

PAY NO ATTENTION TO THE HISTORY BEHIND THE CURTAIN¹: THE WICKED PROBLEM OF HISTORICAL AMICUS BRIEFS

Abstract: Amicus curiae briefs have become a powerful and increasingly common feature of judicial decision making. Historically understood as neutral figures and “friends of the court,” modern amicus briefs frequently function as advocacy tools that interest groups, scholars, and organizations seeking to influence judicial decision-making use. In recent years, historical amicus briefs, or those presenting historical evidence or arguments, have particularly grown in number as courts increasingly use originalist theories of interpretation and adjudication. Despite their growing influence, historical amicus briefs operate with minimal procedural oversight. Unlike expert testimony introduced in trial courts that are subject to certain evidentiary safeguards, historical amicus briefs do not face meaningful scrutiny regarding methodology, expertise, or evidentiary reliability. This Note argues that the increasing reliance on historical amicus briefs presents an issue for courts. After examining the history and evolution of amicus practice and the methodological tensions between legal advocacy and historical scholarship, this Note evaluates potential reforms—including enhanced disclosure requirements, expert screening mechanisms, and Daubert-style evidentiary guardrails—to promote transparency, methodological integrity, and more reliable uses of history in judicial decision making.

INTRODUCTION

In 2022, in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, the Supreme Court fully embraced the use of historical analysis in judicial decision making, announcing that, to survive scrutiny under the Second Amendment, firearm regulations must be consistent with historical regulations of the conduct in question.² The decision prompted Harvard University professor and historian Jill Lepore to accuse the Court of “rel[ying] on a fundamentally anti-

¹ WARNER BROS. ENTERTAINMENT, *The Wizard of Oz | 75th Anniversary “Wizard Revealed”* | Warner Bros. Entertainment, at 1:07–1:10 (YouTube, July 17, 2013), <https://www.youtube.com/watch?v=-RQxD4Ff7dY>. “Pay no attention to that man behind the curtain,” the Great and Powerful Wizard of Oz bellows in *The Wizard of Oz* as little Toto reveals Oz’s hiding place to Dorothy and her friends. *Id.*

² See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 11 (2022) (holding a New York gun regulation unconstitutional because it was not consistent with historical understandings and conceptions of gun rights and the Second Amendment); *infra* notes 84–91 and accompanying text.

democratic historical record.”³ She was not alone in her criticism.⁴ Saul Cornell, a professor of history at Fordham University, wrote that the Court’s historical analysis amounted to “an ideological fantasy” of the past⁵ and warned that *Bruen* would delegitimize the intellectual and moral reputation of the Supreme Court due to the “intellectual dishonesty and ignorance of basic legal historical method” of the decision.⁶

Debates about the use of history in judicial decision making are not new.⁷ Indeed, scholars have long opined on the value and validity of legal interpretations which center historical narratives and evidence over theories which focus on contemporary impacts.⁸ Further, even the most vociferous adopters of theo-

³ See Jill Lepore, *The Supreme Court’s Selective Memory*, NEW YORKER (June 24, 2022), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-selective-memory-on-gun-rights> [perma.cc/RKU9-7RWU] (responding to the *Bruen* decision). Lepore praised the approach to history presented by the New York state’s lawyers. *Id.* She then questioned the Court’s methodology and use of historical evidence, asking “[w]hat counts?” as historical evidence. *Id.* Lepore’s commentary focused on the inconsistencies and difficulties created by the *Bruen* Court’s methodology, ultimately excoriating it and its potential consequences. *Id.*

⁴ See *Bruen*, 597 U.S. at 26 (Breyer, J., dissenting) (criticizing the majority for its approach and use of history in *Bruen*). Justice Breyer accused the Court of using history to pursue a certain, specific result in the case. *Id.*; William W. Taylor, III, *How the Supreme Court Is Destroying Its Own Legitimacy*, ALL. FOR JUST. (Jan. 25, 2023), <https://afj.org/article/how-the-supreme-court-is-destroying-its-own-legitimacy/> [perma.cc/4KQT-KLYP] (criticizing the Court’s “[r]esult[s]-[o]riented [o]pinions,” including *Bruen*); Saul Cornell, *Clarence Thomas’ Latest Guns Decision Is Ahistorical and Anti-Originalist*, SLATE (June 24, 2022), <https://slate.com/news-and-politics/2022/06/clarence-thomas-gun-decision-bruen-anti-originalist.html> [perma.cc/M62Q-Z8BC] (criticizing Justice Thomas’s reasoning in *Bruen*). Cornell further notes Justice Thomas’s reference to Chief Justice Taney’s *Dred Scott* opinion that, according to Cornell, was emblematic of Justice Thomas’s use of history where “old texts are pressed into the service of modern agendas.” *Id.*

⁵ See Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [perma.cc/3CF5-YTGG] (noting issues with the *Bruen* opinion, including ignoring relevant historical evidence that contradicted the majority’s position). After the *Bruen* decision, Cornell accused Justice Thomas of creating an ahistorical account of the past, including distortions of history about the Reconstruction era in the United States. *Id.* Cornell frequently contributes to amicus briefs for Second Amendment cases. *Id.*

⁶ Cornell, *supra* note 4; see Taylor, *supra* note 4 (citing polls that showed Americans saw the Supreme Court as politicized). Taylor argues that these “wounds are entirely self-inflicted” by the Court because of its scholarship. *Id.*

⁷ See Michael L. Smith, *History as Precedent: Common Law Reasoning in Historical Investigation*, 27 U. PA. J. CONST. L. 587, 591 (2025) (discussing several methods of historical interpretation and methodology used by courts). Smith explains that a significant issue with historical analysis by courts is the lack of constraints or formalized process for how to collect, digest, and use historical evidence. *Id.*

⁸ See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1253–58 (2019) (explaining the differences between originalism and living constitutionalism, including differing understandings of originalism).

ries based on historical analysis often debate *what* or *whose* history should guide interpretation.⁹

In recent years, hunger for historical input in judicial decision making has only increased, as the Court has looked to the historical record in a host of high-profile, politically charged decisions involving guns,¹⁰ abortion,¹¹ voting rights,¹² tariffs,¹³ and presidential immunity,¹⁴ to name a few.¹⁵ These decisions highlight the need for methodologically sound historical evidence and argu-

⁹ Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9–10 (2018) (noting disagreement among proponents of originalism over whether originalist history should focus on the Framers’ intent or the “original public meaning” of laws and text). Ultimately, most originalists embraced the original public meaning lens that Justice Scalia, and others, championed. *Id.* at 9–10, 14.

¹⁰ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022) (holding a New York gun law unconstitutional and developing a new history and tradition test); *infra* notes 84–91 and accompanying text (using a history and tradition test that relied heavily on historical sources); *United States v. Rahimi*, 602 U.S. 680, 685–86 (2024) (holding that a gun regulation was constitutional because it was consistent with historical understandings of the Second Amendment and further refining the history and tradition standard set by the Court in *Bruen*); *United States v. Ledvina*, 166 F.4th 716, 722 (8th Cir.) (Stras, J., concurring) (citing *Bruen*’s history and tradition test in a case considering the constitutionality of a gun regulation), *cert. denied*, (U.S. June 17, 2026) (No. 26-5025); *United States v. Hemani*, 146 S. Ct. 1677, 1688 (2026) (citing historical sources that describe the drinking habits of President Adams, Washington, and Madison); Amy Howe, *Supreme Court Skeptical of Law Banning Drug Users from Possessing Firearms*, SCOTUSBLOG (Mar. 2, 2026), <https://www.scotusblog.com/2026/03/supreme-court-skeptical-of-law-banning-drug-users-from-possessing-firearms/> [perma.cc/SAN7-3NGJ] (describing the oral argument in *Hemani*, including questions from Justice Gorsuch about the drinking habits of former Presidents in relation to habitual drunkard laws of the founding era that restricted gun ownership, cited later by Justice Gorsuch in the Court’s *Hemani* decision).

¹¹ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231, 241–45 (2022) (relying heavily on an analysis of collected historical sources to overturn the Court’s decision in *Roe v. Wade*); *infra* notes 207–211 and accompanying text.

¹² See *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (affirming the district court’s ruling that an Alabama districting plan violated the Voting Rights Act). The Court in *Milligan* recounted the history of the Fifteenth Amendment to the Voting Rights Act in the 1960s as part of its analysis. *Id.* at 10–12. Justice Thomas’s dissent in *Milligan* also utilized history and historical sources to disagree with historical underpinnings of the Court’s decision and its interpretation of historical sources. *Id.* at 69–70 (Thomas, J., dissenting). The Court responded by stating “[b]ut history did not stop in 1960.” *Id.* at 32 (majority opinion).

¹³ See *Learning Res., Inc. v. Trump*, 607 U.S. 229, 266–67 (2026) (Gorsuch, J., concurring) (citing extensive historical sources in a concurrence to the Court’s opinion holding that President Donald Trump was not authorized to impose global tariffs based on the International Emergency Economic Powers Act).

¹⁴ See *Trump v. United States*, 603 U.S. 593, 642 (2024) (relying on historical sources from the Founding Era to discuss presidential immunity).

¹⁵ See M. Henry Ishitani, *Today’s Brandeis Brief? The Fate of the Historians’ Brief Amidst the Rise of an Originalist Court*, 2 J. AM. CONST. HIST. 1, 1 (2024) (quoting Justice Sotomayor saying historical briefs were “the most important” form of briefing for the Court). Ishitani further details the increase of submissions and use of amicus briefs at the Supreme Court. *Id.*; Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902–03 (2016) (noting the increase in amicus briefs, including by 800% since the 1950s); *infra* note 58 and accompanying text (same).

ments.¹⁶ Therefore, *how*, *what*, and *from whom* the judiciary receives historical evidence is critical.¹⁷

Judges access historical evidence in many ways, including through parties' briefs and independent research by judges and their law clerks.¹⁸ An increasingly common, though established, source of historical evidence is the amicus curiae brief.¹⁹ Courts have long accepted and used amicus briefs to inform judicial decisions.²⁰ An "amicus" or "friend of the court" can submit amicus briefs on any number of relevant subjects and, indeed, historians including Jill Lepore and Saul Cornell often submit briefs providing historical evidence to courts.²¹ Moreover, scholars, organizations, and legal advocates alike laud amicus briefs as a democratic tool that gives interested and potentially affected parties a voice.²²

Amicus curiae briefs that contain historical evidence, including from expert historians, do not face the same scrutiny as other forms of expert evidence introduced in judicial proceedings.²³ The Supreme Court sets and amends rules regulating amici participation before it, while the Federal Rules of Appellate Procedure are promulgated and amended by the Judicial Conference of the United States, the Supreme Court, and Congress.²⁴ The Supreme Court and lower courts generally accept amici, so long as they "bring[] to the attention of the Court relevant matter" and are not repetitive or frivolous.²⁵ Beyond this

¹⁶ See *infra* notes 186–204 and accompanying text.

¹⁷ See *infra* notes 205–211 and accompanying text.

¹⁸ See Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2033, 2037, 2059 (2012) (describing the ways judges receive information in cases on appeal, including through amicus briefs).

¹⁹ See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694–95, 698 (1963) (describing the role and use of amicus curiae briefs from their inception in American courts); *infra* notes 39–59 and accompanying text.

²⁰ See *infra* notes 39–59 and accompanying text.

²¹ See Ishitani, *supra* note 15, at 20–22 (listing historians who write frequently on the topic of historical methodology at the Supreme Court); MORNING EDITION, *Does History Support Removing Donald Trump from the Presidential Ballot?*, NPR (Jan. 31, 2024), <https://www.npr.org/2024/01/31/1228067671/does-history-support-removing-donald-trump-from-the-presidential-ballot> [perma.cc/P68E-RCEN] (same).

²² Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 319–20 (2008) (arguing that amicus briefs are a central feature of "deliberative democracy," which includes "informed debate as a condition to democratic society").

²³ See David DeMatteo & Kellie Wiltsie, *When Amicus Curiae Briefs Are Inimicus Curiae Briefs: Amicus Curiae Briefs and the Bypassing of Admissibility Standards*, 72 AM. U. L. REV. 1871, 1876–77 (2023) (describing the dangers of admitting scientific and technical evidence, that would otherwise be introduced by experts qualified under the *Daubert* standard, through amicus briefs); FED. R. EVID. 702–706 (detailing the rules of expert evidence submitted in federal courts, specifically in trial courts).

²⁴ See SUP. CT. R. 37 (describing the requirements of submitting an amicus curiae brief to the Supreme Court); FED. R. APP. P. 29 (describing the rules of amicus procedure in federal circuit courts).

²⁵ SUP. CT. R. 37; see FED. R. APP. P. 29 (citing Rule 29 of the Federal Rules of Appellate Procedure that contains similar language to the Supreme Court rule).

restriction, amici can submit briefs unincumbered by tests of validity or qualification.²⁶ A concern arises, therefore, that amicus briefs may introduce methodologically unsound historical evidence and arguments that may ultimately creep into judicial decisions.²⁷

Whether or not one agrees with a theory of constitutional interpretation that relies primarily on historical evidence to analogize the present day to the past, this theory predominates judicial decision making today.²⁸ Amicus briefs that contain historical evidence as a cover to advance ideological arguments erode the legitimacy of judicial decisions and the intellectual honesty of the historical profession suffers.²⁹

Part I of this Note provides a broad background of historical amicus curiae briefs, including a history and evolution of amicus briefs and their use at the courts, contemporary changes to the regulation of amicus briefs, and the intersection of amicus curiae and historians at the Supreme Court.³⁰ Part II discusses contemporary debates about the proper use of amicus briefs, how historical amicus briefs intersect with these modern views, and why historical amicus briefs require special caution when used in judicial decisions today.³¹ Finally, Part III of this Note evaluates several approaches to resolving this issue, including imposing evidentiary guardrails similar to those found in federal trial courts, and beefing up disclosure requirements of briefs.³² Ultimately this Note argues that the issue of historical amicus briefs is at an inflection point and, without change or recognition, there is a high risk of judges using unsound history to decide cases which have momentous implications.³³

I. HISTORY BEFORE THE COURT

This Part describes the evolution and use of amicus briefs in federal courts, the use of history in legal practice and judicial decision making, and examines the trend of historical analysis in amicus briefs. The first section traces the histo-

²⁶ See DeMatteo & Wiltsie, *supra* note 23, at 1875–77 (highlighting concerns about amicus briefs). For example, DeMatteo and Wiltsie explain that amicus briefs include many types of information on various topics, including technical data, scientific information, and other material from specialized fields. *Id.* at 1876. These briefs do not go through the same procedural safeguards as specialized or expert evidence at the trial level that might contain similar information. *Id.* at 1876–77.

²⁷ See *infra* note 172 and accompanying text.

²⁸ See Marc Spindelman, *Kavanaugh, Rahimi, and the Effort to Legitimate Originalism*, 173 U. PA. L. REV. ONLINE 103, 103–04 (2025), <https://pennlawreview.com/2025/06/10/kavanaugh-rahimi-and-the-effort-to-legitimate-originalism/> [perma.cc/Q67S-3GXW] (noting the prevenience of originalist interpretation at the Supreme Court).

²⁹ See *supra* notes 2–6 and accompanying text.

³⁰ See *infra* notes 39–141 and accompanying text.

³¹ See *infra* notes 142–211 and accompanying text.

³² See *infra* notes 212–268 and accompanying text.

