 2869 (2010).

154. *Id.* at 2887–88.

155. *Id.* at 2886–88.

156. *Id.* Interestingly, the concurring opinion by Justice Stevens, who disagreed at length with the majority's analysis but nonetheless concurred in the result, makes only a passing, non-deferential reference to the SG's amicus brief. *Id.* at 2894 n.12 (Stevens, J., concurring).

157. *See generally Morrison*, 130 S. Ct. at 2886–88. For another example in the foreign relations context of an opinion carefully discussing why it was not giving weight to the SG's amicus brief, see Abbott v. Abbott, 130 S. Ct. 1983, 2007–08 (2010) (Stevens, J., dissenting) (footnote omitted) (arguing that SG's amicus brief, presenting the position of the State Department, was not entitled to weight, since it was "newly memorialized," was "possibly inconsistent" with the Department's prior interpretation, and the "Executive's understanding of the treaty's drafting history [was not] particularly rich or illuminating").

158. For two recent examples, see Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1662 (2013) (interpreting the Alien Tort Claims Act); Chafin v. Chafin, 133 S. Ct. 1017, 1021 (2013) (interpreting a treaty).

Morrison also illustrates that the genre of foreign relations cases is itself a complex one, and deference, however expressed, to the SG as amicus will and should depend in part on the precise nature of the issue presented. Much can depend, for example, on how, if at all, Congress has statutorily addressed an issue, or delegated the resolution of an issue to the Executive, or if the President is relying on his independent lawmaking powers.[159] Thus, for interpretation of treaties, the Court can justify deference to the SG's amicus views since the Executive, presumably, has the best information (not all of it public) regarding how the treaty was negotiated, the impact of its implementation, and the need for consistency among its signatories in its meaning.[160] In contrast, the extraterritorial effect of federal statutes, as in *Morrison*, present relatively ordinary issues of statutory interpretation. The Executive, as party or amicus, possesses no special authority on that topic and thus no particular deference is due.

2. Congressional Delegation to the Executive: Private Enforcement of Federal Law, and Preemption

A second set of cases where the Court has at least sometimes expressed some level of deference draws on the *Chevron* model, since it is more explicitly premised on Congressional delegation to the executive branch of authority to enforce federal law. Consider first situations where Congress has statutorily lodged authority in the executive branch or agencies to enforce federal law by rulemaking or litigation. In its opinions, the Court sometimes purports to give deference to the SG's amicus briefs in cases where private parties are attempting to enforce these laws via litigation.[161] But one can easily find counterexamples in such suits where the Court gives no such deference.[162] The SG has frequently claimed that the United States has an interest in these cases since the executive branch has authority to enforce these laws, and expansion or limitation on private enforcement

159. *See, e.g.*, Bradley, *supra* note 125, at 691–94 (arguing that *Chevron* deference is appropriate when addressing extraterritorial application of federal laws); *id.* at 716 (arguing that *Chevron* deference is not appropriate with regard to the federal common law of foreign relations); Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 257–63 (discussing when the Executive is due deference on foreign official immunity issues).

160. *See Abbott*, 130 S. Ct. at 1993. Which is not to say that the Court always defers to the Executive's interpretation of a treaty. *See, e.g.*, Gonzales v. O Centro Espirita Benef. Uniao do Vege., 546 U.S. 418, 437–38 (2006) (rejecting executive interpretation of treaty with no mention of deference).

161. For examples, see cases cited *supra* notes 13, 131.

162. For examples, see cases cited *supra* notes 13, 136.

necessarily affects how the Executive will act.[163] One might argue that the Executive is well equipped to balance the costs and benefits of private enforcement, as opposed to the courts, and that *Chevron* deference, or something close to it, would be appropriate for the SG's views, via amicus or otherwise, on these matters.[164]

It is true that the Constitution requires the President to faithfully execute the laws,[165] and Congress has expressly empowered the executive to enforce these laws, and the practical experience of the government, as expressed by the SG, should be of interest to the Court. But the interest of the government is typically not so strong as to justify explicit deference. The frequently-stated interest, that the executive also enforces these laws, is conclusory and question begging. The issues of deciding the scope of an express private right of action, or implying a private right of action, are ultimately ones of statutory interpretation, and the executive branch or the SG has no special purchase on the resolution of those issues.

