

AMICI CURIAE DURING THE REHNQUIST YEARS

by RYAN J. OWENS and LEE EPSTEIN

With the end of the “Rehnquist Court,” observers of all ideological stripes are beginning to opine on the principal legacy of the era. Is it the “resurrection” of federalism?

A resurgence of judicial supremacy? The expansion of gay rights? A dramatically reduced plenary docket? The attention to foreign law sources? A growing wariness of the death penalty? *Bush v. Gore* (2000)?

To this list, the astute Court watcher, Linda Greenhouse, has added a less apparent candidate: a group of justices “primed and willing to listen” to arguments made by “skilled” advocates. In Greenhouse’s account, the Court’s consideration of the claims of attorneys and *amici curiae*—especially claims about the consequences of its decisions—explains why even some of its more conservative members were willing to uphold the Family and Medical Leave Act,¹ to retain state programs that fund legal services for the poor,² to allow universities to take race into account in admissions decisions,³ and to reconsider whom the state may legally execute.⁴ A particularly compelling example of her thesis, Greenhouse suggests, is *Lawrence v. Texas*⁵ in which the majority struck down same-sex sodomy laws:

The growth in amicus curiae participation – and perhaps the growing influence of amici as well – was a fundamental part of the Rehnquist era.

The [amicus curiae] briefs proved unusually enlightening for the Court. While victory has a thousand fathers, some of these briefs were particularly important.: an international brief, filed by Harold Koh of Yale Law School to inform the Court of legal developments in other Western judicial systems and demonstrate the error of the *Bowers v. Hardwick* majority’s generalizations about how “Western civilization” regards various sexual practices; briefs

by professors of history and by a coalition of gay rights groups led by the Human Rights Campaign, likewise demonstrating that the assumptions in *Bowers* about the historical treatment of gay people were also incorrect; and briefs describing the demography,

lives, and aspirations of the gay community in ways that underscored how out of synch with current perceptions and realities the *Bowers* opinion, and the premises behind it, had become. The National Lesbian and Gay Law Association filed one such brief, and the American Psychological Association filed another. There were also important briefs from the American Bar Association and two libertarian organizations that the Court recognized as repeat players, the Cato Institute and the Institute for Justice.⁶

We thank Tom Marshall for suggestions on an earlier version of this article. Epstein thanks the National Science Foundation for supporting her research on the Supreme Court.

1. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
2. *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).
3. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
4. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 125 S.Ct. 1183 (2005).
5. 539 U.S. 558 (2003).
6. Linda Greenhouse, *What Got Into the Court? What Happens Next?*, 57 Me. L. Rev. 1 (2005).

Why was the Rehnquist Court especially (and perhaps unusually) attentive to arguments offered by groups and other interested third parties? Greenhouse offers a number of possibilities, not the least of which was the Court's concern with "its own institutional legitimacy"⁷ in the wake of *Bush v. Gore*.⁸

Greenhouse, of course, is not the first to draw attention to the importance of "good lawyering"⁹—although the extent to which legal arguments and briefs submitted by the parties or *amici curiae* actually affect the justices is hotly debated in academic circles. Some social scientists, most notably Jeffrey A. Segal and Harold J. Spaeth,¹⁰ assert that justices make decisions based on their own political values vis-à-vis the facts raised in cases; attorneys' arguments, the preferences and likely reactions of Congress, public opinion, and so on have little bearing on their votes. Other commentators reject this view in part or in full. Epstein and Knight, for example, claim that if justices desire to etch their policy preferences into law, then they require information about how actors in a position to thwart those preferences may respond to their decisions.¹¹ Not only can amici supply such information but their sheer numbers may also convey the extent to which legal and political communities support (or oppose) particular policies.

The goal of this article is not to join this controversy. Nor is it to assess Greenhouse's claims about the importance of good lawyering during the Rehnquist Court era. Taking on either would require an entire issue or two of *Judicature*. Rather, the objective is far more modest: to provide a descriptive account of *amicus curiae* participation during the Rehnquist Court. Specifically, it considers the amount of third-party involvement in litigation, and the extent to which the justices make use of *amici* arguments in their opinions. While these data alone cannot resolve any on-going debates, they provide fodder for future participants. Perhaps more consequentially, they raise

important questions for further contemplation.