³³ See *infra* notes 213–268 and accompanying text.

ry, evolution, and proliferation of amicus curiae briefs in the federal courts.³⁴ The second examines the methodologies and principles of historical scholarship and the increasing use and influence of historians' amicus briefs before the Supreme Court.³⁵ The third explores the rise of originalism and recent Supreme Court decisions that have intensified debates over the proper use and interpretation of history in adjudication.³⁶ The fourth compares procedural safeguards governing expert testimony in federal courts with expert evidence presented in amicus briefs.³⁷ Finally, the fifth section surveys the rules governing amicus submissions across the federal court system, including recent changes and proposed amendments addressing consent, disclosure, and transparency.³⁸

A. Amicus Briefs

1. History

Legal scholars have thoroughly documented the history of the amicus curiae ("amicus") or "friend of the court" brief.³⁹ Examples of amici exist throughout history dating to Roman law.⁴⁰ Amici were common in English common law courtrooms, typically appearing as an unbiased, neutral party who informed the judge of relevant case law.⁴¹ These bystanders usually ap-

³⁴ See *infra* notes 39–59 and accompanying text.

³⁵ See *infra* notes 60–78 and accompanying text.

³⁶ See *infra* notes 79–97 and accompanying text.

³⁷ See *infra* notes 98–111 and accompanying text.

³⁸ See *infra* notes 115–141 and accompanying text.

³⁹ See Krislov, *supra* note 19, at 694–95 (detailing the history of the amicus brief). Legal scholars writing about amicus briefs frequently cite Krislov's article. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1765 (2014) (citing Krislov and describing the long history of amicus briefs).

⁴⁰ See generally Krislov, *supra* note 19 (tracing amicus practice throughout history).

⁴¹ See *id.* at 694 (expanding on the history of amici in common law). Krislov notes that early versions of amici in English common law consisted of "oral 'Shepardizing'" to "bring[] up . . . cases not known to the judge." *Id.* at 695. Another function of amici is as a kind of witness, one example being of a legislator informing the court of the legislative intent behind a contested piece of legislation. *Id.* These bystanders would also appear to call attention to the death of a party, an error, and to advocate for infants. *Id.*; Larsen, *supra* note 39, at 1765 (describing the role of amici). Larsen expands on Krislov's scholarship to emphasize that early amici were not usually organizations or a client, but rather the lawyers who "stood in 'an essentially professional relation to the Court.'" *Id.* (quoting Krislov, *supra* note 19, at 703); Frank M. Covey, Jr., *Amicus Curiae: Friend of the Court*, 9 DEPAUL L. REV. 30, 33–34 (1959) (describing the debate over whether amici date back to Roman law). Covey details scholarly interpretations of the Roman *consilium*, a court-appointed officer who advised judges. *Id.* at 33. The evolution of a *consilium* to the amici practice that developed in English common law is insufficient, according to Covey, because judges appointed these advisors who could not appear on their "own initiative," along with several additional inconsistencies. *Id.* at 34. Covey also describes the role of amici as those who aid and advise a court, not the parties themselves, emphasizing the perception of early amici as neutral. *Id.* at 33.

peared in person and were valued by courts and jurists because they aided the court in avoiding errors contrary to the interests of justice.⁴²

In the 1820s, then-future Congressman and perennial presidential candidate Henry Clay was the first formal amicus to appear at the Supreme Court.⁴³ Since Clay's appearance, amici at the Supreme Court and in lower courts have been a mainstay.⁴⁴ Although amici were common at the Supreme Court throughout the nineteenth century, official rules governing their role did not exist until 1937.⁴⁵ Further, there is no constitutional right nor guarantee to present an amicus and the structures directing acceptances of appearances in person or by brief were, and remain, flexible and highly discretionary throughout the federal court system.⁴⁶ Nevertheless, amicus briefs have been a popular tool of parties and nonparties to inform courts.⁴⁷

⁴² See Krislov, *supra* note 19, at 703 (calling early amici "a neutral, amorphous embodiment of justice"); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1248 (1992) (noting how courts accepted amici to avoid errors and uphold the integrity of the courts).

⁴³ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 17–18 (1823). Clay first acted as amicus on a motion to rehear the case, heard and decided during the Court's 1821 Term. See Ruth Wedgwood, *Cousin Humphrey*, 14 CONST. COMMENT. 247, 252–53 (1997) (describing Clay's intervention as a friend of the court after the Court's first decision in the case). The trajectory of *Biddle* was unique, arising out of a 1789 compact between Kentucky and Virginia. *Id.* at 251. Eventually, a dispute between two private citizens, Green, a Virginian, and Biddle, a Kentuckian, over the constitutionality and applicability of the compact made its way to the Supreme Court. *Id.* at 251–52. At the first argument for the case in 1821, however, Biddle's attorney did not make it from Kentucky and the Court heard only Green's attorney. *Id.* at 252. Subsequently, Clay acted as amicus curiae, arguing that the decision would interrupt the rights of other Kentuckians. *Id.*; *Biddle*, 21 U.S. at 17–18. In this way, Clay acted more as an advocate for the rights of his fellow Kentuckians than as a neutral court advisor. See Larsen, *supra* note 39, at 1766 (describing Henry Clay's appearance in the case). Clay went on to participate in the rehearing of the case as amicus curiae where Biddle again lost. Wedgwood, *supra*, at 253.

⁴⁴ See Larsen, *supra* note 39, at 1766 (noting that Clay's appearance was unique in the 1820s but would become increasingly common). Larsen also notes that Clay's appearance marked a shift from neutral advisors to third-party representatives. *Id.*

⁴⁵ See Garcia, *supra* note 22, at 321 (stating that the Supreme Court promulgated its first official amicus rule in the 1930s). Garcia further notes that the Court added restrictions on amicus procedure throughout the rest of the twentieth century. *Id.* He adds that the Court does not reject briefs often. *Id.*

⁴⁶ See Krislov, *supra* note 19, at 695 (noting that permission to appear as amicus "has always been a matter of grace rather than right"). Indeed, the first restrictions on amicus curiae in the Rules of the Supreme Court in 1937 only required written consent from parties, though in practice most parties filed blanket consent. SUP. CT. R. 27.9, 308 U.S. 23 (1939) (containing the first mention of amicus briefs in Supreme Court Rules); Larsen, *supra* note 39, at 1767–68 (describing early amicus practice). Amicus filings remain lax even today and although there are additional restrictions regarding disclosure requirements and that seek to limit frivolous or extraneous content, the Court removed consent requirements in its 2023 amendment to the rules. SUP. CT. R. 37.

⁴⁷ See Krislov, *supra* note 19, at 696 (noting the common use of amicus briefs throughout history).

2. Evolution

Originally, the “friend of the court” amicus model was a neutral party whose main function was to assist the judge in rendering an informed opinion.⁴⁸ Amici evolved over time, however, particularly their use in adversarial common law courts.⁴⁹ Eventually, courts welcomed amici and amicus briefs from interested third parties in addition to neutral participants.⁵⁰ This advocacy model, or the “litigating” amicus curiae became particularly popular in United States federal courts, where disputes between two parties could have nationwide implications.⁵¹ Rather than attempt to join the suit through processes such as intervention, therefore, amici could represent the concerns and arguments of additional nonparty participants.⁵²

The “Brandeis brief” emerged as another development of amicus practice in the early twentieth century.⁵³ In 1908, in *Muller v. Oregon*, then-future Supreme Court Justice Louis Brandeis submitted a brief with a primarily nonlegal focus.⁵⁴ Subsequently, and with the concurrent rise of legal realism, amicus

⁴⁸ See *supra* notes 39–42 and accompanying text.

⁴⁹ See Krislov, *supra* note 19, at 696 (arguing that the increase of amicus curiae can be partially attributed to their role as a solution to strict limits on adversarial proceedings in courts). Krislov details several examples of amici acting on behalf of a non-party whose interests were otherwise at stake in the case. *Id.* at 697.

⁵⁰ See Lowman, *supra* note 42, at 1249 (noting the role of amici in protecting the rights of third-party interests).

⁵¹ See *id.* at 1249–51 (describing the evolution of the adversarial system as a “trial by duel” whereby parties were responsible for their own suit and intervenors were generally disfavored). Lowman notes that the U.S. federal system exacerbated the adversarial nature of amicus briefs. *Id.*

⁵² *Id.* Lowman argues that amicus evolution in federal courts was a “direct result of the absence of a formal method of third-party intervention.” *Id.* at 1254. He also notes that Clay’s amicus appearance in *Biddle* resembled the role of an intervenor under modern procedure. *Id.* at 1255. Lowman argues that because current third-party practice overly complicates proceedings, or otherwise interested parties are barred from intervening because of a lack of Article III standing or other restrictions, amicus briefs act as a fairness tool, providing an avenue for those with legitimate interests in the case to weigh in. *Id.* at 1257.

⁵³ See Larsen, *supra* note 39, at 1770 (describing the Brandeis brief). A Brandeis brief is a popular type of amicus brief. *Id.* These briefs rely on nonlegal policy arguments and data to inform courts, rather than traditional legal logic and analysis, or case precedents. *Id.* Factual data from scientific and social science fields have been cited in Supreme Court cases since at least the introduction of the Brandeis brief. *Id.* at 1771.

⁵⁴ *Muller v. Oregon*, 208 U.S. 412, 416 (1908). Brandeis filed his brief on behalf of an Oregon law that limited working hours for women. *Id.* Brandeis represented Oregon, making his amicus brief a party brief, not a third-party brief. *Id.* at 415. He submitted his original, now-eponymous, Brandeis brief as a separate brief according to the Court. *Id.* at 416. In addition, the Court cited the “very copious collection” of evidence in Brandeis’s brief. *Id.* at 419 & n.1; Larsen, *supra* note 39, at 1770. Louis Brandeis’s brief in *Muller* detailed a sociological argument, with evidence of women’s working conditions that Brandeis compiled with the help of his sister-in-law Josephine Goldmark. Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783, 790 n.34 (1958). His brief included findings on the effects of women working long hours on safety, the general welfare, and morals, as well as the benefits of shorter working hours and contained evidence from physicians, employers, and employees. *Id.*; Brief for Defendant in Error at 28–64, 92–103, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

briefs frequently took the form of the Brandeis brief.⁵⁵ Brandeis briefs serve a broader evidentiary function because they use social sciences, empirical research, and a wide range of nonlegal expertise—including historical research—to inform a court’s decision.⁵⁶

3. Proliferation

Advocates, third parties, and experts employed amicus briefs persuasively throughout the twentieth century across federal courts.⁵⁷ Submission of briefs, however, exploded in the late twentieth century into the twenty-first, increasing by 95% from 1995 to 2016.⁵⁸ This was especially true at the Supreme Court level where amici file briefs in almost every case and the number of briefs per case remains high.⁵⁹

B. The Historians’ Brief

History is a specialized academic discipline with its own methodologies, techniques, philosophies, and intellectual purposes.⁶⁰ Although historians do

⁵⁵ See Larsen, *supra* note 39, at 1770–73 (delineating the shift toward legal realism in the early twentieth century and influence of Brandeis briefs). Larsen notes that this influence occurred slowly over time, and that in the early days of legal realism, most of the Court’s factual citations were from evidence on the record. *Id.* at 1772. Amicus briefs became increasingly favored toward the mid-century, however. *Id.* Legal realism, which emerged around the same time, is a theory based on the idea that law should not solely come from legal principles and rules, as legal formalists believed. See Joseph A. Reinert, *The Myth of Judicial Activism*, 29 VT. B.J. 35, 35–36 (2003) (describing the differences between legal formalism and legal realism). Rather, legal realists believed the law was based on a combination of legal rules and principles, as well as social and personal considerations. *Id.* at 36. Importantly, legal realists believed the law was uncertain, occasionally unpredictable, and flexible. *Id.* at 35–36.

⁵⁶ See Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 93 (1993) (describing the use of social science-based amicus briefs at the Supreme Court). Social science briefs often include non-record evidence, which is evidence not entered during the trial phase of a proceeding. *Id.* at 94 n.10. Social science amicus briefs might also contain legislative facts, or information that has no bearing on the events of the particular case at hand. *Id.* at 94 n.7; Dobbins, *supra* note 18, at 2017 (defining legislative facts).

⁵⁷ See Larsen, *supra* note 39, at 1773–74 (noting several prominent cases that cite amicus briefs).

⁵⁸ See Larsen & Devins, *supra* note 15, at 1902 n.1 (noting that 98% of Supreme Court cases, as of 2016, have amicus curiae). The 95% increase in amicus filings pales in relation to the 800% increase from the 1950s. *Id.* Larsen and Devins attribute part of this increase to interest group’s use of amicus as a form of lobbying. *Id.* at 1903. They also point to the “amicus machine,” a group of “Supreme Court specialists” who coordinate amicus filing to “get the Justices the information they crave, packaged by lawyers they trust.” *Id.* at 1915. These specialists are primarily made up of members of the Supreme Court Bar, who are authorized to submit amicus briefs to the Court. *Id.* at 1915–16.

⁵⁹ *Id.* at 1902–03, 1902 n.1.

⁶⁰ See Joseph R. Strayer, *Introduction* to MARC BLOCH, *THE HISTORIAN’S CRAFT*, at 1, 8 (Peter Putnam trans., 1964) (noting that history’s “particular object[ive]” is “the spectacle of human activity” that is “adorned with the subtle enchantment of the unfamiliar”).

not agree about every aspect of historical scholarship, there are basic precepts most understand and follow.⁶¹

1. Methodology

Vigorous research and uncertainty are central to historical scholarship.⁶² Historians scour primary and secondary sources for evidence to support or contradict their arguments.⁶³ They evaluate sources for bias, credibility, reliability, and usefulness.⁶⁴ Historians recognize that not all sources are created equal and they account for this in their research and analysis.⁶⁵ Further, the quality of research in historical scholarship is paramount to its respectability.⁶⁶

⁶¹ See Peter Gibbon, *Historians Disagree About Everything, or So It Seems*, 38 HUMANITIES 32, 33, 35, 37 (2017), <https://www.neh.gov/humanities/2017/summer/feature/historians-disagree-about-everything-or-so-it-seems> [perma.cc/W26P-7WVB] (noting the diverse backgrounds and perspectives of historians today as compared to earlier generations). According to Gibbon, historians may disagree about the nature of history and have differing interpretations but generally share certain goals including fostering tolerance and sympathy but also building academic and intellectual skills. *Id.* at 37. “[B]attle[s] over history,” as Gibbon explains, includes disagreement over how to frame certain historical figures, what voices to highlight or scrutinize, and other subjective considerations. *Id.* at 37, 38. But see *Statement on Standards of Professional Conduct*, AM. HIST. ASS’N (Jan. 7, 2023) <https://www.historians.org/resource/statement-on-standards-of-professional-conduct/> [perma.cc/6UGV-9335] [hereinafter *Standards of Professional Conduct*] (describing the professional, academic standards of history). The American Historical Association (“AHA”) is a national organization incorporated by an act of Congress in 1889. *Congressional Charter*, AM. HIST. ASS’N, <https://www.historians.org/about/aha-congressional-charter/> [perma.cc/9TQM-WY2C]. Among the duties of the AHA are to submit reports about historical matters to the Smithsonian Institution. *Id.* AHA’s statement on professional conduct is wide-ranging, but generally includes basic standards of historical methodology, ethics, and practice of historical scholarship. *Standards of Professional Conduct*, *supra*; see Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U.L. REV. 1518, 1532 (2003) (explaining the incongruencies between the legal and historical fields).

⁶² See ANTHONY BRUNDAGE, *GOING TO THE SOURCES: A GUIDE TO HISTORICAL RESEARCH AND WRITING* 17 (5th ed. 2013) (describing the variety of sources historians use in their research). According to Brundage, “any remnant of the past can serve [a] purpose.” *Id.* at 19. In addition, Brundage notes the dynamism and uncertainty of history. *Id.* at 2. He argues, however, that even though full objectivity is impossible to achieve, it is a goal of history, that history and the past is ultimately unchangeable. *Id.* Brundage also argues that searching for an objective truth is not undone by new discoveries or perspectives, but rather that historical knowledge, when done correctly, builds on itself and that this “concept of a dynamic historical past holds the promise of intellectual excitement.” *Id.* at 3.