Particularly instructive in this regard are the line of cases where the Court has grappled with implying rights of action. When the Court directly addressed these issues starting in the 1960s, it was prone to imply private rights of action, as a necessary adjunct, as it saw it, to the limited enforcement resources of the executive branch. Later, the Court retreated and held that implying rights of action are simply issues of statutory interpretation, and that resolution of those cases should not turn on the preferred policy preferences for expanding or limiting private remedies.[166] In a parallel fashion, the Court initially appeared to give significant weight to the views of the SG, as party or amicus, in the implication of private actions, but later discounted the views of the SG in this regard.[167]

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163. *See supra* notes 76–77.

164. *See* FALLON, *supra* note 95, at 709–10 n.9; Matthew Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95 (2005).

165. U.S. CONST. art. II, § 3.

166. For a helpful overview and discussion of the cases and the Court's changing views, see FALLON, *supra* note 95, at 690–715.

167. In the case credited with jump-starting the implication of private remedies, the SG, for the SEC, had filed an amicus brief in support of the plaintiff. J.I. Case v. Borak, 377 U.S. 426, 427 (1964). The Court observed that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," and that the SEC "advises [presumably referring to the amicus brief] that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited." *Id.* at 432. As late as 1979, a majority of the Court was giving significant attention to the views of the enforcing agency expressed by the SG when the United States was a party, or as amicus, to the necessary use of implied private remedies. *E.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677, 707–08 & n.42 (1979). *Cannon* was the high-water mark for the implication of private remedies, and soon thereafter the Court began to frame the inquiry as

The Court is right to have become skeptical of giving dispositive weight to the views of the executive branch in these cases. If statutory interpretation is the touchstone, one must acknowledge that the statutes (like many statutes) are products of compromise, and the result of a compromise may have been *not* to provide for private enforcement, or limit the scope of private remedies that were created.[168] Moreover, private remedies may lead to the over enforcement of federal law, or disrupt the centralized and uniform enforcement of federal law by the executive branch.[169] Furthermore, public choice theory suggests that federal agencies may be subject to capture by interest groups regarding the existence or scope of private enforcement of federal law.[170] Whether one agrees or disagrees with these critiques, the SG has no monopoly on the proper way to balance the virtues or vices of private enforcement. The Court, then, should consider but not give express deference to the views of the United States as party or amicus on these issues.

Another, related area where the Court has sent mixed signals is preemption of state law by federal law. Sometimes the Court gives deference to the views of the SG, typically as amicus,[171] and sometimes not.[172] The divergence in statements by the Court seems to be largely a function of the overall lack of clarity in current doctrine about the level of deference that should be given an agency's opinion about the resolution of that conflict.[173] There is similarly a robust scholarly debate on whether and

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purely one of statutory interpretation, and likewise discounted the views of the SG. *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 287–91 (2001).

168. FALLON, *supra* note 95, at 709; Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 LAW & SOC. INQUIRY 657, 657 (2012) (demonstrating through case studies that divergence between legislative and executive preferences, due to different political parties in control of the branches or other factors, may lead Congress to rely, or not rely, on private suits for enforcement in lieu of or in addition to administrative enforcement); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 821 (2008) (reaching similar conclusions in study of federal statutory regulation from 1887 to 2004).

169. FALLON, *supra* note 95, at 709; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1137–38 (2012) (discussing trade-offs between public and private enforcement of federal law); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782–86 (2011) (same).

170. *E.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 148–50 (2012) (discussing institutional limits on the SEC in objectively viewing proper roles of enforcing the federal securities laws).