Amici participation

After Clement E. Vose's seminal studies of the NAACP's litigation campaign to end restrictive covenants,¹² the scholarly community seemed primed to incorporate lawyering and interest groups into analyses of courts. Virtually every leading textbook of the day on American government, interest groups, and the judiciary cited Vose's work approv-

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ingly. Yet for all this attention his research failed immediately to spawn broader interest in the subject of group mobilization of the law.

In retrospect, a number of factors inhibited the growth of this area of inquiry. But surely a 1969 study by Nathan Hakman played a leading role. After discovering that interest groups rarely participated in litigation during the Supreme Court's 1928-1966 terms, Hakman attacked Vose's idea that *amicus curiae* briefs were a form of political action. Mere "scholarly folklore" was what Hakman deemed it.¹³

These days, as most Court observers are all too aware, it is Hakman's conclusion that is the stuff of folklore. As Figure 1 shows, interest

group participation, as friends of the court, has been a regularized part of Supreme Court proceedings since the late 1960s (when Hakman concluded his study). By 1971, for the first time in the Court's history, one or more amici appeared in a majority of its cases (56 percent).¹⁴

Since the 1970s that percentage has steadily increased with time—to the point where it is now the rare case in which at least one amicus *does not* file. Figure 1 underscores this claim, as does Figure 2, which compares sub-

missions during each term of the Burger (1969-1985) and Rehnquist (1986-2003) Courts. At the onset of the Burger years, friends of the court participated in fewer than four of every ten cases; by 1985 participation had nearly doubled, to seven out of ten. Across the entire 1969-1985 period, the mean is 59 percent, with a standard deviation of 11. Growth continued during the Rehnquist Court years, reaching new heights in the 2001 term, when at least one *amicus curiae* brief accompanied nearly 95 percent of the cases. The mean for the 1986-2003 terms is 88 with a standard deviation of only 5.

Virtually no type of legal dispute is now beyond the reach (or, apparently, interest) of *amici curiae*. When

7. *Id.* at 10.

8. 531 U.S. 98 (2000).

9. Many case studies of interest group litigation make this point. See, e.g., Clement E. Vose, *CONSTITUTIONAL CHANGE* (Lexington: Lexington Books, 1972); Lee Epstein and Joseph F. Kobylka, *THE SUPREME COURT AND LEGAL CHANGE* (Chapel Hill: University of North Carolina Press, 1992); Ellen Ann Anderson, *OUT OF THE CLOSETS & INTO THE COURTS* (Ann Arbor: University of Michigan Press, 2005). For larger-*n* analyses, see Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Kevin T. McGuire and Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993).

10. See, e.g., *Their Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge

University Press, 2002).

11. Lee Epstein and Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in *INSTITUTIONAL APPROACHES TO SUPREME COURT DECISION MAKING* (eds. Cornell Clayton and Howard Gillman) (Chicago: University of Chicago Press, 1999).

12. Clement E. Vose, *NAACP Strategy in the Restrictive Covenant Cases*, 6 W. RESERVE L. REV. 101 (1955); Clement E. Vose, *CAUCASIANS ONLY* (Berkeley: University of California Press, 1959).

13. Nathan Hakman, *The Supreme Court's Political Environment: The Processing of Noncommercial Litigation*, in *FRONTIERS OF JUDICIAL RESEARCH* 199 (eds. Joel B. Grossman and Joseph Tanenhaus) (New York: John Wiley and Sons, 1969).

14. This figure appears in Lee Epstein, et al., *THE SUPREME COURT COMPENDIUM* 688 (Washington, DC: Congressional Quarterly Press, 2003).

O'Connor and Epstein updated Hakman's study to cover the 1970-1980 terms, they found a higher degree of participation in some areas than others. In suits involving labor-management relations, for example, *amici* were a major presence, filing briefs in 90 percent of the 86 cases.¹⁵ On the other hand, criminal procedure attracted a relatively meager amount of attention: in only about a third of 362 cases did one or more *amici* appear.