⁶³ See *id.* at 17 (defining and discussing primary sources). Historians often prefer primary sources, which can be written documents, physical artifacts, oral histories and audio or video recordings, and more. *Id.* Historians also use secondary sources, often contemporary works created by other historians that compile and evaluate primary sources. *Primary and Secondary Sources*, UCLA DEP’T OF HIST., <https://history.ucla.edu/primary-secondary-sources/> [perma.cc/SV77-F7FU]. As opposed to secondary sources, which historians also use, primary sources are original documents and first-hand accounts of a historical event. *Id.*

⁶⁴ See *Standards of Professional Conduct*, *supra* note 61 (describing the importance of scrutinizing historical sources). The AHA describes this process as part of “practicing history with integrity.” *Id.*

⁶⁵ See *Which Sources of the Past Are Viewed as Trustworthy?*, AM. HIST. ASS’N, <https://www.historians.org/teaching-learning/current-events-in-historical-context/history-the-past-and-public-culture-results-from-a-national-survey/4-which-sources-of-the-past-are-viewed-as-trustworthy/> [perma.cc/

Importantly for this Note, historians often encounter and embrace inconsistencies, complexities, and the unknown.⁶⁷ Historical research and interpretation evolve constantly as historians reevaluate their own scholarship, contribute to their colleagues, and uncover new sources and lines of inquiry.⁶⁸ Indeed, historians often disagree over matters some might consider basic historical facts.⁶⁹ Disagreement among historians allows for creativity and the development of multiple perspectives.⁷⁰ Such disagreements between professional historians typically involve rigorous research and academic integrity.⁷¹ Therefore, it is difficult to find definitive, correct answers in historical scholarship.⁷² Rather, historical scholarship is an ongoing dialogue between sources, historical arguments, and interpretations that connect the past and present.⁷³

2. Historical Briefs at the Court

Historical amicus briefs regularly make their way to judges' desks.⁷⁴ Historians—or those claiming historical expertise—frequently submit amicus briefs, particularly since the emergence and increase in the use of originalism

8NPA-KJYK] (discussing the process of evaluating sources). Although the AHA admits that “[t]here is no rigorous empirical order for the trustworthiness of sources,” they point out that certain sources carry more or less weight depending on factors like reliability or bias. *Id.*

⁶⁶ See *Standards of Professional Conduct*, *supra* note 61 (describing the “shared values of historians” that keep historical scholarship respectable).

⁶⁷ See Martin, *supra* note 61, at 1523–24 (noting that historical truth is unlike legal truths in many ways); *Standards of Professional Conduct*, *supra* note 61 (“[M]ultiple, conflicting perspectives are among the truths of history.”).

⁶⁸ See *Standards of Professional Conduct*, *supra* note 61 (describing the way historical interpretation evolves).

⁶⁹ See *id.* (describing the ongoing process of history); BRUNDAGE, *supra* note 62, at 3 (stating that history is a dynamic process and discipline).

⁷⁰ See *Standards of Professional Conduct*, *supra* note 61 (arguing that disagreement among historians is important to advance the field and historical scholarship); see also Gibbon, *supra* note 61, at 35 (discussing how and why historians disagree). Disagreement happens for several reasons, including because historians have diverse backgrounds and ideologies. *Id.* at 33.

⁷¹ See *Standards of Professional Conduct*, *supra* note 61 (“All historians believe in honoring the integrity of the historical record.”). This means that when disagreement occurs, it is based on legitimate and sound methodical disagreement, not a fabrication of sources or deliberate misinformation. *Id.*

⁷² See Aroop Mukharji & Richard Zeckhauser, *Bound to Happen: Explanation Bias in Historical Analysis*, 1 J. APPLIED HIST. 5, 9 (2019) (arguing that even historians underestimate the uncertainty inherent in historical scholarship).

⁷³ See *Standards of Professional Conduct*, *supra* note 61 (calling history an “endless creative dialogue within and between the past and the present”).

⁷⁴ See Alexandra Michalak, Note, *Historians Wear Robes Now? Applying the History and Tradition Standard: A Practical Guide for Lower Courts*, 32 WM. & MARY BILL RTS. J. 479, 480–82 (2023) (describing the reaction of some lower court judges to historical amicus briefs). Michalak recounts the reaction of one judge, Judge Newsom of the Eleventh Circuit, who expressed anxiety over using historical analysis and urged using amicus briefs and other documents that can inform judges. *Id.* at 482.

as a theory of constitutional interpretation.⁷⁵ In his illuminating study, M. Henry Ishitani estimates as many as 132 historical amicus briefs, what he calls “core historians’ amicus brief[s]” (“CHAB”), were submitted to the Supreme Court between 1987 and 2022.⁷⁶ Ishitani found that the average number of CHABs submitted during each term increased during this period and influenced Court decisions, either because the Justices cited them directly or because he found alignment between historical arguments in CHABs and those made by Justices in their decisions.⁷⁷

Recently, the Court used historical evidence from amicus curiae extensively in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, which is also the case that undoubtedly tightened the relationship between amicus briefs and historical scholarship.⁷⁸

C. The Originalism of It All and Recent Historical Confrontations

1. The Origins of Originalism and Its Evolution: Why Is History So Important?

Although originalism remains a subject of considerable debate, it is generally understood as a method of constitutional interpretation that relies on the original, public meaning of constitutional texts and concepts from the time when they were written and enacted.⁷⁹ Scholars also generally agree that Jus-

⁷⁵ See JACK M. BALKIN, *Historians Meet the Modalities* (cataloging the use of historical amicus briefs at the Supreme Court amidst the rise of originalist theory), in MEMORY AND AUTHORITY 231, 232–34 (2024) (describing the rise of originalism as a popular type of judicial reasoning and interpretation); Ishitani, *supra* note 15, at 11–12.

⁷⁶ See Ishitani, *supra* note 15, at 23–24 (tracking and analyzing amicus briefs submitted to the Court that are signed onto by someone who is either a historian or claims to be a historian and where the brief contains historical evidence or arguments). Ishitani calls these briefs CHABs, or “core historians’ amicus brief[s].” *Id.* at 7.

⁷⁷ See *id.* at 34 (tracking the influence of historical amicus briefs at the Supreme Court). According to Ishitani’s research, conservative majorities cite historical amicus briefs more than liberal or progressive majorities. *Id.* at 35. Ishitani notes an interesting wrinkle in his research: liberal Justices are more likely to utilize historical amicus briefs in dissents, indicating Justices across ideological and jurisprudential spectrums acquiesce, for one reason or another, to a history and tradition analysis. *Id.* at 36.

⁷⁸ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 15 (2022) (articulating the historical methodology future courts should use in similar cases); *id.* at 74–75 (Alito, J., concurring) (citing amicus briefs the Court considered in its decision); *infra* notes 84–91 and accompanying text.

⁷⁹ See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* (explaining the history of originalism in the United States’ legal jurisprudence), in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 13–15 (Grant Huscroft & Bradley W. Miller eds., 2011); Barnett & Bernick, *supra* note 9, at 3 (arguing that originalism also involves “the Constitution’s original spirit . . . the functions, purposes, goals, or aims . . .” in addition to the public meaning of the actual text). Barnett and Bernick add that the meaning of the Constitution does not change unless it has been properly changed through an amendment. *Id.* They also track the evolution of originalist thought itself, from the understanding that it was the Framers’ original intent that defined originalist interpretation to the public meaning of the text. *Id.* at 9–10;

tice Antonin Scalia ushered in the era of originalism at the Supreme Court.⁸⁰ By Scalia's death in 2016, originalism was a, if not the, preeminent theory of constitutional interpretation and continues to define Supreme Court decision making.⁸¹ Despite debates over the precise meaning and application of originalist theory, the use of history, whether through historical arguments, direct historical sources, or both, is central to the application of originalism in judicial decision making.⁸²

Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation> [perma.cc/84GY-4V2K].

⁸⁰ See Solum, *supra* note 79, at 15 (identifying the term "originalist" as first appearing in Justice Scalia's dissent in *Roper v. Simmons* in 1995). Solum also identifies the term "originalism" as appearing in Justice Stevens' dissent in *Van Orden v. Perry* in 2005. *Id.* Solum traces the concept of originalism or ideas of "original meaning" to 1938, when Scalia was only two years old, and additional usages throughout the twentieth century, including the beginning of contemporary use in the 1970s by Robert Bork. *Id.* at 16–18. Solum mostly concedes, however, the "conventional story" that Justice Scalia was largely responsible for the popularization of the concept as far back as the 1980s, even before his nomination to the Supreme Court. *Id.* at 15; Barnett & Bernick, *supra* note 9, at 9–10 (tracing the origins of originalism from Scalia to additional legal and political scholars).

⁸¹ See *Citizens United v. FEC*, 558 U.S. 310, 353 (2010) (holding, in part, that there was no evidence of the First Amendment "as originally understood," suppressing political speech). Justice Kennedy authored the decision in *Citizens United*, however, Justice Scalia wrote a concurrence delving further into an originalist analysis using historical sources. *Id.* at 387 n.3, 387–88 (Scalia, J., concurring); *District of Columbia v. Heller*, 554 U.S. 570, 584, 625 (2008) (interpreting the Second Amendment from the time of the founding and using an explicitly originalist framework); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (holding that a substantive right protected by the Due Process Clause of the Fourteenth Amendment must be "deeply rooted in this Nation's history and tradition" (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))). Scholars have noted that the Court has practiced different types of originalism in its decisions, but *Glucksberg* typically serves as the basis for its "history-and-tradition" version. See Spindelman, *supra* note 28, at 107–08 (describing types of originalism, particularly the one used in *Glucksberg*); Bill Watson, *The Plain-Meaning Fallacy*, 67 B.C. L. REV. 1, 2–3 (2026) (describing the ascendancy of originalism, including in the courts and popular media).

⁸² See Barnett & Bernick, *supra* note 9, at 33–34 (describing an originalist process). Barnett and Bernick describe this process as an "investigation into the context in which" clauses and pieces of the Constitution were enacted. *Id.* at 34. They cite Justice Scalia's use of historical sources in *Crawford v. Washington*. *Id.* at 34 n.173. In *Crawford*, Justice Scalia made historical reference back to Roman times and cites English treatises from as early as the sixteenth century to explain the original meaning of the Confrontation Clause. 541 U.S. 36, 42–43 (2004); see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 644–45 (2013) (defining "adoption history," referring to the history from the "adoption of the Constitution and its subsequent amendments"). According to Balkin, originalists view "original" meaning as fixed when the Constitution was adopted. *Id.* at 647. Accordingly, interpretation must rely on the context of what was happening at the time of constitutional adoption. *Id.* Balkin extends adoption history analysis to discussions of Supreme Court Justices, like Justice Alito, and their originalist interpretations from moments in time, including after the adoption of the Constitution in the eighteenth century, to amendment adoption, such as the Fourteenth Amendment during Reconstruction. *Id.* at 670. Balkin also argues that debate about adoption history and originalism ignores ways in which other history might be relevant to constitutional interpretation. *Id.* at 656.

2. Recent Debates Over the Use of History: *Bruen*, *Dobbs*, *SFFA*, *Rahimi*

Recent Supreme Court decisions and dissents have sparked debates about the proper use of history in judicial decision making.⁸³ In 2022, in *New York State Rifle & Pistol Association, Inc., et al. v. Bruen*, the Supreme Court used an originalist “history and tradition” standard to determine the constitutionality of a New York gun regulation.⁸⁴ The Court held that a New York gun licensing law restricting the issuance of public-carry licenses to people who showed “special need for self-defense” was unconstitutional.⁸⁵ To do so, the Court developed a test that emphasized comparing the challenged regulation and “the Nation’s historical tradition of firearm regulation.”⁸⁶ The Court also provided guidelines for proper historical inquiry under this test, including the use of analogies, the use of historical legal sources, and a hierarchy of time periods to scrutinize.⁸⁷ The Court’s use of historical analysis in *Bruen* drew extensive criticism from historians.⁸⁸

In *Bruen*, the Court centered a specific methodological approach to historical inquiry in Second Amendment cases that scholars believed would apply to a wide variety of cases.⁸⁹ Applications of *Bruen*’s historical analysis, including how and when to apply the test, and how and when to use other types of historical sources and interpretation, have diverged at the Supreme Court.⁹⁰

⁸³ See *infra* notes 84–95 and accompanying text; *supra* notes 10–14 and accompanying text (describing recent Supreme Court cases that use historical sources and arguments).

⁸⁴ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 27 (2022) (assessing the New York regulation by comparing it to regulations from the founding era). *Bruen* addressed a previous test set by the Court in *Heller*, another originalist decision. *Id.* at 10–13. According to the Court, lower courts frequently misapplied the *Heller* test. *Id.* at 8, 15. Subsequently, the Court retooled the *Heller* test, doing away with the lower courts’ “means-end scrutiny” test. *Id.*; Chris Dove, *Judges as Historians: Bruen’s New Rules*, 33 APP. ADVOC. 26, 34–36 (2023) (describing *Bruen*’s reasoning and historical framework).

⁸⁵ *Bruen*, 597 U.S. at 24.

⁸⁶ *Id.* at 38. The Court held that a New York firearm regulation is constitutional if it is consistent with historical tradition. *Id.* at 11. The Court analyzed “how close the law comes to the core of the Second Amendment right,” the first part of the *Heller* test, and abandoned the strict scrutiny analysis that made up the second part. *Id.* at 18–19; *Heller*, 554 U.S. at 598, 603.

⁸⁷ See *Bruen*, 597 U.S. at 25 (categorizing historical time periods). The Court categorized historical time periods from “medieval to early modern England,” through “the late-19th and early-20th centuries.” *Id.* It also cautioned courts about historical evidence that “long predates” either the passage of the Fourteenth Amendment or the ratification of the Bill of Rights when investigating Second Amendment questions. *Id.* at 25–26. Although the Court did not direct lower courts to discount history other than enactment or adoption history in this opinion, it held that “to the extent later history contradicts what the text says, the text controls.” *Id.* at 27.

⁸⁸ See Dove, *supra* note 84, at 51–52 (describing the reaction of historians to the *Bruen* decision, including a statement by Jill Lepore who said the decision was “nothing but inconsistency and caprice”).

⁸⁹ See *id.*, at 30 (arguing that *Bruen*’s methodology will apply to more than Second Amendment cases).

⁹⁰ See *supra* notes 84–88 and accompanying text; *infra* notes 92–95 and accompanying text.