171. For examples, see cases cited *supra* note 130.

172. For examples, see cases cited *supra* note 136.

173. Catherine M. Sharkey, *Preemption as a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1, 9 (2012); Ernest A. Young, *"The Ordinary Diet of the*

to what extent deference is due agencies in this regard.[174] A full recounting of the debate is unnecessary here. The views of the SG can diverge from those of the agency it represents as party or amicus in the Court,[175] but the Court's deference (or lack thereof) to the SG in preemption cases seems entirely a function of its views of the issues and the agency involved. The presence of the SG as such is apparently given no independent weight on the level of deference.[176] Indeed, the institutional features of the SG, advantageous though they are in general, do not match those of the agencies themselves.[177] So, again, however this aspect of the preemption debate is resolved, it seems inappropriate to give the SG's amicus briefs special deference simply by virtue of the brief being the conduit of the position of the agency.

3. Changing Interpretations by the Solicitor General

Another reason that some Court opinions have given for not deferring to the SG amicus briefs is one of timing. The argument is that formally the SG speaks for one person and one presidential administration. The position taken by the brief may differ from past administrations, and even if it doesn't, it does not bind future ones.[178] It seems to follow that the SG's amicus briefs should have no higher status than the briefs of any party or any other amicus, and hence while they may be persuasive, should not be entitled to any particular deference. Indeed, a stronger version of this line of argument would discount *all* SG amicus briefs, since all are products of one SG, whether or not there is inconsistency with the position taken by a previous SG.

Principles of administrative law provide a path to approach if not necessarily resolve this problem. *Chevron* and its progeny provide that

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Law": The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 281.

174. For recent contributions to that debate, see generally, David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125 (2012); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

175. Lemos, *supra* note 33, at 198–203.

176. *Id.* at 206 n.68.

177. *Id.* at 206–22 (arguing that few of the features that justify deference to the views of an agency, such as specialized expertise, transparency, and public access, are replicated in the SG's office). In short, Lemos argues that the SG "injects a legalistic, court-centered perspective into agency decisionmaking, filtering agency arguments through a quasi-judicial screen so as to prepare them for presentation to the Court. That process . . . can operate to leech out many of the characteristics of agency decisionmaking typically thought most valuable." *Id.* at 205.

178. For examples, see several of the cases cited *supra* notes 135–36.

deference by courts to changed agency interpretations is permissible to preserve administrative flexibility, so long as the statute is ambiguous and the interpretation is a reasonable one.[179] Rather than suggesting a bright-line rule must be employed to gauge the effect of inconsistent positions by the SG regarding deference, *Chevron* teaches that apparent inconsistency is only one factor, among several, that a court should consider when deciding whether to defer. Recall that it was earlier argued that strict administrative law deference principles should only apply by analogy to the SG's amicus briefs. Flexible, rather than mandatory deference should apply, meaning the Court should examine the arguments presented in the brief, and take into account (among other things) any changed positions by different SGs.[180]

In particular, the Court should take into account the reasons (if any) presented by the SG for a change in positions. These reasons might include simple disagreement with the position taken by a previous SG, or the consideration of new empirical evidence or the development of new policy strategies by the SG or an agency involved.[181] The latter reasons should be more convincing to justify continuing to give some deference, assuming it is appropriate to give deference in the first place. It will not always be easy for the Court (or, indeed, the SG) to tease out these reasons. Presumably the SG will not be eager to concede that a different position exists at all, much less that is based on an unabashed change in political considerations.[182] But

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179. *E.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005). *See generally* Bradley, *supra* note 125, at 672–73; Posner & Sunstein, *supra* note 125, at 1215. It is worth observing that *Chevron* itself involved a changed interpretation by one administration from an earlier one. *Id. But see* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 132–35 (2011) (arguing that cases and academic commentary are not clear on when change in agency views will or should be given deference).

180. *See supra* Part III.C.