No longer does such stark variation exist. As Figure 3 shows, in terms of *amicus curiae* participation, suits involving unions (94 percent) are virtually indistinguishable from cases implicating criminal procedure (90 percent). Only in federal tax litigation does *amicus curiae* participation taper off, and even there at least one "friend" participated in 10 of the 21 cases.

Impact of *amicus* briefs

While Figures 1-3 document the growth in *amicus curiae* submissions in the contemporary era, they do not speak to questions of influence and importance. Do friends-of-the-court bring new information to the table? Did they exert any influence on votes cast by Rehnquist Court justices? Or on their opinions?

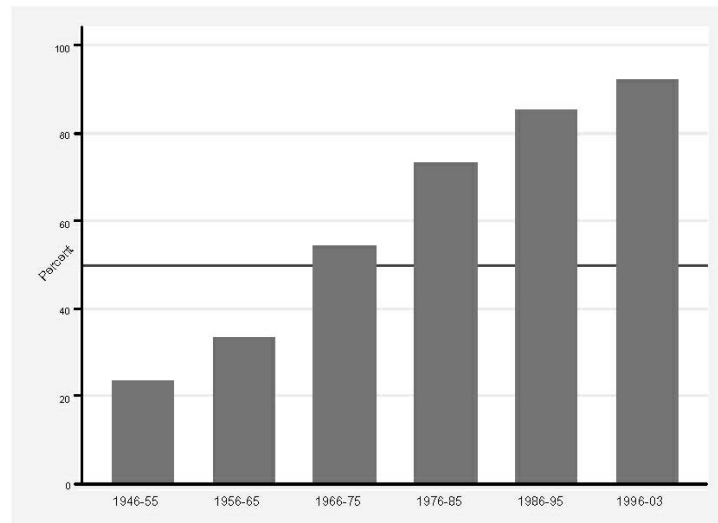
Scholars offer decidedly mixed answers to these questions,¹⁶ and in light of space limitations we can supply only a limited response, derived from analyzing citation patterns.¹⁷ Specifically, did the writer of the Court's majority opinion reference one or more *amici*? Figure 4 displays the results for the 1994-2003 terms, a period of membership stability on

15. Karen O'Connor and Lee Epstein, *Amicus Curiae Participation in the U.S. Supreme Court: An Appraisal of 'Hakman's Folklore'*, 16 LAW & SOC'Y REV. 311 (1981).

16. Compare, e.g., Epstein and Knight, *supra* n. 11, and James F. Spriggs, II and Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997); and Donald R. Songer and Reginald S. Sheehan, *Interest Group Success in Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339 (1993) and Kearney and Merrill, *supra* n. 9.

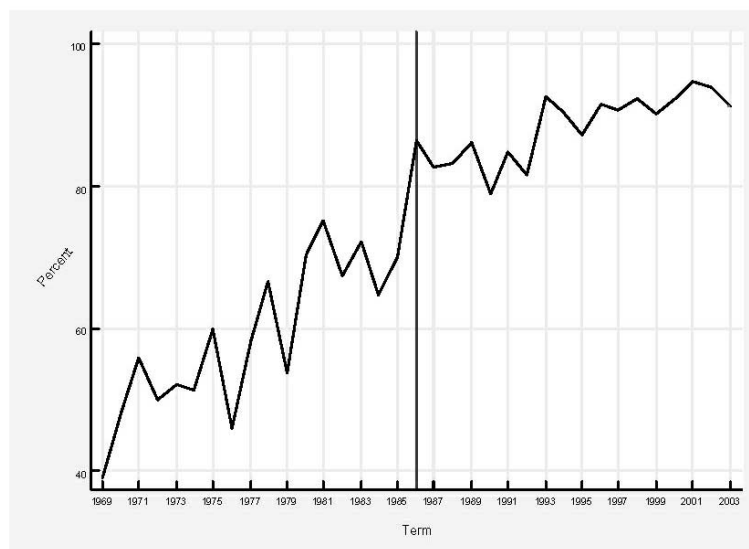
17. This is indeed limited if for no reason other than that citations may well underestimate the influence of *amici*. Justices may adopt arguments in *amicus curiae* briefs without attribution—especially if multiple *amici* make the same argument.

