Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation

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ABSTRACT: On January 4, 2016, over 100 women lawyers, law professors, and former judges told the world that they had had an abortion. In a daring amicus brief filed in *Whole Woman's Health v. Hellerstedt,* the women spoke publicly about one of the most private decisions a woman can make. Their participation in this brief, which captured national media attention, marked their "coming out" to their clients and to all of their former, present, and future supervisors and colleagues; to the judges for whom they have clerked; and to the Justices of the Supreme Court.

The past three years have seen an explosion of such "voices briefs." Sixteen were filed in *Obergefell v. Hodges* alone and seventeen were filed in *Whole Woman's Health.* These briefs can be powerful, but their use is controversial. They tell the stories of non-parties—strangers to the appellate case—with no vetting by cross examination or the rules of evidence. Yet, despite their unconventional nature, they have thus far received little academic attention.

The time has come to ask some tough questions: Are these briefs legally permissible? Theoretically legitimate? How do they compare with other sources consulted regularly by the Court, including factual internet research performed by judges themselves and experiments orchestrated in chambers? Are they really so different from the policy arguments we have accepted without blinking for over a hundred years?

These foundational questions quickly take us into even murkier waters—legal and constitutional theory; narrative theory; framing; and cognitive science.

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Voices briefs prompt us to look at constitutional decision making in a new way. Soon we find that voices briefs are interrogating long-accepted assumptions rather than the other way around. The analysis produces some surprising reasons why voices briefs can play an important role in constitutional interpretation and some realistic ideas about handling the undeniable concerns that still haunt their use.

INTRODUCTION

On January 4, 2016, more than 100 women lawyers, law students, law professors, and former judges filed an amicus brief in *Whole Woman's Health v.*

Hellerstedt.[1] The brief received immediate national attention.[2] In it, these women told the world, perhaps for the first time, that they had had an abortion.

The women spoke publicly about one of the most private decisions a woman can make. The brief marks their "coming out" to their clients; to all of their former, present, and future supervisors and colleagues; and to the judges before whom they will appear or for whom they have clerked. But the brief is more than a disclosure to the wide world. These women are speaking directly and personally from inside the Justices' own rhetorical circle. As one of the brief's authors explained: "It's the Justices' community—it's their colleagues and people who have argued before them and former law school classmates and co-clerks."[3] The Justices would recognize many of the names in the brief's ten-page list of signatories.

The brief shares the women's stories. A woman who has argued multiple cases before the Court described two medically dangerous pregnancies, telling the Court that its decisions protecting her right to choose had been indispensable to her life, both as an attorney and as a wife and mother.[4] A former clerk for the Ninth Circuit Court of Appeals described her situation at age twenty-two, when she was studying to apply to law school and found herself pregnant after a contraception failure. She was single and waiting tables for a living.[5] A litigation partner at a large law firm explained that her abortion as a teenager had given her "the ability to be the first person in my family to graduate from high school, the first person to graduate from college, and the first person to achieve a post-graduate degree."[6] A law professor described being seventeen years old, pregnant, and desperate. At that young age, she kept coming back to only two options: self-abortion by clothes-hanger or suicide.[7] The overarching theme of all these stories

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1. Brief of MacAvoy et al. as Amici Curiae in Support of Petitioners, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 74949. The amici were headed by Janice MacAvoy, a partner at the New York office of Fried Frank, *see Janice Mac Avoy Biography*, FRIED FRANK, http://www.friedfrank.com/index.cfm?pageID=42&itemID=425, and Janie Schulman, a partner at the Los Angeles office of Morrison & Foerster, *see Janie F. Schulman: Overview*, MORRISON FOERSTER, http://www.mofo.com/people/s/schulman-janie-f.

2. *See e.g.*, Adam Liptak, *Eyes on Kennedy, Women Tell Supreme Court Why Abortion Was Right for Them*, N.Y. TIMES (Feb. 29, 2016), http://www.nytimes.com/2016/03/01/us/politics/abortion-supreme-court-women-explain-choices.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0; Ruth Marcus, *In a Supreme Court Brief, Lawyers Bravely Tell Their Own Abortion Stories*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/opinions/in-a-supreme-court-brief-lawyers-tell-their-own-abortion-stories/2016/01/26/19c410fa-c457-11e5-a4aa-f25866ba0dc6_story.html.