181. Kozel & Pojanowski, *supra* note 179, at 115 (drawing these distinctions).

182. The SG, when filing amicus briefs, is not oblivious to changes in position from past SGs. *See, e.g.*, FRIED, *supra* note 51, at 98–131 (discussing change in views on affirmative action cases from the Carter to the Reagan administrations); PACELLE, *supra* note 46, at 144–69 (same). A systematic survey of those instances when the SG, particularly as amicus, departed from positions of prior SGs, is beyond the scope of this article. However, anecdotal evidence suggests that even when bluntly changing positions, the SG will downplay the change, and seek to ground the new position in the interpretation of Court precedent or other legal materials, rightly understood. *See, e.g.*, SG Brief in *Wygant*, *supra* note 52, at 4 (linking anti-affirmation position to the arguably color-blind arguments of the SG as amicus in *Brown*, but not mentioning Carter administration amicus briefs supporting affirmative action); SG Brief in *Kiobel*, *supra* note 79, at 8 n.1 (acknowledging that SG had earlier advanced a different interpretation of the Alien Tort Statute, but basing new interpretation on "further reflection" and more nuanced view of precedent). *See also* Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 NW. J. INT'L. L & BUS. 475, 517–23 (2013) (discussing various reasons for change of position by SGs of different administrations in the *Kiobel* litigation). For an analogous discussion of whether the Office of Legal Counsel in

a more nuanced approach to a change in positions by the SG is preferable to the too-strong medicine of simply discounting *all* SG amicus briefs on the basis that the positions taken reflect the views of only one administration, as opposed to the institutional interests of the United States.

IV. CONCLUSION

It is widely recognized that the Solicitor General, and the attorneys in the SG's office, have enjoyed an extraordinarily high success rate in the Supreme Court, whether representing the United States as a party, or as an amicus curiae. This success is currently accentuated by the historically low docket of the current Court, which means that the SG typically participates as a party or amicus in about three-fourths of the approximately 80 cases the Court decides on the merits each Term. In its opinions, the Court frequently cites, relies on, and sometimes gives explicit deference to, the amicus briefs filed by the SG.

What has been less discussed, on the Court itself or in the scholarly literature, is whether this state of affairs is to be applauded or questioned. This article has undertaken that task. The SG and the attorneys in the SG's office are rightly regarded as extraordinary skilled lawyers, who over decades have earned high accolades and respect among judges and the legal community at large. One can reach that conclusion without agreeing with everything the SG does. Regarding the frequency of the SG filing amicus briefs, I conclude that in general the SG, over many presidential administrations, has had an unjustifiably expansive understanding of the "interests of the United States," which has led the SG to file too many amicus briefs. While difficult to precisely define, that term should be restricted to cases where there is palpable effect on the operations of the executive branch, as opposed to a more general interest by the President or the SG, based on political considerations or otherwise, in the outcome of a suit where the United States is not a party. Avoiding the politicization of the SG's office, and the distortion of the traditional adversarial process, supports modest restraints on the SG's existing amicus filing practice.

That the Court is influenced by the SG's amicus briefs is undeniable and justifiable. What is less clear is the level of deference the Court sometimes gives in its opinions to the positions advanced by the SG as amicus. Of course, when the SG represents the government as a party, the Court is free to give as much or as little deference to the arguments advanced by the

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different administrations should follow stare decisis in its legal opinions, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1448 (2010).

government. It is less clear that any deference is justifiable when the government is not a party and only appears as an amicus. Drawing on federal courts and administrative law principles, I argue that deference is sometimes appropriate in these circumstances. While a full exploration of those instances is beyond this article, I suggest some factors that can inform the Court's decisions to purport to give deference to the SG. Even when deference is not appropriate, the Court can give weight as it sees fit to any particular amicus brief filed by the SG. These arguments, too, would work no radical change in the Court's decision making and drafting of opinions, but would place both on a more coherent basis.