Figure 1. Percentage of U.S. Supreme Court cases with at least one *amicus curiae* brief, 1946-2003 terms (by decade)



Data sources: 1946-1995: Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 753 (2000); 1996-2003: Collected by the authors to be comparable with Kearney's and Merrill's data, though discrepancies may exist.

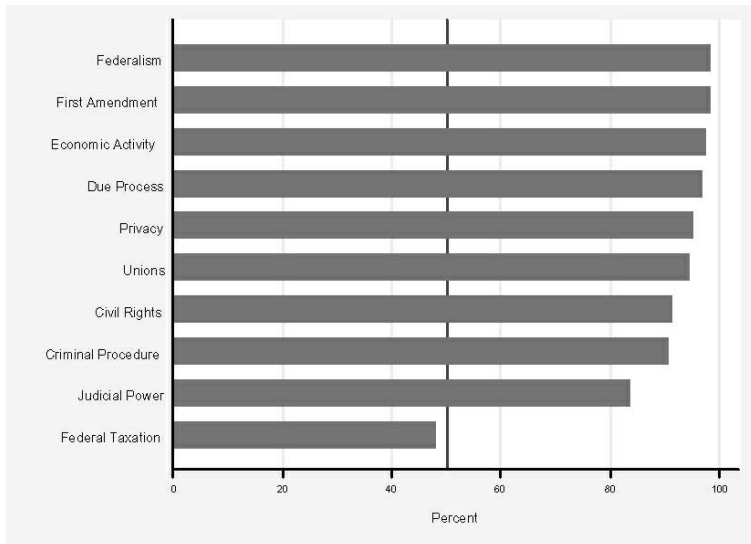
Figure 2. Percentage of U.S. Supreme Court cases with at least one *amicus curiae* brief, 1969-1986 terms (by term).



Note: The line indicates the start of the Rehnquist Court era in the 1986 term.

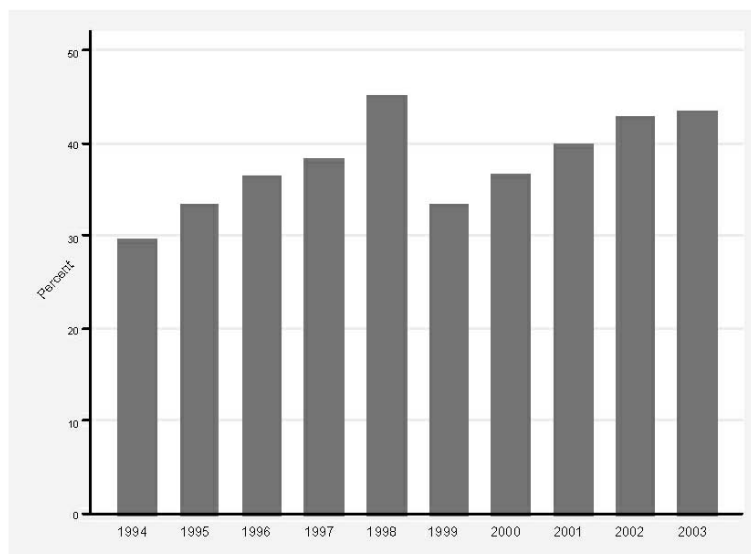
Data sources: 1969-1993: Lee Epstein, et al., THE SUPREME COURT COMPENDIUM 688 (Washington, D.C.: Congressional Quarterly Press, 2003); 1994-2003: Collected by the authors. We attempted to make the 1994-2003 term data comparable to the data appearing in the *Compendium*, but discrepancies may exist. Also there are likely divergences between the data in Figures 1 and 2 since the coders followed different rules.

Figure 3. Percentage of U.S. Supreme Court cases with at least one *amicus curiae* brief, 1994-2003 terms (by issue area).



Data on *amicus curiae* participation were collected by the authors. N=730. Data on issues (the "value" variable) are from Harold J. Spaeth's *U.S. Supreme Court Judicial Database* (last update: June 6, 2005) (available at: <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>). The unit of analysis is case citation (analu=0); the decision type is "orally argued signed opinion" (dec_type=1). We do not include four of Spaeth's "value" categories owing to an insufficient number of cases: Unable to Determine, Attorneys, Interstate Relations, and Miscellaneous.