Indeed, Supreme Court justices have already disagreed about what history to use and how to apply it.⁹¹

In 2024, in *United States v. Rahimi*, the Court clarified and refined the historical analysis framework established by *Bruen*.⁹² In *Rahimi*, the Court addressed the constitutionality of a federal statute that prohibited individuals with a domestic violence restraining order against them from possessing firearms.⁹³ The Court used *Bruen*'s history and tradition test to uphold the statute, holding that it conformed with traditions of founding era firearm regulation.⁹⁴ The Court clarified, however, that the *Bruen* test did not require a regulation to "precisely match its historical precursors" to pass muster, and instead courts should evaluate whether the *principles* of a modern regulation are consistent with a historical regulation.⁹⁵

⁹¹ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 221–31 (2022) (overturning *Roe v. Wade* based on an analysis of historical sources that Justice Alito writing for the Court in *Dobbs* claimed the *Roe* Court mistreated and did not properly analyze). The Court in *Dobbs* surveyed historical sources as far back as the thirteenth century to hold that "the right to abortion is not deeply rooted in the Nation's history and traditions." *Id.* at 242–51. Justice Alito further asserted that the respondents in the case, including their use of amicus briefs, did not present persuasive historical arguments or evidence. *Id.* at 250. The dissent in the case took issue with the Court's historical analysis, including its use of thirteenth century sources. *Id.* at 370–72 (Breyer, Sotomayor & Kagan, JJ., dissenting). The dissent cited *Bruen* on this point, pointing out the inconsistencies with Justice Thomas's time framing. *Id.*; *Vidal v. Elster*, 602 U.S. 286, 301 (2024) (considering a First Amendment question using a history and tradition test). In *Vidal* the Court considered a trademark that included the name of a living person, in this case, Donald Trump. 602 U.S. at 290. The attempted trademark was for "Trump too small." *Id.* The person who tried to register this trademark and was denied argued the section of the Lanham Act that prohibits registering a trademark that "[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent," violated the right to free speech under the First Amendment. *Id.* As part of its analysis, the Court investigated the history and intersections of trademark and First Amendment law, and broadly the recognition of trademarks at the time of the founding. *Id.* at 295–99. Ultimately the Court decided that the Lanham Act did not violate the First Amendment because there was a "tradition of restricting the trademarking of names [that] has coexisted with the First Amendment." *Id.* at 307. Importantly, the Court disagreed with Justice Barrett's historical test in her concurring opinion, which the Court said required a "historical rule that mirrors the names clause." *Id.* at 307 n.4. Indeed, Justice Barrett criticized the majority opinion for its use of evidence of loosely connected cases and "hunting for historical forebears." *Id.* at 311 (Barrett, J., concurring).

⁹² See *United States v. Rahimi*, 602 U.S. 680, 690–93 (2024) (using the history and tradition test outline in *Bruen* to hold that a federal statute was constitutional because it conformed with principles from founding era firearm regulation and clarifying the *Bruen* test).

⁹³ *Id.* at 684.

⁹⁴ *Id.* at 690, 692–93.

⁹⁵ *Id.* at 692–93. Further, the Court noted that the law does not have to "be a 'dead ringer' or a 'historical twin'" to pass muster under a history and tradition test. *Id.* (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 30 (2022)). Justice Sotomayor commended the Court for clarifying the *Bruen* test and rejecting the "exacting historical test" urged by Justice Thomas, the sole dissenter in *Rahimi*. *Id.* at 704 (Sotomayor, J., concurring). Justice Thomas, *Bruen*'s author, argued that the Court's historical inquiry test from *Bruen* was straightforward and clearly showed that no historical regulation supported the challenged regulation. *Id.* at 747–48 (Thomas, J., dissenting).

From *Bruen* to *Rahimi*, debates about the use or misuse of historical arguments, sources, and inquiry in judicial decisions have increased.⁹⁶ Subsequently, there has been an increased scrutiny on what history is used, how it gets to the Court, and who is providing it.⁹⁷

D. Expert Evidence in the Historians' Brief

Many amicus curiae briefs, particularly Brandeis briefs and historians' briefs like those the Court used in *Bruen*, contain information provided by experts in their field.⁹⁸ Facts contained in these briefs are often legislative facts, or facts that are not directly from the case at hand but that nevertheless influence judicial decisions.⁹⁹ Although submitting amicus briefs requires a modicum of process, they do not face the same procedural safeguards as other types of expert evidence and testimony, including evidence introduced in trial courts.¹⁰⁰

1. Expert Testimony

Rules 702 to 706 of the Federal Rules of Evidence govern expert testimony and evidence in federal district courts.¹⁰¹ Evidence introduced as expert testimony is unique because experts can opine on an ultimate issue and, more im-

⁹⁶ Michalak, *supra* note 74, at 497–98 (noting the struggle of lower courts in implementing *Bruen*'s historical standards). Lower court judges expressed concern over the use of historical sources and the imposition it could create for appellate courts to research and sift through sources on their own. *Id.* at 481–82.

⁹⁷ See *infra* notes 186–192 and accompanying text.

⁹⁸ See DeMatteo & Wiltsie, *supra* note 23, at 1876–77 (describing the dangers of admitting scientific and technical evidence, that experts qualified under the *Daubert* standard would otherwise introduce through amicus briefs); Dobbins, *supra* note 18, at 2017 (calling Brandeis briefs “social-science-laden”).

⁹⁹ See Dobbins, *supra* note 18, at 2017, 2032–33 (explaining the difference between adjudicative facts, that are specific to the particular case, and legislative facts, that “involve conclusions about policy, technology, and economics that may have had no reason to be discussed or even anticipated at trial”). Legislative facts, particularly ones that come in amicus briefs, are often used to supplement an existing record. *Id.* at 2017. Dobbins argues, in part, that just by recognizing this acceptance of new evidence, appellate courts can move toward understanding and adequately responding to how the evidence impacts the courts' work. *Id.* at 2064.

¹⁰⁰ *Id.* at 2017; see DeMatteo & Wiltsie, *supra* note 23, at 1876 (describing standards of amicus practice).

¹⁰¹ See FED. R. EVID. 702–706 (describing the rules for expert testimony). Rule 702 is perhaps the most important of these rules because it provides guidelines for a judge, including qualification by a witness's “knowledge, skill, experience, training, or education.” FED. R. EVID. 702; DeMatteo & Wiltsie, *supra* note 23, at 1894–96 n.103 (describing the Federal Rules of Evidence that relate to expert testimony and amendments to these rules). These are hurdles to overcome beyond rules 401 and 403, the general admissibility rules for lay evidence. FED. R. EVID. 401, 403; Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, 60 AM. JUR. TRIALS 1, A. § 3 (2026 Update) (describing admissibility standards for expert testimony).

portantly, can sometimes rely on otherwise inadmissible evidence.¹⁰² In 1993, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court set standards for expert testimony and evidence at the federal level.¹⁰³ In *Daubert*, the Court granted broad discretion to judges as gatekeepers of admissible expert evidence.¹⁰⁴ The *Daubert* standard is not an exhaustive or precise list, but a multifactorial test that directs judges to evaluate the soundness of expert methodology and testimony.¹⁰⁵ The factors include: 1) whether the method or theory relied upon by the expert can be tested, 2) peer review of the method or theory, 3) error rate of the technique or method, 4) general acceptance of experts in the field of the theory or method.¹⁰⁶

In the wake of *Daubert*, uncertainty remained as to whether its admissibility standard applied exclusively to scientific expert testimony or extended to all forms of expert evidence.¹⁰⁷ In 1999, in *Kumho Tire Co. v. Carmichael*, the Supreme Court addressed non-scientific expert testimony, extending *Daubert* to encompass many types of both scientific and non-scientific evidence.¹⁰⁸

2. Expert Testimony in Amicus Briefs

Currently, *Daubert* and its progeny do not apply to evidence contained in amicus briefs introduced in appellate courts, despite the frequent appearance of

¹⁰² See DeMatteo & Wiltsie, *supra* note 23, at 1893–94 (describing the utility of expert evidence to parties). Lay (nonexpert) witnesses can only share what they directly observed—not hearsay, or opinions about outside evidence. *Id.* Expert witnesses, on the other hand, can rely on facts or opinions beyond the scope of admissible evidence, including outside reports, evidence, and even hearsay to form their opinion. *Id.*

¹⁰³ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597–98 (1993) (holding that the Federal Rules of Evidence are sufficient for judges to determine the admissibility of expert testimony). In *Daubert*, the Court abandoned the previous test of admissibility, the “general acceptance” standard articulated in *Frye v. United States*. See *id.* at 597; *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

¹⁰⁴ See *Daubert*, 509 U.S. at 597 (describing the role of trial judges). The Court held that under the Federal Rules of Evidence, judges “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.* at 589; FED. R. EVID. 104(a).

¹⁰⁵ See *Daubert*, 509 U.S. at 592–94 (explaining the factors judges may consider when assessing reliability of expert testimony). The Court explicitly noted that this was not an exhaustive test. *Id.* at 593.

¹⁰⁶ *Id.* at 592–94.

¹⁰⁷ See Jeanne Wiggins, Note, *Kumho Tire Co. v. Carmichael: Daubert’s Gatekeeping Method Expanded to Apply to All Expert Testimony*, 51 MERCER L. REV. 1325, 1333–34 (2000) (explaining the confusion of district and circuit courts in applying *Daubert* to nonscientific evidence).

¹⁰⁸ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that *Daubert* did not only apply to scientific experts, but also “testimony based on ‘technical’ and ‘other specialized’ knowledge” (quoting FED. R. EVID. 702)). In *Kumho*, the nonscientific field in question was engineering. *Id.* The Court also reemphasized that the test was very flexible, and that not every factor would apply to every expert or every case. *Id.* Instead, according to the Court, the *Daubert* factors are “meant to be helpful, not definitive.” *Id.* at 151.

expert evidence in said briefs.¹⁰⁹ Instead, judges sift through amicus briefs using whatever evaluative method they like.¹¹⁰ Often, litigating parties do not have an opportunity to contest expert evidence or opinions contained in amicus briefs except to file their own competing brief.¹¹¹ In fact, the procedure to submit an amicus brief is relatively sparse compared to expert testimony at other levels and differs depending on which federal court the amicus submits their brief to.¹¹²

E. Amicus Brief Procedure in Federal Courts

Although federal courts at different levels share certain features in their treatment of amicus briefs, no uniform procedural framework governs amicus participation across the federal judiciary.¹¹³

1. At the Supreme Court of the United States: Rule 37

Amicus practice and procedure differ throughout the federal court system.¹¹⁴ Rule 37 of the Rules of the Supreme Court of the United States governs amicus filing at the Supreme Court.¹¹⁵ Generally, the rule welcomes briefs that “bring[] to the attention of the Court relevant matter not already brought to its attention by the parties.”¹¹⁶ The remainder of the rule includes timing, filing, and service requirements.¹¹⁷ Rule 37 also includes authorship and monetary

¹⁰⁹ See DeMatteo & Wiltsie, *supra* note 23, at 1876–77 n.13 (noting that *Daubert* is applicable only in the trial courts).

¹¹⁰ See Michalak, *supra* note 74, at 482 (describing the methods discussed by some appellate court judges); Allison Orr Larsen, *History’s Identity Crisis*, 78 SMU L. REV. 293, 294–95 (2025) (describing how judges have felt ill-equipped to use the *Bruen* test because of their unfamiliarity with historical methods and reasoning).

¹¹¹ See DeMatteo & Wiltsie, *supra* note 23, at 1916–17 (describing the process adversaries can use to submit conflicting evidence through amicus briefs, but noting that briefs are often uncontested, particularly at the Supreme Court).

¹¹² See *infra* notes 115–124 and accompanying text; *supra* notes 101–108 and accompanying text.

¹¹³ See *infra* notes 115–124 and accompanying text.

¹¹⁴ See *infra* notes 115–124 and accompanying text.

¹¹⁵ SUP. CT. R. 37.

¹¹⁶ SUP. CT. R. 37.1. This basic premise states that these briefs “may be of considerable help to the Court,” but one that is repetitive or frivolous because it “does not serve this purpose burdens the Court.” *Id.* This language appeared between the 1980 and 1989 Rules of the Supreme Court of the United States. See SUP. CT. R. 37.1 (1989) (containing language, which outlines or defines the contents of an amicus brief, including language encouraging relevant information in amicus briefs); SUP. CT. R. 36 (1980) (describing the requirements of amicus briefs, not including relevance requirements).

¹¹⁷ See SUP. CT. R. 37 (describing the requirements of an amicus curiae brief to the Supreme Court). Important requirements include that only attorneys “admitted to practice before th[e] Court” may file amicus briefs. SUP. CT. R. 37.1. There are potentially over 250,000 members of the Supreme Court Bar. See Larsen & Devins, *supra* note 15, at 1915. Larsen and Devins’ estimate there are 262,000 Supreme Court Bar members and compiled data from scholarship by Richard Lazarus in 2006 and 2007. *Id.* at 1915 n.79 (citing Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491 (2008)).

disclosure requirements that indicate whether a party participated in authoring an amicus brief, whether the party or counsel funded the composition or submission of a brief, as well as any nonparty, non-amicus members who contributed to the brief.¹¹⁸ Amici may submit briefs on behalf of a single party or neither party to the case but must “identify the party supported or indicate whether it suggests affirmance or reversal” on the cover of the brief.¹¹⁹

2. In Lower Federal Courts: Rule 29

In U.S. Courts of Appeals, Rule 29 of the Federal Rules of Appellate Procedure governs amicus practice.¹²⁰ As with Supreme Court Rule 37, Rule 29 of Appellate Procedure includes various filing, timing, and disclosure requirements.¹²¹ Unlike Rule 37, Rule 29 requires that amicus briefs be submitted by a motion for leave to file and include “the movant’s interest; and . . . the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.”¹²²

At the federal trial court level, amicus briefs are generally not submitted and used by practitioners, though several have made the case for their utilization in federal district courts specifically.¹²³ The Federal Rules of Evidence generally account for the lack of amicus practice in federal district courts.¹²⁴

Critics of the Supreme Court Bar often bemoan the difficulty in ascertaining the exact number of attorneys who have been admitted to practice and their names. *Id.*; see Harry William Baumgarten, *Open the Bar: Toward Greater Supreme Court Transparency*, GEO. PUB. POL’Y REV. ONLINE (2020) [perma.cc/Y2MS-K59D] (discussing the lack of data about lawyers who practice in front of the Supreme Court). Although the Supreme Court Journal publishes members of the Bar the year they are admitted, there is no central database search, leading some to call for greater transparency. *Id.* In addition, outside parties filing amicus briefs can argue orally with consent of party or leave of court. SUP. CT. R. 28.7.

¹¹⁸ See SUP. CT. R. 37.6 (delineating disclosure requirements of amicus briefs to the Supreme Court). The brief must state if “counsel for a party authored the brief in whole or in part,” in addition to if “such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief,” and finally, “shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.” *Id.* This aspect of the rule very closely resembles Rule 29 of the Federal Rules of Appellate Procedure, for which there is a current proposed change. FED. R. APP. P. 29; *infra* notes 134–141 and accompanying text.

¹¹⁹ SUP. CT. R. 37.3.

¹²⁰ FED. R. APP. P. 29.

¹²¹ SUP. CT. R. 37; FED. R. APP. P. 29.

¹²² See FED. R. APP. P. 29 (describing the requirements of an amicus curiae brief to federal appellate courts). Rule 29 in its current form has several similarities to Rule 37 of the Rules of the Supreme Court of the United States, particularly its authorship and disclosure requirements. *Id.*; SUP. CT. R. 37; see *supra* note 118 and accompanying text. One notable difference is the absence of relevancy language in rule 37.1 of the Rules of the Supreme Court. See *supra* note 117 and accompanying text. The appellate procedure rules also contain a consent requirement, which the Rules of the Supreme Court removed in 2023. See *infra* note 127 and accompanying text; FED. R. APP. P. 29.2.

¹²³ See Drew Dulberg & Amanda Baird, *Amicus Participation in Trial Courts: Navigating Uncharted Territory*, BOS. BAR J. (2024), <https://bostonbar.org/journal/amicus-participation-in-trial-courts-navigating-uncharted-territory/> [perma.cc/3GDA-BQZM] (arguing for the use of amici in trial

3. Recent Developments

There is one recent significant change to amicus procedure at the Supreme Court and one significant proposed change to appellate court amicus procedure.¹²⁵

a. The Supreme Court and the End of Consent

In January of 2023, the Clerk of the Supreme Court issued a memorandum announcing changes to Rule 37 of the Rules of the Supreme Court.¹²⁶ These changes included the removal of consent requirements.¹²⁷ Prior to the change, anyone filing an amicus curiae brief needed consent from both parties.¹²⁸ If a party withheld consent to file the brief, the amici had to ask the Court's permission directly, which it usually granted.¹²⁹ Many advocates applauded this change because it permits amicus participation without relying on party gatekeepers.¹³⁰ Other practitioners, however, worried the removal of consent requirements could result in amicus "overkill."¹³¹ In many instances par-

courts and written rules for their use); Akiva Shapiro, Lee R. Crain & Amanda L. Lesavage, *Tips for District Court Amicus Brief Success*, 264 N.Y.L.J. (2020), <https://www.gibsondunn.com/wp-content/uploads/2020/12/Shapiro-Crain-LeSavage-Tips-for-District-Court-Amicus-Brief-Success-New-York-Law-Journal-12-23-2020.pdf> [perma.cc/ZX35-SWE9] (arguing for the use of amici in federal trial courts and providing steps for their use).