3. Marcus, *supra* note 2 (quoting Alexia Korberg of Paul, Weiss, Rifkind, Wharton & Garrison LLP).

4. Brief of MacAvoy et al., *supra* note 1, at 32.

5. *Id.* at 15-17.

6. *Id.* at 10-11.

7. *Id.* at 23.

is that without reproductive choice, women—*these* women—could not have participated fully in the same professional community in which the Justices have lived and thrived.[8]

Though among the bravest, this brief was not the first "voices brief"[9] relating stories of individuals who were strangers to the appellate case. The first such brief was filed in 1986,[10] but until recently, they were rare.[11] Times have changed, however. *Obergefell v. Hodges*[12] brought an explosion of amicus filers telling their own stories. A total of sixteen voices briefs were filed in that case alone.[13] And the phenomenon continues. After the dust settled in *Whole Woman's Health v. Hellerstedt*,[14] seventeen briefs had related stories of non-parties.[15] On deeply personal constitutional issues such as marriage equality and reproductive rights, voices briefs are now *de rigueur*.

These briefs can be powerful, even heart-wrenching, but their use has so far received little academic attention.[16] The time has come to take them seriously, and that means asking some tough questions: Are they legally permissible? Theoretically legitimate? How do they compare with other sources consulted by appellate courts, including internet explorations performed by judges at their own computers? Are voices briefs really so different from the policy arguments we have accepted without blinking for over a hundred years?[17] These foundational questions quickly take us into even deeper waters—legal theory, traditional forms of legal reasoning, narrative theory, framing, and cognitive science.

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8. One sentence sums up the brief's message: "To the world, I am an attorney who had an abortion, and, to myself, I am an attorney because I had an abortion." *Id.* at 3.

9. Ruth Petchesky was among the first to discuss the phenomenon of voices briefs. Rosalind Pollack Petchesky, *Amicus Brief:* Richard Thornburgh v. American College of Obstetricians and Gynecologists, 9 WOMEN'S RTS. L. REP. 3, 4-5 (1986). Robin West also wrote of "voices briefs." *See* Robin L. West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 82 n.174 (1990); *see also* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 40 (2010).

10. The first voices brief was filed in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). It was followed by two briefs filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), one on each side of the issue, and by another on the pro-life side in *Gonzales v. Carhart*, 550 U.S. 124 (2007). *See* Appendix. *See generally* Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327.

11. Only four voices briefs had been filed over a span of twenty-five years. Then four more were filed in just the two years of 2011 and 2012, perhaps signaling a tipping point. These four briefs included three in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), and another in *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See* Appendix.

12. 135 S. Ct. 2584 (2015).

13. *See* Appendix.

14. 136 S. Ct. 2292 (2016).

15. *See* Appendix.

16. Ruth Petchesky pointed out and praised the original voices brief. Petchesky, *supra* note 9. A few other articles have referred to these briefs while making other interesting points. *See e.g.*, Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in* William L. Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137 (1990) (analyzing the arguments in *Webster* from a feminist perspective); Nancy Levit, *supra* note 9, at 22-23, 33 (pointing out the need for litigators to develop narratives with which courts and wider audiencies can personally identify). None has yet analyzed the legitimacy of the phenomenon itself.

17. Policy arguments based on social science have been accepted forms of argument since the iconic "Brandeis Brief" filed in *Muller v. Oregon*, 208 U.S. 412 (1908). *See* discussion *infra* Part II.

Voices briefs prompt us to look at constitutional deliberation in a new way. Soon we find that voices briefs are interrogating long-accepted assumptions rather than the other way around.

This Article argues that voices briefs continue a legitimate tradition of citizen input on issues before the Court. This is not to say that constitutional decisions should be made either by polling citizens or by emotional reactions to tearful stories. Far from it. But neither should they be made in a hermetically sealed environment—a sterile setting uncontaminated by input from the very citizens whose lives will be profoundly shaped by the Court's decisions. There is little to lose and much to gain by allowing amicus filers to share their stories.