Figure 4. Percentage of majority opinions citing at least one *amicus curiae* brief in cases with at least one *amicus curiae* brief, 1994-2003 terms (by term).



Data collected by the authors. N=620. Using Spaeth's terminology, the unit of analysis is case citation (analu=0); the decision type is "orally argued signed opinion" (dec_type=1).

the Rehnquist Court (or a "natural court").

When the opportunity arises to cite an *amicus curiae* brief, which it now does in about nine out of every ten cases (see Figure 2), majority opinion writers often take advantage of it. Across this natural court, the Court's opinion referenced at least one *amicus* in 38 percent of the 687 cases in which one or more friends participated. In the last two terms, 2002 and 2003, that percentage surpassed 40 (as it did in 1998 as well).

Relative to earlier years, this is an astonishingly high figure. Kearney and Merrill (2000) tell us that between the 1946 and 1985 terms, majority, plurality, concurring, and dissenting opinions combined cited to *amicus curiae* briefs in just 24 percent of the cases.¹⁸ But, as Figure 4 indicates, since 1994 that percentage never fell below 30 for majority opinions alone. Unless dissents and other separate writings account for a trivial fraction of Kearney and Merrill's data, which our limited analyses suggest is not the case, majority opinion coalitions on the Rehnquist Court made far more use of *amicus* briefs than did their predecessors.

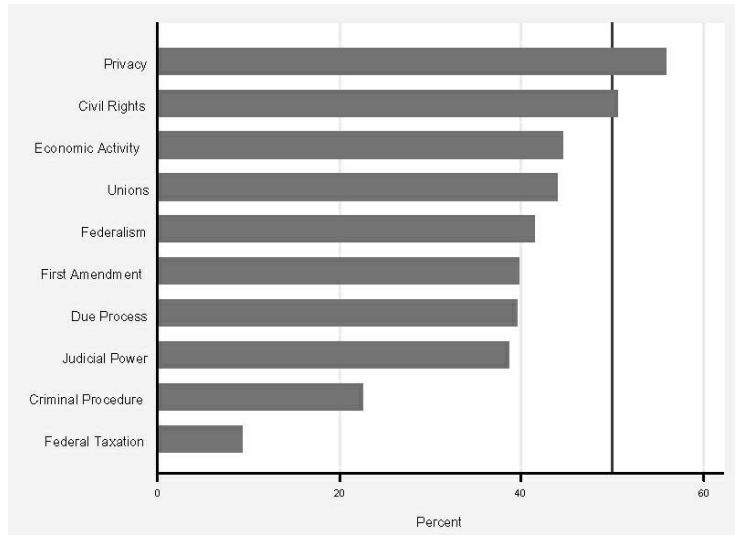
Even more interesting are the patterns of citations across issues and justices. Figure 5 reveals rather high variation. Once again, federal taxation sits at the low end of the graph: Not only do fewer amici file briefs in these suits (see Figure 3), the majority opinion writer is substantially less likely to cite to them when they are present. Perhaps this is no coincidence. The lack of attention to amici in this area may signal potential "friends" against filing.¹⁹ Then again, the comparatively few references to briefs filed in criminal procedure cases has hardly deterred third parties from participating in that area (see Figure 3).

At the very high end in Figure 5 are cases involving privacy and civil rights. In both, the Rehnquist

18. Kearney and Merrill, *supra* n. 9, at 758.

19. The converse could hold as well: The Court fails to cite briefs in these cases because they are relatively few in number.

Figure 5. Percentage of majority opinions citing at least one *amicus curiae* brief in cases with at least one *amicus curiae* brief, 1994-2003 terms (by issue).



Data collected by the authors. N=672. Data on issues (the "value" variable) are from Spaeth's *U.S. Supreme Court Judicial Database*. The unit of analysis is case citation (analu=0); the decision type is "orally argued signed opinion" (dec_type=1). We do not include four of Spaeth's "value" categories owing to an insufficient number of cases: Unable to Determine, Attorneys, Interstate Relations, and Miscellaneous.