¹²⁴ See *supra* notes 115–123 and accompanying text; SUP. CT. R. 37; FED. R. APP. P. 29.

¹²⁵ See *infra* notes 126–141 and accompanying text.

¹²⁶ Memorandum from the Sup. Ct. of the U.S. Off. of the Clerk to Those Intending to File an Amicus Curiae Brief in the Sup. Ct. of the U.S. (Jan. 2023), <https://www.supremecourt.gov/casehand/AmicusGuide2023.pdf> [perma.cc/ZAR6-3T5Z].

¹²⁷ See *id.* (describing the changes to Rule 37 of the Rules of the Supreme Court). The memorandum removed the requirement to file blanket consent, or motions for leave to file. *Id.* It also redefined several timing requirements for the certiorari and merits stage as well as contents of the brief. *Id.* The consent requirement appeared in the very first amicus requirements in 1937, surviving eighty-six years. SUP. CT. R. 27.9, 308 U.S. 23 (1939); SUP. CT. R. 37; Garcia, *supra* note 22, at 321.

¹²⁸ See Larsen, *supra* note 39, at 1766–67 (describing amicus consent practices throughout the twentieth century); Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 393–94 (2015) (describing the old consent rules at the Supreme Court and lower appellate courts). In addition, Anderson describes past perspectives on filing briefs and the use of consent. *Id.* at 407–08. Specifically, Anderson cites a 1957 Solicitor General policy that frowned upon tangentially or disinterested parties filing briefs. *Id.* The Solicitor General's policy discouraged briefs "with merely an academic interest," or ones considered to be propaganda. *Id.*

¹²⁹ See Larsen, *supra* note 39, at 1767–68 (noting that most parties filed blanket consent, but in the event they did not, parties might have to ask leave of the Court).

¹³⁰ See Lawrence Ebner, *Federal Courts Should Adopt Supreme Court's Amicus Stance*, LAW360 (2022), <https://www.law360.com/articles/1557370> [perma.cc/57XH-N8AQ] (arguing that the Rules of Appellate Procedure should follow the Supreme Court in removing the consent rule for amicus curiae briefs). Ebner argues that amicus curiae should be unconstrained because good amicus briefs are helpful to the court, including to provide "nonadjudicative factual information." *Id.*

¹³¹ See Brad Hughes, *Changing Rules to Eliminate Consent Requirements for Amicus Briefs—How Far Will They Go?*, OHIO APPEALS (2023), <https://www.ohioappeals.com/2023/02/articles/trending/consent-requirements-for-amicus-briefs/> [perma.cc/7C2G-D9R7] (commenting on Ebner's article).

ties filed blanket consent to amici under the previous requirements of Rule 37, meaning it is not clear how much of a difference this rule change will make.¹³² Consent remains a requirement in the Federal Rules of Appellate Procedure.¹³³

b. Disclosure Requirements in Lower Courts

In August 2024, the Committee on Rules of Practice and Procedure Judicial Conference of the United States proposed an amendment to Appellate Rule 29.¹³⁴ This amendment would, among several proposed changes, enhance monetary and party disclosure requirements.¹³⁵ Under the proposed rule change, the relationship between an amicus and both parties and nonparties would face greater scrutiny.¹³⁶ This includes financial disclosures if, in the twelve months prior to the filing of the brief, “a party, its counsel, or any combination of parties, their counsel, or both has . . . contributed or pledged to contribute an amount equal to 25 percent or more of the total revenue of the amicus curiae for its prior fiscal year.”¹³⁷ The proposed amendment also imposes disclosure requirements on nonparties who contribute to amicus briefs.¹³⁸ Specifically, it requires disclosure of earmarked donations by new members to organizations submitting an amicus brief, when they are made for the purposes of supporting the creation, submission, or drafting of the brief.¹³⁹ It also requires that organizations indicate

Hughes does not take a direct position on whether the Supreme Court’s rule change is positive or negative but does point out a possible consequence of “too many amicus briefs crowding out one another.” *Id.*

¹³² See Larsen, *supra* note 39, at 1767–68 (noting that in most cases the consent requirement was inconsequential because parties filed blanket consent).

¹³³ FED. R. APP. P. 29(a)(2).

¹³⁴ COMM. ON RULES OF PRAC. & PROC., JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE AND BANKRUPTCY PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 28–45 (Aug. 2024), https://www.uscourts.gov/sites/default/files/2025-02/preliminary_draft_of_proposed_amendments_2024.pdf [hereinafter PRELIMINARY DRAFT] [perma.cc/BL9R-VRN3]. This change would go into effect in December of 2026. *Id.* at 3.

¹³⁵ See *id.* at 28–45 (delineating the proposed changes). The proposed changes would also add language that mirrors the Rules of the Supreme Court, stating that briefs should include relevant matter that “may help the court,” and other briefs that are redundant are disfavored. *Id.* at 28.

¹³⁶ *Id.* at 34–36.

¹³⁷ *Id.* at 35.

¹³⁸ See *id.* at 36, 43–44 (describing the justification of the Committee in comments to the amendment). The Committee first noted that disclosure requirements already exist for nonparties of any donation, regardless of how small the size of the donation. *Id.* at 43.

¹³⁹ See *id.* at 36, 43 (justifying the changes in the amendment, specifically why it was important to include nonparty contributions and new member contributions). The Committee noted that they considered removing the “earmark[]” requirement of the disclosures, so that the amicus brief would be required to disclose any contributor to an amicus organization. *Id.* at 43. The Committee decided that this change might overburden amicus organizations and disincentivize contributions to an organization, even when the donations were made without any connection to an amicus brief. *Id.* Therefore, the amended rule only requires disclosure of contributors who give “more than \$100 intended to pay for preparing, drafting, or submitting the brief.” *Id.* at 36. The Committee also did not get rid of the membership requirement in the rule. *Id.* at 43. In the current rule, an amicus must include nonparties,

their founding date if it occurred within twelve months prior to filing a brief.¹⁴⁰ The committee justified the rule change as a way to avoid the risk that an “amicus is being used as a paid mouthpiece by [a] contributor.”¹⁴¹

II. MAKING HISTORY, MAKING LAW

Amicus briefs are powerful legal tools.¹⁴² Indeed, recent research shows that they play an important role in judicial decision making.¹⁴³ Further, scholars and advocates alike applaud amicus briefs for their accessibility and democratizing power.¹⁴⁴ Considering the significance of amicus briefs scholars are also deeply interested, even concerned, with the information they contain.¹⁴⁵ This is especially true of historical amicus briefs that judges increasingly solicit and use.¹⁴⁶

This Part discusses the issues related to the use of historical amicus briefs in judicial decisions.¹⁴⁷ Section A of this Part discusses perspectives on the utility of amicus briefs in judicial decision making.¹⁴⁸ Section B elaborates on the differences between legal and historical arguments in amicus briefs, including federal judges’ recent reliance on these briefs.¹⁴⁹

“other than the amicus curiae, its members, or its counsel.” FED. R. APP. P. 29(a)(4)(E)(iii). Therefore, amici are not required to reveal the names of members, regardless of whether the donations were earmarked for the amicus brief or not. *Id.* The amendment retains this part of the rule, *unless* the member only became a member of the organization in the previous twelve months. PRELIMINARY DRAFT, *supra* note 134, at 36. Then, if that member contributed over \$100 earmarked for the amicus brief, the amici must report them. *Id.* The Committee calls this change an “anti-evasion rule that treats new members of an amicus as non-members.” *Id.* at 44.

¹⁴⁰ PRELIMINARY DRAFT, *supra* note 134, at 44 (commenting on the purpose for this change). The Committee reasoned that this change would “reveal an amicus that may have been created for purposes of particular litigation,” and essentially allow greater transparency for the public to evaluate the amici. *Id.*

¹⁴¹ *Id.* at 43.

¹⁴² See Anderson, *supra* note 128, at 370 (quoting a partner at a law firm who connected effective representation with amicus participation); *supra* note 77 and accompanying text (noting the increasing influence of amicus briefs on the Supreme Court); *infra* note 153 and accompanying text.

¹⁴³ See Larsen & Devins, *supra* note 15, at 1902–03 (describing the increase in amicus filings and their influence on the Supreme Court).

¹⁴⁴ See *infra* notes 162–166 and accompanying text (advocating for the view that amicus briefs are democratizing). But see *infra* notes 167–173 (providing an argument that amicus briefs can actually be anti-democratic or lead to anti-democratic outcomes).

¹⁴⁵ See *infra* notes 167–173 and accompanying text.

¹⁴⁶ See *infra* notes 193–194 and accompanying text.

¹⁴⁷ See *infra* notes 150–211 and accompanying text.

¹⁴⁸ See *infra* notes 150–173 and accompanying text.

¹⁴⁹ See *infra* notes 174–211 and accompanying text.

A. Perspectives on the Utility of Amicus Briefs

A significant factor in the discussion of historical amicus briefs is the influence of amicus briefs generally in judicial decision making.¹⁵⁰ According to Professor Allison Orr Larsen, the ideal amicus brief is one that supplements factual gaps as neutrally as possible.¹⁵¹ Even purportedly purely factual briefs may not be totally neutral, however.¹⁵² Instead, interest groups and ideological actors often use amicus briefs as enormously powerful advocacy tools.¹⁵³ Subsequently, scholars question the popularity of amicus participation and frequency of their use considering the relative absence of verification procedures.¹⁵⁴

Scholarly critiques of amicus briefs as instruments of judicial lobbying date back at least to 1953, when Fowler V. Harper and Edwin D. Etherington criticized their use as lobbying devices.¹⁵⁵ Subsequent critiques of amicus

¹⁵⁰ See *infra* notes 151–173 and accompanying text.

¹⁵¹ See Larsen, *supra* note 39, at 1759–61 (articulating the various ways that courts use amicus briefs). According to Larsen, most scholars view the “educating” amicus as a positive feature in federal litigation. *Id.* at 1760. This is because fact gathering and analysis can be costly and time consuming for courts, and in addition, judges and their staff may not have the requisite expertise to appropriately acquire necessary information. *Id.* at 1760–61. This view is also consistent with traditional amicus practices. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC’Y REV. 807, 810 (2004) (discussing two ways that information arrives at the Supreme Court, through public opinion and amicus briefs). Collins notes that Supreme Court Justices admit that information contained in amicus briefs can be very useful. *Id.* at 829. *But see* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 695 (2008) (reporting that, although members of the Supreme Court favor factual information contained in amicus briefs, respondents from the circuit and district courts to a poll about the usefulness of informative amicus briefs are generally “lukewarm”).

¹⁵² See Larsen, *supra* note 39, at 1763 (describing the shift of amicus briefs from neutrality to advocacy); Collins, *supra* note 151, at 808 (asserting that amicus briefs are not neutral sources); Rustad & Koenig, *supra* note 56, at 100 (noting the incongruity of amicus briefs submitted by lobbyists or proponents of a particular party and purported scientific objectivity). *But see* Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790–1890*, 20 CONST. COMMENT. 111, 122 (2003) (arguing that advocacy, non-neutral amicus briefs have been a mainstay of amicus practice in the American legal system for as long as neutral amicus briefs have). Banner does not necessarily conclude that this means scholars should change their perception of the use of adversarial amicus briefs in the present day. *Id.*

¹⁵³ See Anderson, *supra* note 128, at 380 (calling interest groups who submit amicus briefs as a form of advocacy either direct “Friend[s] of a Party” or an “Independent Friend”); Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RSCH. Q. 55, 56–57 (2007) (describing the role of amicus briefs as an advocacy tool).

¹⁵⁴ See Anderson, *supra* note 128, at 362 (noting the potential drawbacks of amicus briefs). Anderson describes amicus briefs’ “delusive innocuousness.” *Id.* (quoting Krislov, *supra* note 19, at 694). Anderson notes one criticism is that there is no real screening process for amicus curiae. *Id.* at 370. She also notes the proliferation of “friend of the party” amicus briefs, or briefs submitted by someone with close connections to one of the litigating parties. *Id.* at 379.

¹⁵⁵ See Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amicus Curiae*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 216, 216 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing the use of amicus briefs by judicial lobbyists). Epstein and Knight describe the policy interests of judges and how they might seek

briefs have similarly focused on their use as vehicles for introducing policy-based arguments into judicial decision-making.¹⁵⁶

Although amicus curiae briefs evolved from the theory and practice of the disinterested bystander, the litigating amicus and Brandeis brief, both introduced earlier in this Note,¹⁵⁷ dominate amicus practice today.¹⁵⁸ Many of these briefs are filed by well-funded interest groups hoping to influence judges to adopt policy positions.¹⁵⁹ Scholars, policy makers, and advocates alike, however, debate the desirability of this practice.¹⁶⁰ Section 1 of this Section discusses a democratizing view of amicus briefs and Section 2 of this Section discusses concerns related to lobbying through amicus briefs.¹⁶¹

information from amicus briefs to justify decisions. *Id.* at 216–17, 220–21; Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1177 (1953) (noting that “[b]riefs [of] amici are often valuable,” however, issues arise when those briefs fall below appropriate levels of “decency, moral[ity], and intellect[us]”). *Id.* Interestingly, Harper and Etherington discuss the Court’s rejection of amicus briefs in certain circumstances. *Id.* at 1173. They argue that the early to mid-century Court concluded “that, in most cases, the ‘friends’ of the Court were more trouble than they were worth.” *Id.* This, apparently, led to the Rules of the Supreme Court (even if minimal) that regulate amicus practice today. *Id.*; Lucius J. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 J. POL. 41, 52–53 (1967) (describing the role of amicus briefs in third-party lobbying and participation). Barker calls certain amicus practice “flagrant abuses,” including non-neutral briefs. *Id.* at 53; Collins, *supra* note 153, at 55 (noting that lobbying is typically associated with the political branches of government, rather than the judiciary). Collins discusses members of the judiciary as legal thinkers rather than being driven by policy outcomes, but that amicus briefs might help one party articulate their argument more persuasively than their opponents. *Id.* at 58–59.

¹⁵⁶ See Anderson, *supra* note 128, at 412 (describing the dangers of amicus briefs to judges’ role as a neutral arbiter).

¹⁵⁷ See *supra* notes 53–56 and accompanying text.

¹⁵⁸ See Larsen, *supra* note 39, at 1773 (discussing the prevalence of Brandeis briefs today). Larsen also discussed the evolution of the litigating amicus and its appearance as amicus practice moved from neutrality to advocacy. *Id.* at 1767; see also Banner, *supra* note 152, at 113 (arguing that amicus curiae briefs in the American legal system have always been partisan in some way or another).

¹⁵⁹ See Collins, *supra* note 153, at 55 (claiming that interest groups predominantly use amicus briefs to lobby courts); Larsen, *supra* note 39, at 1763 (calling that interest groups who submit amicus briefs are often “well-organized and well-funded”); Thomas G. Hansford & Kristen Johnson, *The Supply of Amicus Curiae Briefs in the Market for Information at the U.S. Supreme Court*, 35 JUST. SYS. J. 362, 362–63 (2014) (describing the role of organized interests in lobbying the Supreme Court). Hansford and Johnson argue that the Court’s demand is one of the drivers of increasing amicus practice. *Id.* at 362–64.