Parts I through III of this Article set these questions in their relevant context. Part I examines how voices briefs have been used. It questions whether they are as radically new, at least in function, as they first appear. Continuing that question, Parts II and III explore the Court's surprisingly unfettered use of non-record material, arguing that voices briefs differ little from these non-record sources long and freely used by the Court.

Having established the relevant context, the Article then places voices briefs within it. Part IV examines the cognitive and behavioral science of how voices briefs seek to persuade. The science shows that, far from *introducing* bias to a neutral process, voices briefs may be the only way to *counter* the preexisting values bias that accompanies human deliberation. In fact, stories may encourage a values-committed decision maker to rely more, not less, on traditional merits reasoning.

Further, as Part V argues, it is not only the parties who will learn whether they can marry the person they love or whether they will have control over their own bodies. Voices briefs provide nonparties a crucial right to be heard on deeply personal questions that will decide their own futures. And irrespective of outcome, voices briefs can encourage the Court to write opinions that respect and value all sides of an issue, thus modeling better public discourse in today's polarized public square.

Voices briefs may serve all of these important practical functions, but do they run afoul of commonly accepted legal theories or principles of constitutional interpretation? Part VI argues that they do not. But that is not to say that voices briefs prompt no misgivings. Part VII recognizes some understandable concerns and proposes normative practices to improve the briefs' reliability and utility.

I. VOICES BRIEFS

Amicus briefing has long been an accepted practice in the Supreme Court,[18] but in the modern era, amicus filings have increased dramatically. One scholar

18. For the history and current practice of amicus filings in the Supreme Court, see generally Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361 (2014-

documented an astounding 800% increase in a span of fifty years.[19] The record in *United States v. Windsor*[20] included seventy-nine amicus briefs.[21] *Whole Woman's Health v. Hellerstedt*[22] saw 86 amicus briefs.[23] In perhaps the apex to date, *Obergefell v. Hodges*[24] produced 144 amicus briefs.[25] The vibrancy of this amicus practice reflects an increased desire for connection between the Court and those it governs. Voices briefs—a new form of amicus advocacy—may be among the most telling signs of these democratic pressures. It is time for a closer look at these voices briefs.

A. What Are Voices Briefs?

Voices briefs relate stories drawn from the lives of individuals who are strangers to the case. These stories appear for the first time on appeal, sidestepping trial court evidentiary standards. They introduce the Court to some of the individuals who have lived the issues firsthand. For example, the first voices brief, filed in *Thornburgh v. American College of Obstetricians and Gynecologists*,[26] explained the stories and introduced the speakers:

> As part of this action, people wrote letters describing why they or people they knew chose to have abortions. The letters came from people from all walks of life. Many writers described themselves in their letters:
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> > I am a Christian. I have a college degree and am a registered nurse. I am a 32 year old Black female. I am a Baptist by faith . . . .
> > I was a nice Irish Catholic girl dating a nice Irish boy from Queens. I was born in Puerto Rico, and I grew up and went to school there . . . .

2015); Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2000); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L REV. 1757, 1765-1768 (2014).

19. Kearney & Merrill, *supra* note 18, at 752 (noting that the filing of Supreme Court amicus briefs has increased by 800% over fifty years).

20. 133 S. Ct. 2675 (2013).

21. *United States v. Windsor*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/.

22. 136 S. Ct. 2292 (2016).

23. *Whole Woman's Health v. Hellerstedt*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole/.

24. 135 S. Ct. 2584 (2015).

25. *Obergefell v. Hodges*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/.

26. 476 U.S. 747 (1986).