Court's majority opinion writers were *more likely than not* to cite to at least one third-party brief. This finding may reflect the quality of submissions in these areas, as some observers suggest, or perhaps the sheer number of participating amici. While, for purposes of this brief survey, we collected data only on *whether* one or more amici filed a brief, other commentators have amassed information on the *number* of briefs filed. What these inventories tend to show is that litigation implicating privacy (especially abortion) and civil rights (especially affirmative action) generate an unusual amount of participation. Of the 34 cases denoted by Kearney and Merrill in their 2000 study as attracting more than 20 *ami-*

cus curiae briefs between the 1946 and 1995 terms, more than a third involved privacy or civil rights. Topping their list was the abortion case, *Webster v. Reproductive Health Services*²⁰ (78 briefs), followed by the landmark affirmative action suit, *Regents of the University of California v. Bakke*²¹ (54 briefs).²²

These days, the new record-holder is another affirmative action case, *Grutter v. Bollinger*,²³ which drew more than 80 briefs,²⁴ and from a wide-range of interests at that: colleges and universities, Fortune 500 companies, and retired military officers, to name just a few. In light of the sheer number of participants, not to mention the quality of at least some of the submissions, it is no surprise that the majority opinion writer in *Grutter*, Sandra Day O'Connor, referenced numerous amici. She pointed to a brief filed on behalf of Amherst College et al., to shore up her point that "public and private universities across the Nation have modeled their own admissions programs on

Justice Powell's views [in *Bakke*] on permissible race-conscious policies."

Likewise O'Connor cited a submission by the American Educational Research Association to bolster her argument that "student body diversity promotes learning outcomes..." Finally, and perhaps most famously of all, came her references to briefs filed by corporations and retired military officers to support her claims that the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," and that diversity in the military is "essential" for it to "fulfill its principle mission to provide national security."

Just as opinion writers are more likely to cite amici in some areas than others, variation also exists by justice. Figure 6 displays the percentage of majority opinions citing *amicus* briefs, and shows an intriguing pattern: The liberal wing of the Court (Stevens, Ginsburg, Souter, and Breyer) more often references third-party briefs than does the conservative wing (Kennedy, Rehnquist, Scalia, and Thomas) (46 percent versus 32 percent).

Why this is the case we can only speculate. Perhaps, as some commentators suggest, the Rehnquist Court's liberal members are more concerned with the real-world consequences of their decisions—information that amici can supply (as they did in *Grutter*). Or perhaps referencing *amici curiae* is a strategic move, designed to draw the attention of the (relatively) centrist Anthony Kennedy, who seems less reluctant than Justices Scalia and Rehnquist to make use of third-party briefs. Greenhouse, among others, suggests that the *amicus* submissions in *Lawrence* held a good deal of sway with Kennedy, the majority opinion writer in the case. Finally, while right-of-center groups have stepped up their litigation activities over the last few decades, it still may be the case that liberal interests file more *amicus curiae* briefs. Because we lack systematic data on the ideological bent of *amici*, this is sheer speculation. But it is nonethe-

20. 492 U.S. 490 (1989).

21. 438 U.S. 265 (1978)

22. Kearney and Merrill, *supra* n. 9, at 831.

23. 539 U.S. 306 (2003).

24. Greenhouse, *supra* n. 6, at 6, writes that "more than 100 briefs, a record number, were filed" in the Michigan affirmative action cases. Our figure (of 84 briefs) for *Grutter* excludes briefs filed by individuals.