¹⁶⁰ See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745–46 (2000) (discussing competing perspectives on amicus practice). Kearney and Merrill helpfully layout the basic pros and cons of amicus practice. *Id.* For example, amicus briefs provide valuable and relevant information that supports the rational of a party that they were unable to provide in traditional party briefing. *Id.* at 745. On the other hand, relative opponents to amicus practice, like Judge Posner, lament the duplicative tendencies of amicus practice that can overwhelm or distract an already busy judiciary. *Id.*

¹⁶¹ See *infra* notes 162–173 and accompanying text.

1. Amicus Briefs as a Lobbying Tool: The Democratizing View

One view is that amicus briefs democratize the judicial process.¹⁶² Under this theory, amicus briefs are a low-cost, relatively accessible way for interested parties to voice concerns and policy preferences to the judiciary.¹⁶³ Others argue that amicus briefs allow interest groups and social movements to send broad messages to their supporters and allies, or even explore the feasibility of future campaigns and arguments.¹⁶⁴ Others still have argued that amicus briefs allow interested parties the opportunity to weigh in on cases where the Supreme Court might establish wide-ranging precedent.¹⁶⁵ Despite concerns about the efficacy of using amicus briefs as third-party practice, they allow an interested or impacted actor to be heard in some way.¹⁶⁶

¹⁶² See Garcia, *supra* note 22, at 317 (arguing that amicus briefs are an important tool of democratic participation and speech). Garcia connects amicus participation directly to the First Amendment right to petition. *Id.* at 319. This is a significant connection because it justifies third-party practice through amicus briefs. *Id.*

¹⁶³ See *id.* at 332 (listing the democratizing elements of amicus practice). Garcia pushes back against concerns that amicus participation is specialized and therefore reserved for experienced, well-funded interest groups. *Id.* He argues that power imbalances are a feature across litigation and amicus briefs provide an important way to “level the playing field.” *Id.* Further, amicus briefs allow many people to “band together,” potentially alleviating some of these concerns. *Id.* Lastly, Garcia notes the concerns about the proliferation of amicus briefs in recent years, however, he argues that, because amicus participation is so vital to constitutional participation, it should not be strictly curtailed. *Id.*

¹⁶⁴ See *id.* at 318 (noting one purpose of participation in the judiciary, and through amicus briefs, is to “use the courts to send messages about . . . goals”). Advocates of this theory point to the use of amicus briefs leading up to cases like *Brown v. Board of Education*, where, according to Garcia, the NAACP and ACLU used amicus briefs to explore reactions to arguments that would form the basis of Thurgood Marshall’s argument in *Brown*. *Id.* at 341; Lowman, *supra* note 42, at 1245 (calling the amicus “a lobbyist, an advocate, and . . . the vindicator of the politically powerless”); Epstein & Knight, *supra* note 155, at 221 (discussing how amicus briefs inform the judiciary of what constituencies are interested in the outcome of the case and what their concern is); Collins, *supra* note 151, at 826 (describing how like-minded groups might unite to file an amicus brief together). Collins describes this type of amicus practice as an “all join” where groups can file together and collectively, and individually, signal they “feel[] strongly about the importance of an issue.” *Id.*

¹⁶⁵ See Larsen, *supra* note 39, at 1815 (noting that people might be more critical of amicus practice, particularly its fact-supplying feature, when a Supreme Court decision has “wide policy-making implications”). Larsen notes that this is especially significant considering the Court’s “shift . . . away from dispute resolution and towards law declaration.” *Id.* at 1802; Barker, *supra* note 155, at 42 (describing the Supreme Court making “broad-scale policy determinations” in *Brown v. Board of Education* and *Baker v. Carr*); see also Kearney & Merrill, *supra* note 160, at 826 (discussing the utility of amicus briefs to litigants in lower courts who may never appear before the Supreme Court, but who are nevertheless impacted by a ruling and submit amicus briefs attempting to influence the outcome).

¹⁶⁶ See Barker, *supra* note 155, at 41 (discussing the intersection of amicus and third-party practice). Perhaps unsurprisingly, several prominent interest and policy groups have spoken out against changes to amicus procedure, particularly the proposed amendments at the appellate level. See Daryl Joseffer & Mariel Brookins, *Proposed Amendments to the Amicus Process Are a Solution in Search of a Problem*, FED. SOC’Y (Nov. 2024), <https://fedsoc.org/commentary/fedsoc-blog/proposed-amendments-to-the-amicus-process-are-a-solution-in-search-of-a-problem> [perma.cc/FR8F-PJCE] (questioning whether proposed amendments to amicus practice at the appellate level is a violation of the First Amendment). Groups like the Federalist Society consider proposed changes to amicus rules that, ostensibly, would

2. Amicus Briefs as a Lobbying Tool: The Hidden Influence View

Some scholars doubt the idealistic, democratizing view of amicus practice.¹⁶⁷ Rhode Island Senator Sheldon Whitehouse is a particularly vocal opponent of the proliferation of what he sees as unsavory judicial lobbying through amicus briefs.¹⁶⁸ Senator Whitehouse worries that, instead of democratizing access to the judiciary, amicus briefs, and their increasing favor in appellate courts and at the Supreme Court, provide disproportionate influence to well-connected interest groups and savvy insiders of the judicial system.¹⁶⁹ Indeed, his main consternation centers around “dark money” funders of amicus briefs—relying

provide greater clarity into the funding of amicus briefs by interest organizations, violations of free speech and raise other “serious constitutional problems.” *Id.* The Federalist Society opinion calls the amendments “problematic,” particularly because they might discourage briefs. *Id.*; Rose Laoutaris & Nino Marchese, *Defending Free Speech: ALEC’s Response to Proposed Amicus Brief Disclosure Rules*, AM. LEGIS. EXCH. COUNCIL (Feb. 2025), <https://alec.org/article/defending-free-speech-alecs-response-to-proposed-amicus-brief-disclosure-rules/> [perma.cc/W258-VY9Y] (arguing that the proposed amendments violate First Amendment free-speech rights). In particular, the American Legislative Exchange Council takes issue with how these amendments might discourage organizations’ amicus filings, citing concerns about donor privacy. *Id.*; Tyler Martinez, *Protecting Privacy and Advocacy: Dangerous Proposed Amendments to Federal Rule of Appellate Procedure Rule 29*, NAT’L TAXPAYERS UNION FOUND. (Dec. 11, 2024), <https://www.ntu.org/foundation/detail/protecting-privacy-and-advocacy-dangerous-proposed-amendments-to-federal-rule-of-appellate-procedure-rule-29> [perma.cc/SSL4-CDB4] (implicating campaign finance and free-speech arguments to advocate against the proposed amendments). The National Taxpayers Union Foundation recommend rejecting the amendments. *Id.*

¹⁶⁷ See Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141, 141 (2021), <https://yalelawjournal.org/essay/a-flood-of-judicial-lobbying-amicus-influence-and-funding-transparency> [perma.cc/PVG4-5X35] (highlighting ethical considerations of current amicus practice).

¹⁶⁸ See *id.* at 142–43 (describing amicus practice as a tool used by entrenched interest groups). Senator Whitehouse tracks the evolution of the amicus brief, utilizing the work of several prominent scholars, including Allison Orr Larsen and Samuel Krislov. *Id.* at 143 n.9, 144 n.17. The swell of amicus briefs appears to have spurred much of the recent scholarship around amicus practice, including notice from critics like Senator Whitehouse. *Id.* at 144. Although it is not necessarily surprising that Senator Whitehouse, a University of Virginia Law School graduate, would take interest in this scholarly debate, it is worth noting he is a Democratic Senator, writing in this capacity in this article. *Id.*; *Meet Sheldon*, SHELTON WHITEHOUSE: U.S. SENATOR FOR R.I., <https://www.whitehouse.senate.gov/about/> [perma.cc/GE3T-TMCB]. Senator Whitehouse expresses particular ire for the use of amicus practice by what he sees as plainly political actors, including groups connected to the Republican party like the Federalist Society. Whitehouse, *supra* note 167, at 153.

¹⁶⁹ Whitehouse, *supra* note 167, at 153 (discussing concerns about amicus practice by the “wealthy few [who] fund” amicus practice and “exacerbate[] preexisting countermajoritarian and inequality concerns”). Senator Whitehouse also discusses the “amicus wrangler,” or advocate who is tasked with vetting amicus briefs. *Id.* at 146. Senator Whitehouse points out these lawyers are often connected to a party in the case, and that these amicus wranglers are mostly available to well-connected, well-funded parties. *Id.* But see Larsen & Devins, *supra* note 15, at 1919–21 (offering a positive view of “amicus wranglers”).

on loose donor disclosure requirements—who seek to influence the judiciary from the shadows.¹⁷⁰

Further, critics of current amicus practices question amicus briefs’ influence on judges as neutral decision makers.¹⁷¹ Scholars worry that judges could cherry-pick information from the flood of amicus briefs that serve partisan purposes, sheltering behind the legitimacy of amicus practice.¹⁷² Scholars express this concern particularly with respect to Brandeis briefs and those containing social science data.¹⁷³

B. Difficulties in Assessing Historical Amicus Briefs

Critics of historical amicus briefs often question the suitability of judges to choose, evaluate, and appropriately utilize historical arguments and evidence in such briefs without any evidentiary guidelines.¹⁷⁴ These concerns arise out of common criticisms of expert qualification under the Federal Rules of Evidence and the divergence of historical scholarship and legal arguments.¹⁷⁵ Although this Note focuses on the intersection of history, historians, and amicus briefs and not district court testimony, this discussion is essential to understanding the intersections of historical evidence and legal arguments, and

¹⁷⁰ See Whitehouse, *supra* note 167, at 146 (decrying dark money contributors to amicus practice). Senator Whitehouse expresses concerns that dark money funders are hidden “to the parties, the Court, and the public.” *Id.*

¹⁷¹ Hansford & Johnson, *supra* note 159, at 363 (describing their theory that amicus briefs influence courts and, in turn, that courts vie for information from amici); Larsen, *supra* note 39, at 1777 (discussing the “crav[ing] [of] more factual information, and the amicus briefs . . . stepping in to fill the void”).

¹⁷² See DeMatteo & Wiltsie, *supra* note 23, at 1876 (describing amicus briefs that contain misleading or distorted facts); Banner, *supra* note 152, at 122 (suggesting amicus briefs have been partisan for much of their history); Rustad & Koenig, *supra* note 56, at 162 (warning against unfettered and unrestricted use of social science data in amicus briefs). But see Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 9 N.Y.U. L. REV. 175, 218 (2018) (discussing the fact-finding role and history of federal courts). Larsen suggests judges are less susceptible to alternative facts due to their label as “reluctant fact-finders.” *Id.* She optimistically hopes they may be able to overcome the scourge of alternative facts, “rising above the fray created by a factual free-for-all society.” *Id.*; Melissa Murray, *Making History*, 133 YALE L.J.F. 990, 996 (2024), <https://yalelawjournal.org/essay/making-history> [perma.cc/YW3N-BFDR] (arguing that the Roberts Supreme Court uses history to make outcome-driven decisions). Murray further argues that the use of history gives the Court a veneer of objectivity. *Id.*

¹⁷³ See DeMatteo & Wiltsie, *supra* note 23, at 1876 & n.11 (discussing concerns with amicus briefs that contain scientific information); Larsen, *supra* note 39, at 1762 (discussing the ability of judges to evaluate factual experts from amicus briefs). Although Larsen has elsewhere lauded judges for their fact-finding conservatism, here she doubts their ability to evaluate factual claims and experts in amicus briefs. *Id.* at 1762–64; Rustad & Koenig, *supra* note 56, at 93–94 (discussing the use of social science data through amicus briefs like Brandeis briefs). Rustad and Koenig acknowledge the use of social science in amicus briefs, but warn there is a danger courts can be misled when briefs contain distorted information presented for partisan purposes. *Id.* at 94.

¹⁷⁴ See *infra* notes 192–203 and accompanying text.

¹⁷⁵ See *infra* notes 178–191 and accompanying text.

historians' role in advancing those arguments in an adversarial system.¹⁷⁶ Subsection One of this Section discusses criticisms of historical evidence in trial courts, Subsection Two discusses concerns about where historical evidence comes from, Subsection Three notes the struggles of appellate court judges in using historical facts presented at trial or in amicus briefs, and Subsection Four notes the influence of historical amicus briefs in appellate courts.¹⁷⁷

1. Historians on the Stand

One criticism of the *Daubert* test is its utility in assessing non-scientific methodology and evidence, especially related to fields like history.¹⁷⁸ Yet, historical evidence is expert evidence and historians regularly appear as expert witnesses on all manner of historical subjects, in all manner of cases.¹⁷⁹ As expert witnesses, historians are subject to the *Daubert* standard.¹⁸⁰ Scholars note, however, that historians present unique challenges to *Daubert* assessment and adversarial confrontation.¹⁸¹ These incompatibilities include a difficulty in recognizing and analyzing a particular historian's methodology compared to the historical method, which often differs from the scientific method.¹⁸² Another is weighing experience alongside other *Daubert* factors.¹⁸³ Finally, scholars debate the in-

¹⁷⁶ See Martin, *supra* note 61, at 1521 (explaining the complications of historical testimony and evidence in an adversarial system).

¹⁷⁷ See *infra* notes 178–211 and accompanying text.

¹⁷⁸ See Maxine D. Goodman, *A Hedgehog on the Witness Stand—What's the Big Idea?: The Challenges of Using Daubert to Assess Social Science and Nonscientific Testimony*, 59 AM. U. L. REV. 635, 638–39 (2010) (calling for changes to *Daubert* based on difficulties in assessing non-scientific experts); Holly Morgan, Comment, *Painting the Past and Paying for It: The Demise of Daubert in the Context of Historian Expert Witnesses*, 44 WAKE FOREST L. REV. 265, 275 (2009) (describing the perils of mis-qualifying historians as experts); Martin, *supra* note 61, at 1532 (describing the incompatibility between historical theory and methodology and legal advocacy).

¹⁷⁹ See Martin, *supra* note 61, at 1519–20 (explaining the types of cases historians have been called to testify in, including cases involving LGBTQ rights, voting rights, Indigenous rights, and more).

¹⁸⁰ See *id.* at 1532–33 (explaining the *Daubert* factors and how they apply to historians as non-scientific experts).

¹⁸¹ See *supra* note 178 and accompanying text; *infra* notes 182–184 and accompanying text.

¹⁸² See Martin, *supra* note 61, at 1521 (explaining the methodologies followed by different specialties); Maxine D. Goodman, *Slipping Through the Gate: Trusting Daubert and Trial Procedures to Reveal the 'Pseudo-Historian' Expert Witness and to Enable the Reliable Historian Expert Witness—Troubling Lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824, 838 (2008) (explaining the issues with applying a *Daubert* analysis to non-scientific fields). Goodman argues that historical and scientific methodologies differ because the scientific method involves testing a hypothesis, whereas the historical method relies on source analysis and interpretation. *Id.*

¹⁸³ See Morgan, *supra* note 178, at 277–78 (describing a case in which the judge predominantly relied on a historian's experience and made only cursory references to the methodology and technique of the historian). Morgan questioned whether relying solely on experience simply indicated relevant qualifications or qualifications *and* the reliability of evidence. *Id.* at 284–85. Morgan argued that qualifications are not sufficient to assess reliability, providing examples of how qualifications alone might

congruence between historical and legal purpose and advocacy, leading expert historians to abandon sound methodological principles, based on qualification and experience, when confronted by cross-examination in the court room.¹⁸⁴

2. What Facts? Whose Facts?

A primary concern with amicus briefs, particularly those containing factual data or evidence is the lack of qualification of authors and verification of information contained in them.¹⁸⁵ According to scholars like Allison Orr Larsen, this is salient in an era of information oversaturation and alternative facts.¹⁸⁶ As Larsen concedes, competing factual interpretations and claims are a mainstay of the American adversarial system.¹⁸⁷ The difference presently, however, is how easily judges can access information manipulated by outside actors.¹⁸⁸

Historical facts are especially prone to manipulation because they are not necessarily empirical data or testable observations.¹⁸⁹ Rather, historical facts, as contained in historical amicus briefs, are more often interpretations and

indicate someone has worked as a historian before, but not that their research or evidence was reliable in each situation. *Id.* at 290–91.