> I have been married 38 years; I am the mother of 5 wanted and thoroughly loved children and grandmother of 3 . . .[27]

On some issues, Justices' need for this kind of introduction may be significant. Consider, for example, the widely reported conversation between Justice Powell and one of his clerks during the pendency of *Bowers v. Hardwick*, a case involving the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults.[28] Justice Powell, the crucial and vacillating swing vote in the case, sought out one of his law clerks to discuss the case.[29] He told the clerk that he did not think he had ever met a homosexual.[30] Powell "was struggling to understand a phenomenon totally alien to him."[31] He asked why gay men did not date and marry women.[32] When the clerk explained that many gay men could not achieve an erection during intimate contact with a woman, Powell was confused because sodomy requires an erection.[33] The clerk had to explain that gay men do achieve erections during sexual contact with men.[34] Describing the conversation, the clerk recalls, "What struck me . . . . is that the concept of homosexuality had no content for him. He had no frame of reference."[35]

The irony, of course, was that the law clerk to whom Justice Powell was speaking was a gay man.[36] In fact, Justice Powell had hired many gay clerks in the past.[37] But because most gay men were closeted, Powell had little way to understand homosexuality on a human level.[38] Ultimately, Powell provided the fifth vote for the opinion that refused to recognize a right to privacy for intimate sexual contact occurring at home between consenting adults.[39]

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27. Brief for the National Abortion Rights Action League et al. as Amici Curiae in Support of Appellees at 5-6, Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (Nos. 84-495, 84-1379), 1985 WL 669630 [hereinafter NARAL Brief] (citations omitted). The brief is reprinted in Petchesky, *supra* note 9.

28. 478 U.S. 186 (1986).

29. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521-24 (1994).

30. *Id.* at 521; Debra Cassen Weiss, *Justice Who Said He Never Met A Homosexual Actually Had Several Gay Clerks*, A.B.A. J. (June 10, 2013), http://www.abajournal.com/news/article/justice_who_said_he_never_met_a_homosexual_actually_had_several_gay_law_cle/.

31. JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 273 (2001).

32. *Id.*

33. *Id.* at 274.

34. *Id.*

35. *Id.*

36. *Id.* at 272.

37. *Id.* at 272, 275.

38. JEFFRIES, *supra* note 29, at 521. Subsequently, Justice Powell regretted his decision to be the majority's fifth vote. When asked about the *Bowers v. Hardwick* decision four years later, he said, "I think I probably made a mistake in that one." *Id.* at 530. Had Justice Powell made a different choice, the right to privacy in intimate relationships would have been established in 1986, seventeen years before *Lawrence v. Texas*, 539 U.S. 558 (2003).

39. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the Georgia sodomy law).

That kind of well-intentioned naiveté can limit the worldview of good people like Justice Powell, for it is a common human characteristic to associate primarily with and listen primarily to those we perceive to be like us. That cultural tendency increasingly operates in today's polarized public debates.[40] Recently, for example, Linda Greenhouse reported a conversation with the late Justice Scalia in which he said that he got his news from the car radio and from skimming two conservative newspapers. He said that he had stopped reading the *Washington Post* because it had become too liberal.[41] The point here is not to criticize either Justice Powell or Justice Scalia. In this age of *MSNBC* and *Fox News*, people who lean left and people who lean right are perhaps equally inclined to listen primarily to those with whom they already agree.

Even if the Justices routinely associate with a diverse set of individuals and groups, they cannot fully understand the impact of the issues before them without either personal experience or exposure to the perspectives of those with personal experience. For example, one of the stories set out in the *Thornburgh* NARAL brief explained a part of the pro-choice perspective that likely would be outside the experience of at least eight[42] of the *Thornburgh* Justices:

> Women are fertile from, approximately, the age of 15 to 45. Most women will spend the majority of these 30 years trying not to get pregnant. But no contraceptives are one hundred percent safe and effective and they often fail despite conscientious use:
>
> > I was a married woman using the birth control methods available at the time; a diaphragm and a spermicide jelly. My first child was planned and I was very happy. Slightly more than two years later I had another planned child. Then I found myself pregnant with a child that would be only 17 months younger than the second child. I had used my birth control methods assiduously but to no avail. I accepted the fact of that child and loved it. Then I got pregnant again. This one would be only 13 months younger than the third child. I was faced with the unpleasant fact that I could not stop the babies from coming no matter what I did . . . . [The abortion] was a tremendous relief and I have never regretted it. My husband then had a vasectomy . . . . You cannot possibly know what it is like to be the helpless pawn of nature. I am a 71 year old widow.[43]

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40. *See generally* BILL BISHOP WITH ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

41. Linda Greenhouse, *Resetting the Post-Scalia Supreme Court*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/18/opinion/resetting-the-post-scalia-supreme-court.html?_r=0.