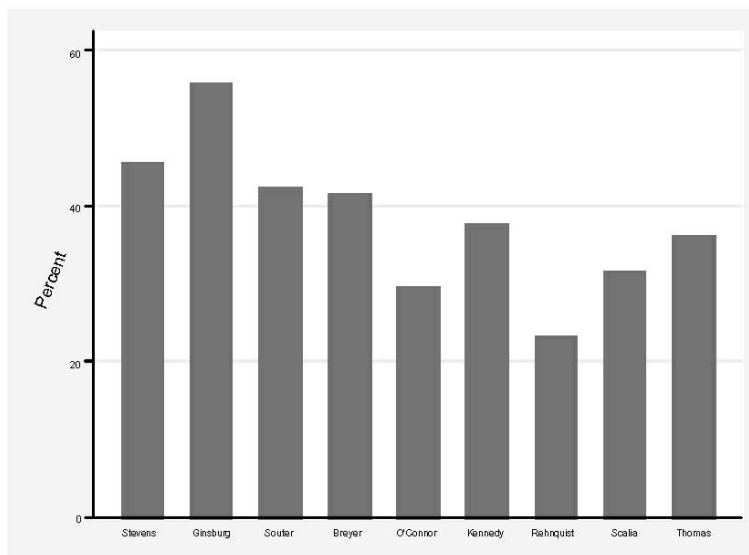
less true that at least in the high-profile case of *Grutter*, briefs filed in support of affirmative action well outnumbered those submitted on the other side.²⁵ (On the other hand, in *Lawrence* slightly more organized interests filed in favor of, and not against, the same-sex sodomy law.²⁶)

Discussion

We began this article with the idea that “good lawyering” held a place of particular prominence during the Rehnquist Court years. While we have not provided proof positive of this proposition, neither have we uncovered evidence to contradict it. Quite the opposite: Virtually all the data are consistent with commentary on the importance of *amici curiae*. More friends are filing than ever before, and more opinions cite their arguments than ever before. Perhaps the two trends are related. It could be that the more briefs filed, the more fodder for the Court’s opinion writer. Just as possible, the greater the influence amici believe they exert on the Court, the more likely they are to file in the future.

Either way, the question of the role of good lawyering in the Supreme Court deserves far greater attention than we are able to devote to it here. More broadly, our analyses raise many more questions than we can answer—though, again, perhaps none more so than why we continue to observe growth in *amicus curiae* participation. Certainly, a number of interesting possibilities present themselves. One follows from our suggestion above: past success breeds future participation. But many others exist, such as the decline in the Court’s plenary docket, which left fewer opportunities for *amicus curiae* involvement; the need for “counteractive” lobbying, as groups on the left and right now regularly participate in litigation (though perhaps not in equal numbers);²⁷ or uncertainty surrounding the median justice (chiefly Justice O’Connor but occasionally Kennedy²⁸).

Figure 6. Percentage of majority opinions citing at least one *amicus curiae* brief in cases with at least one *amicus curiae* brief, 1994-2003 terms (by opinion writer).



Note: The justices are ordered from most liberal (Stevens) to most conservative (Thomas).

Data collected by the authors. To use Spaeth’s terminology, the unit of analysis is case citation (analu=0); the decision type is “orally argued signed opinion” (dec_type=1). To order the justices from most liberal to most conservative, we rely on Lee Epstein, et al., *The Judicial Common Space*, J. L. ECON. & ORGANIZATION (forthcoming) (available at: <http://epstein.wustl.edu/research/JCS.html>)

These and other possibilities deserve attention if only because “patterns of behavior that...experience change...should not be treated as idiopathic curiosities but as perplexing phenomena worthy of systematic analysis.”²⁹ But there is another reason. The growth in *amicus curiae* participation—and perhaps the growing influence of amici as well—may not be the principal legacy of the Rehnquist Court, yet it is a fundamental part of this fascinat-

ing era, and one that commentators ought not overlook. ❧

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25. Of the 84 *amicus curiae* briefs in *Grutter* (excluding briefs filed by individuals), 68 (or 81 percent) supported the affirmative action plan.

26. Thirty-two *amicus curiae* briefs (excluding those filed by individuals) appeared in *Lawrence*. Of the 32, 14 (or 44 percent) supported petitioner Lawrence.

27. On counteractive lobbying, see David Austen-Smith and John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25 (1994); on the use of litigation by groups on the right and left, see Epstein & Kobyłka, *supra* n. 9.

28. For more on the identity of the median justice during the Rehnquist Court years, see Andrew D. Martin, Kevin Quinn, and Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005).

29. Thomas G. Walker, et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988). Walker and his colleagues offered this observation in a study of the increase in dissent on the Court but we believe it is equally apt of the growth in *amicus curiae* participation.