¹⁸⁴ See Martin, *supra* note 61, at 1532 (examining the historical method and its incongruence with acting as an expert witness). Martin highlights the adversarial nature of courtroom testimony, and direct and cross-examination. *Id.* at 1538. She explains how historians report acting outside the usual historical methodology when questioned on the witness stand. *Id.*

¹⁸⁵ See Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1216 (2013) (discussing the dangers of facts introduced in an appeal that do not have the usual “procedural safeguards”). Borgmann further asserts that many facts introduced in the appellate process through amicus briefs are “dubious,” and would never survive an admissibility challenge at trial. *Id.*; DeMatteo & Wiltsie, *supra* note 23, at 1876–77 (same). In addition, factual assertions are rarely contested by the parties in the case, discounting claims that adversarial safeguards exist to screen false or misleading information. *Id.* at 1916.

¹⁸⁶ See Larsen, *supra* note 39, at 1763–64 (describing the availability of factual information). Larsen posits that parties have a wide range of facts and sources to choose from, meaning it is not difficult to assemble factual assertions that serve their argument in some way. *Id.* She urges reforms to amicus practice in a post-Internet universe. *Id.* at 1764; Larsen, *supra* note 172, at 179 (warning of the intersection of increasing reliance on factual claims and “an environment where information is very easy to manipulate”).

¹⁸⁷ See Larsen, *supra* note 172, at 179–80 (noting the relationship between the adversarial nature of the American legal system, and factual interpretations and disputes).

¹⁸⁸ Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 497 (2000) (describing advancements in technology and legal research that make information more accessible).

¹⁸⁹ See Larsen, *supra* note 172, at 179–80 (discussing historical facts). Larsen notes the particular danger with historical claims, where advocates present incomplete historical arguments or facts and rely on judges’ predilections for “law office history.” *Id.* at 180. According to Larsen, we are in the age of “‘law office history’ gone wild.” *Id.*; see also David T. Hardy, *Lawyers, Historians, and “Law-Office History,”* 46 CUMB. L. REV. 1, 3 (2015) (defining “law office history” as “history written as advocacy”).

compilations of historical information by an author or authors.¹⁹⁰ These facts, which are presented as true, are therefore ripe for manipulation.¹⁹¹

3. Who Interprets the Facts?

Amicus briefs appear on judges' desks with minimal verification.¹⁹² Still, amicus briefs are appreciated, even sought after by the judiciary.¹⁹³ This leaves judges to parse through briefs using their own verification standards, independently verify and accept their factual content, and use them in their decisions.¹⁹⁴ Scholars question whether judges are well-suited to make these determinations, both because of the abundance of briefs received in some cases, and the skills required to adequately scrutinize factual accuracies and inaccuracies.¹⁹⁵

This is of particular concern when historical amicus briefs appear before judges with minimal historical training.¹⁹⁶ Although historical scholarship and the legal field frequently overlap, scholars note that there are aspects of the two that are incompatible and distinct.¹⁹⁷

First, the basic purposes and theory of legal advocacy and history diverge substantially.¹⁹⁸ Jack Balkin, in his book *Memory and Authority*, argues that

¹⁹⁰ See Larsen, *supra* note 172, at 182 n.27 (defining "fact-y" as a fact that someone can falsify and is supported by secondary sources); Larsen, *supra* note 110, at 298 (concluding that not every historical claim is equal or the same as another). Larsen classifies historical claims in the following way: "[some claims are] narrative; others are about the state of law at a particular moment in time; still, others are a hybrid form of history combined with empirical data." *Id.*

¹⁹¹ See Larsen, *supra* note 172, at 179 (calling some factual claims by advocates "'creative' over-reach").

¹⁹² See DeMatteo & Wiltsie, *supra* note 23, at 1913 (defining mischaracterized or even inaccurate data and information contained in amicus briefs as *inimicus*).

¹⁹³ See Larsen, *supra* note 39, at 1761 (detailing judicial perspectives of amicus briefs). Larsen provides commentary from former Justice Breyer and current Justice Alito explaining their interest in amicus briefs. *Id.* Both Justices note that amicus briefs can be helpful in providing the court additional non-adjudicative facts for use in their analysis. *Id.*; Ishitani, *supra* note 15, at 1 (noting Justice Sotomayor's appreciation of the historical amicus brief).

¹⁹⁴ See Michalak, *supra* note 74, at 481 (warning courts against relying on amicus briefs, particularly ones with dubious factual claims or that contain historical outliers).

¹⁹⁵ See *id.* at 480 (noting that most lawyers, including judges, have not trained as historians). Even if a judge is a trained historian, that is no guarantee they are specialists in the particular historical field or time period relevant to the case or amicus brief. *Id.* Michalak also notes the "mountains of historical documents and amicus briefs" that judges might contend with. *Id.* at 481.

¹⁹⁶ *Id.* at 480; see Larsen, *supra* note 110, at 297–98 (calling judges who deal with battling historical interpretations "actors on the front lines"). Larsen quotes a federal district judge from Mississippi who asserted "[t]his court is not a trained historian" when confronting historical evidence. *Id.*

¹⁹⁷ See Martin, *supra* note 61, at 1523–24 (suggesting an antagonism between history and the law). Martin calls lawyers and historians "odd bedfellows" because of how intertwined but at odds the disciplines are. *Id.* A significant difference, Martin notes, is that the law is a practice of finality, unlike history, which is about ongoing refinement. *Id.* This view is consistent with professional historians who note that history is dynamic. BRUNDAGE, *supra* note 62, at 3.

¹⁹⁸ See Martin, *supra* note 61, at 1523–25 (noting several ways in which legal advocacy and historical scholarship diverge). Martin lists several aspects, including that legal advocacy focuses on the

lawyers are trained to win arguments, “to assert and dispute claims about legal authority,” and to remove uncertainty by crediting or discrediting truths as significant to winning their argument.¹⁹⁹ In contrast, historians do not necessarily search for a single truth.²⁰⁰ Uncertainty and nuance are part and parcel of the historical method and often welcomed, rather than lamented by historians.²⁰¹ Second, there are academic steps to evaluating a piece of historical writing that scholars note can inevitably interfere with a judges’ evaluation of historical amicus briefs.²⁰²

Judges who use historical amicus briefs are not bound by any evidentiary procedures to verify the use of sound historical methodology or veracity of expert historical evidence.²⁰³

4. Influence of Historical Amicus Briefs and History at the Courts

Courts frequently use amicus briefs in decision making.²⁰⁴ As discussed previously, the use of amicus briefs, particularly historical and Brandeis briefs, has increased significantly.²⁰⁵ Scholars note the recent and competing uses of

best outcome for a particular client. *Id.* This means that lawyers are not impartial, and they do not consider, or at least use, multiple viewpoints in a final argument. *Id.* Instead, a lawyer’s final argument presents facts and evidence to benefit a client. *Id.* Conversely, a historian may consider, weigh, and acknowledge competing answers and evidence without undermining their ultimate argument or goal. *Id.* at 1525. Martin cites professional historians who recognize the incompatibility between history and the practice of law, including one who said, “[m]y experience has taught me that . . . history and the law are in a state of perpetual warfare.” *Id.*

¹⁹⁹ BALKIN, *supra* note 75, at 232–34. Balkin argues that lawyers are trained to use history in this adversarial system. *Id.* at 232.

²⁰⁰ *See id.* (arguing that historians are not trained to win legal arguments). Balkin notes that historians are interested in historical scholarship for many different reasons and are “taught to relish and respect ambiguity, the complexity and multi-vocality of the past, and the inevitability of multiple interpretations.” *Id.* Instead, historians “find excitement . . . in interpretation.” Myron A. Marty, *Historians’ Crafts: Common Interests in a Diverse Profession*, 81 J. AM. HIST. 1078, 1085 (1994).

²⁰¹ *See* Martin, *supra* note 61, at 1524–25 (noting that lawyers are not “balanced or impartial” in contrast to historians who are often trained to accept ambiguity).

²⁰² *See* Hardy, *supra* note 190, at 3 (discussing the conflicts between law and history). Hardy contends that historians view constitutional history and associated topics as fluid, ongoing, and without definitive answers. *Id.* Conversely, a courts’ job is to “find meaning.” *Id.*; Murray, *supra* note 172, at 990, 1014 (describing how courts “do history,” concluding that it is tantamount to “making history”).

²⁰³ *See supra* note 109 and accompanying text (explaining that *Daubert* and the Federal Rules of Evidence do not apply to amicus briefs); *supra* notes 115–123 and accompanying text (describing the relatively minimal procedural requirements to submit an amicus brief in federal court).

²⁰⁴ *See* Ishitani, *supra* note 15, at 35–36 (discussing the frequency with which historical briefs appear in Supreme Court opinions and dissents); Kearney & Merrill, *supra* note 160, at 757 (delineating citations to amicus briefs at the Supreme Court over the years).

²⁰⁵ *See supra* notes 77, 204 and accompanying text (detailing the use of amicus briefs and historical amicus briefs at the Supreme Court).

historical amicus briefs in important Supreme Court cases, including *Dobbs v. Jackson Women's Health Organization*.²⁰⁶

Historians and legal scholars criticized the Court's narrow analysis of history in *Dobbs* and use, or misuse of historical amicus briefs in its decision.²⁰⁷ For example, legal scholar Professor Thomas Crocker notes the long view of history and tradition Justice Alito took in the *Dobbs* opinion, although utilizing a range of historical sources.²⁰⁸ Further, the Court claimed this was an objective approach.²⁰⁹ Significantly, the Court in *Dobbs* leaned heavily on historical amicus briefs to construct its argument that *Roe* contained a "faulty historical analysis," although also condemning historical arguments in various amicus briefs as weak.²¹⁰ Notably, several of the amici—the Organization of American Historians and American Historical Association—released a statement after the decision expressing concern about the Court's use of history.²¹¹

²⁰⁶ See Larsen, *supra* note 172, at 201 (describing competing amicus briefs submitted to the Court in *Dobbs*); Larsen & Devins, *supra* note 15, at 1921 (noting the use of competing briefs). Larsen and Devins quote A.E. Dick Howard—an American legal scholar—calling the trend of submitting copious, competing amicus briefs an "arms race."; Dove, *supra* note 84, at 57–58 (detailing the competing use of history and amicus briefs in Supreme Court case *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*).

²⁰⁷ See Thomas P. Crocker, *What Is Deeply Rooted in the Constitution?*, 50 BYU. L. REV. 265, 266 (2024) (arguing the *Dobbs* opinion "demonstrate[d] the pitfalls in adopting a narrow historical analysis"); Michalak, *supra* note 74, at 511 (questioning the Court's use of historical sources in *Dobbs*, particularly in contrast to the historical sources used in *Bruen*). As Michalak notes, in *Bruen* the Court "reasoned that medieval sources were too far removed from the founding . . . to shed light on" the issue, yet in the same term, the Court utilized medieval sources in *Dobbs*. *Id.*

²⁰⁸ See Crocker, *supra* note 207, at 322–24 (detailing the long view of history described by the Court, including reference back to medieval times). Crocker further discusses the opinions use of "selective quotation[s]" from sources. *Id.* at 319; Michalak, *supra* note 74, at 493–94 (noting that Justice Alito suggested courts use historical evidence "dating back to the Founding era, and perhaps even beyond"); Murray, *supra* note 172, at 995 (calling the history the *Dobbs* Court used "malleable").

²⁰⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 241 (2022); see Crocker, *supra* note 207, at 312 (noting that the Court claimed an objective analysis in *Dobbs*).

²¹⁰ See *Dobbs*, 597 U.S. at 250–55 (lambasting the brief historical references used by the Court in *Roe* and condemning historical arguments in amicus briefs submitted by interested groups in *Dobbs*).

²¹¹ See OAH and AHA Issue Joint Statement on the U.S. Supreme Court *Dobbs v. Jackson Decision*, ORG. OF AM. HISTORIANS (July 6, 2022), <https://www.oah.org/2022/07/06/joint-oah-aha-statement-on-the-dobbs-v-jackson-decision/> [perma.cc/C7R6-QDWF] (asserting the organizations were "dismayed that the Court declined to take seriously the historical claims of our brief"). The organizations called out the Court's misrepresentations of historical sources and the impact the sources and evidence had on the precedent set in the case. *Id.* Lastly, the article claims the opinion "inadequately represents the history of the common law." *Id.*; Heidi Przybyla, *Plain Historical Falsehoods: How Amicus Briefs Bolstered Supreme Court Conservatives*, POLITICO (Dec. 3, 2023), <https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497> [perma.cc/HGB9-5GBD] (describing the source of many of the historical briefs at the Supreme Court, including the influx from the Federalist Society). The article details the life and work of popular conservative historian Robert P. George. *Id.* "The trouble for them," George said of the historical associations, is 'the sources are available to us, just as they are to them. So we can see what the sources say and compare it with what they claim the sources say.'" *Id.*

III. EVALUATING POSSIBLE SOLUTIONS TO AN URGENT ISSUE

This Note focuses on concerns about unverified and methodologically unsound historical arguments contained in amicus briefs and their powerful influence at federal appellate courts.²¹² It is vital to know *who* compiled and interpreted historical facts presented to a court, *how* they were compiled, and *from where* they were compiled.²¹³

Many legal scholars have opined on this issue before.²¹⁴ In fact, this Note is part of a perennial call to action, reemerging in strength when the Supreme Court or a lower court relies on questionable historical arguments or sources, particularly those arriving through amicus briefing.²¹⁵ Therefore, the main goal of this Note is to keep the issue of historical amicus briefs front and center, and encourage reform alongside the scholars who lead this work, and have for many years.²¹⁶ Section A of this Part argues that solving this issue is critical given the Court's increasing preference for history and tradition tests.²¹⁷ Section B argues for restraining amicus practice, rather than encouraging it.²¹⁸ Section C of this Part evaluates a slate of possible solutions.²¹⁹

A. The Inflection Point

This is a critical moment for amicus reform.²²⁰ Recent appellate decisions indicate that amicus participation is increasing rapidly, with historical scholarship taking center stage.²²¹ The vague history and tradition standard in *Bruen*—that the Court only somewhat clarified in *Rahimi*—will continue to sow confusion and encourage judges to solicit historical clarification in amicus briefs.²²² Further, the *Bruen* standard has encouraged amici to include or exclude specific historical evidence and arguments to serve their narratives and allows judges to

²¹² See *supra* notes 204–211 and accompanying text.

²¹³ See *supra* notes 178–203 and accompanying text.

²¹⁴ See *infra* note 215 and accompanying text.

²¹⁵ See, e.g., Larsen, *supra* note 39, at 1764–65 (presenting the case for amicus reform); Ishitani, *supra* note 15, at 9 (same); Anderson, *supra* note 128, at 366 (same).

²¹⁶ See *supra* note 215 and accompanying text.

²¹⁷ See *infra* notes 220–224 and accompanying text.

²¹⁸ See *infra* notes 225–233 and accompanying text.

²¹⁹ See *infra* notes 234–268 and accompanying text.

²²⁰ See *supra* notes 211, 215 and accompanying text (compiling articles that highlight increasingly troubling issues with amicus briefs).

²²¹ See *supra* notes 76–77 and accompanying text (citing the increase of historical amicus briefs at the Supreme Court and in judicial decision-making).

²²² See Dove, *supra* note 84, at 40 (noting the confusion in federal courts after the *Bruen* decision). According to Dove, soon after the *Bruen* decision, the Supreme Court granted certiorari in *Rahimi* to provide guidance. *Id.* at 48. Even Dove's article, which is meant to provide guidance to amici following the *Bruen* decision, is emblematic of the confusion caused by the case and the importance of framing briefs a certain way. *Id.* at 31; Larsen, *supra* note 110, at 294 (noting that lower courts were "baffled" after the *Rahimi* and *Bruen* decisions).

cherry-pick history based on ideological goals.²²³ It is clear that courts will continue to “do[] history,” regardless of their historical training or expertise.²²⁴

B. *Less Is More*

Sometimes less is more.²²⁵ Although several scholars applaud amicus practice as “democratizing,” misinformation contained in amicus briefs and subsequently utilized in judicial decision making could be anti-democratic.²²⁶ As long as the Court relies on an originalist theory, amicus briefs that contain misleading or even ahistorical evidence and arguments are damaging.²²⁷ Some scholars believe an increase in the supply of amicus briefs from professional or even progressive historians, a concerted effort by historians and advocates concerned with recent activity in the judiciary, is the correct solution.²²⁸ Although this might ensure more diverse or professional perspectives in amicus briefs, it does not guarantee judges will *use* those briefs.²²⁹ Instead, these solutions would increase the crush of amicus briefs courts already have to manage and exacerbate anxieties about what information courts must consider to make decisions.²³⁰

Therefore, a solution to this problem must confront the proliferation of historical amicus briefs by *restraining* historical amicus practice, not increasing it.²³¹ This is not to say there are particular historians who should write his-

²²³ See Larsen, *supra* note 110, at 310 (describing the continued use of “law office history”). Larsen includes commentary from Jake Charles, a constitutional law scholar, who describes the increasing trend of law office history as “Ctrl+F history,” basically articulating the cherry-picking that judges might utilize to find historical arguments and sources that suit their needs. *Id.*

²²⁴ See Murray, *supra* note 172, at 995 (describing how courts “do[] history” and how this trend is bound to continue based on recent patterns).

²²⁵ See *infra* notes 226–233 and accompanying text.

²²⁶ See Garcia, *supra* note 22, at 317, 357 (providing a “normative defense of amicus participation,” including that it democratizes litigation); *supra* notes 162–166 and accompanying text; cf. Aaron Tiedemann, *The Problem of Misinformation in a Democracy*, (discussing the negative consequence of misinformation on voting) in WHY AMERICANS CRAVE FAKE NEWS: HOW OUR ELECTORAL SYSTEM DRIVES DEMAND FOR MISINFORMATION, NEW AM. (Aug. 21, 2023), <https://www.newamerica.org/political-reform/reports/why-americans-crave-fake-news/the-problem-of-misinformation-in-a-democracy/perma.cc/QQE9-AUXU>.

²²⁷ See Przybyla, *supra* note 211 (expressing concern about the influence of improper history contained in amicus briefs).

²²⁸ See Ishitani, *supra* note 15, at 63–64 (arguing that historians, particularly progressive historians, should “burgeon[] efforts” to produce more, better briefs).

²²⁹ See *id.* at 33 (detailing how the Supreme Court does not use many amicus briefs, including those that might be well regarded or respected in the larger academic and legal communities).

²³⁰ See Hansford & Johnson, *supra* note 159, at 373–74 (noting the increase of amicus briefs submitted to the Supreme Court); Larsen, *supra* note 39, at 1764 (detailing how the Supreme Court must sort through the large amounts of factual issues in amicus briefs); *supra* notes 57–59 and accompanying text (describing the proliferation of amicus briefs and large number now submitted to the Supreme Court).

²³¹ See *infra* notes 238–268 and accompanying text.

torical amicus briefs, or certain pieces of historical evidence or arguments that would be allowed in the briefs themselves.²³² Rather, solutions should draw on preexisting legal safeguards and practices, and emphasize transparency, academic integrity, and sound methodological standards.²³³

C. Slate of Solutions

The following solutions are ordered from least to most disruptive to current amicus practice.²³⁴ Any solution to this issue should begin with a recognition that the historical amicus brief is both a Brandeis brief *and* a litigating brief.²³⁵ By the nature of history as an academic subject, history that appears in amicus briefs is not neutral.²³⁶ Regardless of ideological or political affiliation, it is important to recognize that *any* history is non-neutral.²³⁷

1. Historical Amicus Bar and Other Expert Screeners

An oft proposed solution involves the expansion of the Amicus Bar or other experts to screen amicus briefs before they land on judges' desks.²³⁸ Under this solution, courts would appoint scholars with academic expertise to evaluate historical arguments contained in amicus briefs and pass those briefs that meet a standard of validity and integrity on to judges.²³⁹ Such a group might consist of attorneys, like a traditional bar, but might also include a coalition of legal and historical scholars.²⁴⁰

This is an attractive solution because, especially in the case of professional historians, it relies on the expertise of those who actively work in the field,

²³² See *infra* notes 239–240 and accompanying text.

²³³ See *infra* notes 239–240, 257–258 and accompanying text.

²³⁴ See *infra* notes 238–268 and accompanying text.

²³⁵ See *supra* note 158 and accompanying text.

²³⁶ See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1246–49 (warning against the misuse of descriptive history, which sees historical facts as objective and might ignore the complexities of historical analysis and adjudication); Rebecca Pillar, *History in the Making: Why Courts Are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187, 189–90 (2015) (describing incongruencies between law and history, particularly in objectivity); Larsen, *supra* note 110, at 300 (discussing debates over whether history is an objective study).

²³⁷ See *supra* note 236 and accompanying text.

²³⁸ See Larsen, *supra* note 172, at 200, 225 (discussing the role of amicus wranglers); Ishitani, *supra* note 15, at 15 (same); *supra* note 169 and accompanying text.

²³⁹ See Michalak, *supra* note 74, at 507–08 (advocating for the use of historical experts who could screen historical claims and evidence). Michalak suggests the use of court appointed experts to alleviate judges concerned with having to discern and evaluate historical arguments and evidence on top of their legal work. *Id.* Michalak quotes one judge who asserted “[w]e were not trained as historians. We practice[] law, not history.” *Id.* at 507.

²⁴⁰ See Ishitani, *supra* note 15, at 27 (noting the number of historians who are experienced filers of historical amicus briefs at the Supreme Court); Larsen & Devins, *supra* note 15, at 1916–17, 1919–20 (describing the make-up of the Supreme Court Bar and members who are “amicus wranglers,” working to compile amicus briefs to file at the Court).

unlike judges who are first and foremost legal actors.²⁴¹ Further, an initial screening process could relieve judges of the task of digging through copious amicus briefs.²⁴² In addition, this solution would not limit the number of briefs advocates can submit to a court or necessitate the expansion of donor disclosure, placating advocates of accessibility and democratization.²⁴³

Concerns might arise, however, in deciding who is given this important power and responsibility.²⁴⁴ The current Amicus Bar is a select group that does not necessarily reflect the most diverse slate of advocates.²⁴⁵ Similarly, expanding the Amicus Bar to include legal historians, academics, and other historical experts risks selecting a non-representative group.²⁴⁶ Despite these concerns, this solution would not significantly alter current amicus practice and could help to provide courts with methodologically sound historical amicus briefs.²⁴⁷

2. Enhanced Donor and Authorship Disclosure

Any potential solution is arguably unsatisfactory without confronting a major issue in amicus practice across the board, the lack of transparency of who submits a brief and what underlying ideological goals they might have.²⁴⁸ Donor transparency, like that contemplated by the amendments to appellate procedure, work toward confronting this issue.²⁴⁹ The amendments, as they currently stand, however, are a compromise and do not represent the full scope of necessary changes at all levels.²⁵⁰

²⁴¹ See *supra* notes 239–240 and accompanying text.

²⁴² See *supra* notes 58–59 and accompanying text (describing the proliferation of amicus briefs).

²⁴³ See *supra* notes 162–166 and accompanying text (describing the democratic theory of amicus briefs).

²⁴⁴ See Michalak, *supra* note 74, at 507–08 (describing the process of appointing experts, including court experts and special masters).

²⁴⁵ See *supra* note 58 and accompanying text (describing the “amicus machine”); *supra* note 117 and accompanying text (detailing the number of attorneys eligible to practice in the Supreme Court and file amicus briefs). But see *supra* note 159 and accompanying text (offering a negative view of the amicus machine, particularly that it contains a select few attorneys and tends to emphasize certain scholarship).

²⁴⁶ See *supra* note 158 and accompanying text.

²⁴⁷ See *supra* notes 115–123 and accompanying text (describing current amicus practice in federal courts).

²⁴⁸ See Larsen, *supra* note 39, at 1808 (discussing the lack of transparency of interested parties who submit amicus briefs); *supra* notes 167–173 and accompanying text.

²⁴⁹ See *supra* notes 134–141 and accompanying text (describing proposed amendments to appellate level amicus procedure).

²⁵⁰ See PRELIMINARY DRAFT, *supra* note 134, at 16 (detailing how the Judicial committee decided not to pursue certain amendments to Appellate Procedure Rule 29, including requiring nonparties to disclose any contributions to an organization whether the donations were earmarked for amicus briefs or not).

Importantly, these amendments will not impact amicus practice at the Supreme Court.²⁵¹ In order to adequately confront the issue of donor and authorship transparency, the Supreme Court must adopt more stringent requirements, similar to those proposed in appellate procedure.²⁵² Whether that is a realistic call to action is questionable, however, considering recent changes to the Rules of the Supreme Court has generally lifted restrictions on amicus practice.²⁵³ Nevertheless, it is a necessary step towards transparency.²⁵⁴ This solution may disincentivize advocates with nefarious motives or purposefully misleading history from filing amicus briefs.²⁵⁵ It does not, however, fully reach the issue that is explicitly imposing verification procedures on amicus practice in order to weed out methodologically unsound briefs.²⁵⁶

3. *Daubert*-Style Guardrails

A third solution involves applying *Daubert* style gatekeeping to amicus briefs.²⁵⁷ Allison Orr Larsen suggests this could involve requiring briefs with expert evidence to contain an explanation of methodologies used in the brief, requiring purely factual briefs rather without any opinion on the legal issue, and requiring that any evidence and data contained in the brief be publicly available.²⁵⁸

Other scholars have noted that this solution is needed primarily at the appellate or Supreme Court level because district courts can bring historians in to testify as experts, subject to the regular *Daubert* process.²⁵⁹ Amicus practice and rules could require the introduction of briefs in District Courts before they reach appellate courts, which might alleviate the issue of copious briefs at the appellate courts and make historians available for qualification under *Daubert*

²⁵¹ See *supra* notes 115–123 and accompanying text (detailing the current amicus practice at federal appellate courts and the Supreme Court).

²⁵² See *supra* notes 134–141 and accompanying text (describing proposed changes to amicus practice at the federal appellate court level).

²⁵³ See *supra* notes 126–133 and accompanying text.

²⁵⁴ See Whitehouse, *supra* note 167, at 166 (describing the importance of transparency in amicus practice); *supra* notes 167–173 and accompanying text.

²⁵⁵ See PRELIMINARY DRAFT, *supra* note 134, at 20 (describing how the proposed rules might incentivize or disincentivize amicus filing).

²⁵⁶ See *supra* notes 178–211 and accompanying text.

²⁵⁷ See Piller, *supra* note 236, at 210 (suggesting using *Daubert* standards in amicus briefs); Larsen, *supra* note 39, at 1811 (same).

²⁵⁸ See Larsen, *supra* note 39, at 1810–12 (describing approaches to using the *Daubert* standard in amicus briefs). Larsen suggests limiting briefs to facts in the record or trying to “divorc[e] factual claims from legal argument,” but also suggests the difficulty in this. *Id.* at 1811. Larsen also endorses limiting amicus briefs to those that include methodological explanations. *Id.*

²⁵⁹ See Dobbins, *supra* note 18, at 2052 (explaining how evidence is introduced in appellate courts through amicus briefs); *supra* notes 178–184 and accompanying text.

standards.²⁶⁰ If the underlying research or professional qualifications of the historian were dubious, an organization or individual presenting the brief might be reticent to submit it.²⁶¹ Because amicus briefs are more likely filed at the appellate level, particularly when a case gains attention, pushing amicus submission to lower courts is not necessarily feasible, or even wise.²⁶²

Another solution could require *Daubert* style gatekeeping in all federal courts.²⁶³ A drawback to this approach is the sheer amount of work it would require of appellate courts and their staff, on top of already crowded dockets.²⁶⁴ Perhaps historical amicus briefs—and even other social science briefs or briefs containing expert evidence—should be segregated from briefs that primarily contain legal analysis.²⁶⁵ This might lessen the number of briefs that go through a review process by courts, but one could also argue that, as the Court increasingly relies on an originalist theory of interpretation, it is more likely that legal analysis will contain historical arguments and evidence.²⁶⁶

Any solution to amicus practice requires committed, urgent action.²⁶⁷ Although *Daubert* style guardrails reach the heart of the issue, which is the danger of methodologically unsound history influencing judicial decisions, enhanced disclosure requirements and an Amicus Bar round out an aggressive plan to confront current issues.²⁶⁸

CONCLUSION

The veracity of the history that reaches judges is of paramount importance, especially given the overwhelming use of history and tradition standards at the Supreme Court and, by extension, in lower federal courts. Because history provides no definitive answers, the methods used and the people producing it should be transparent, scrutinized, and restrained so jurists can make

²⁶⁰ See Larsen, *supra* note 39, at 1802, 1810 (describing that expert testimony must be available for cross-examination and other evidentiary safeguards at the trial court levels); *supra* notes 101–108 and accompanying text (delineating the *Daubert* standards).

²⁶¹ See Larsen, *supra* note 39, at 1810 (describing how evidentiary safeguards might incentivize or disincentivize filing of briefs).

²⁶² See DeMatteo & Wiltsie, *supra* note 23, at 1917–18 (noting the prevalence of amicus briefs in appellate courts and arguing for introducing them at the trial court level). *But see supra* note 74 and accompanying text (describing federal judges who have expressed exhaustion over the amount of amicus briefs they sift through).

²⁶³ See *supra* notes 101–108 and accompanying text (describing the *Daubert* standards, which currently only apply to federal trial courts and expert evidence).

²⁶⁴ See *supra* notes 57–59 and accompanying text (discussing the high number of amicus briefs submitted in federal courts).

²⁶⁵ See *supra* notes 53–56, 98–99 and accompanying text (describing types of amicus briefs, including ones that contain legal analysis versus those that contain factual evidence from experts).

²⁶⁶ See *supra* note 81 and accompanying text (noting the ascendancy of originalism); *supra* notes 76–77 and accompanying text (noting the use of historical amicus briefs in Supreme Court decisions).

²⁶⁷ See *supra* note 224 and accompanying text.

²⁶⁸ See *supra* notes 238–266 and accompanying text.

more informed and good-faith uses of the historical information they are provided. Amicus briefs, particularly historical amicus briefs, play an increasingly influential role in supplying that history to courts. Without meaningful safeguards, however, they risk introducing selective or methodologically unsound historical evidence and arguments into judicial decisions. Reforms emphasizing transparency, methodological integrity, and established evidentiary gate-keeping standards would preserve the value of amicus participation while strengthening the reliability of the history.

ELIZABETH LANGA