42. At the time of the *Thornburgh* opinion, eight of the Justices were men: Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

43. NARAL Brief, *supra* note 27, at 19 (citations omitted).

When Justices understand the experience of some groups but not others, the ideal of equal treatment before the Court may be in jeopardy. Voices briefs help to fill the inevitable gap between a Justice's personal experience and the realities of other lives and other perspectives.

B. Recent Examples

The stories in voices briefs come from a variety of sources, including testimony before legislative or other regulatory bodies, news coverage, op-eds, books, interviews, studies, affidavits, emails, and letters collected by organizations.[44] Several examples taken from opposing briefs in *Obergefell* demonstrate the strategy. The *Obergefell* brief filed by PFLAG[45] in support of marriage equality includes eight first-person stories, each told at some length and most including a picture.[46] For example, the story of Tom and Jan Harry, parents of a lesbian daughter, is told as a conversation, part of which is set out here:

> Tom: I was born and raised in Ohio. Jan and I married in 1971 . . . . We are both pastors in the United Methodist Church. . . .
>
> Jan: We have two children, our daughter Sonya and our son Chris. . . . Growing up, Sonya always dreamt of getting married and having two kids. . . .
>
> Tom: Sonya came out to us an adult. . . .
>
> Jan: What I mainly recall about her coming out is my fear for [her]. . . . But . . . . by 2002, she was in a committed relationship with Alison, and they wanted to affirm their commitment in a ceremony before family and friends. So we put up two big tents in our yard . . . .
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> [The following picture appears at this point in the brief.]

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44. No court rule requires that each individual file a formal consent for a brief's inclusion of her story. However, most of the individuals have already shared their stories in other public fora, such as in legislative and agency processes, books, interviews with a journalist, and court documents. Organizational collection projects and social science studies customarily explain the purpose of the collection request. To date, there is no indication that any private story has been shared without informal consent.

45. Brief of PFLAG, Inc. as Amicus Curiae in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004714. ("Obergefell PFLAG brief").

46. *Id.*

Sonya and Alison

> Tom: Sonya and Alison are now parents of two boys, fulfilling Sonya's childhood dream of being a mom. We are fortunate to live just three blocks away from our grandchildren. Having witnessed their journey as parents, we can say, without hesitation, that Sonya and Alison are conscientious and nurturing parents. . . .
>
> Jan: We are heartened to see growing acceptance of same-sex couples in our community. But Ohio's laws still fail to recognize Sonya and Alison as a married couple . . . . Not only Sonya and Alison, but our grandchildren deserve better than that. . . . Our grandchildren deserve to know that their family is worthy of the same respect as other families.[47]

On the other side of the issue, the *Obergefell* brief filed by Same-Sex Attracted Men and Their Wives includes first-person stories offered to argue that "man-woman definitions of marriage" do not foreclose the institution of marriage to gay men and lesbians.[48] Portions of these stories are interspersed throughout the brief. For example, we meet Danny Caldwell:

> When Danny Caldwell reached puberty, he realized "that I had something a little bit different that I didn't think the other kids had to deal with." As a young adult, Danny "started looking a lot on the Internet for help with this, and all I could find were things saying you just need to

47. *Id.* at 5-9. The use of such stories has been a subject of dispute even within the LGBTQ community. *See, e.g.*, Charlton C. Copeland, *Creation Stories: Stanley Hauerwas, Same-Sex Marriage, and Narrative in Law and Theology*, 75 L. & CONTEMP. PROBS. 87, 105-13 (2012).

48. Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents and Affirmance at 7, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1608211.

> accept . . . who you are . . . . Deep down I knew that wasn't going to make me happy. What I really wanted was a wife and kids . . .
>
> Danny wrote a letter to his mom, explaining his feelings. "She helped me realize what I really did want and that I wasn't going to be happy settling for something less . . . ." Not long after, he met his wife Erin. Eight years, and two boys, later, Danny reflects: . . . "I can't imagine what life would be like without Erin and without my boys. Some people would probably say, 'You're not happy; you're just suppressing things.' They can think what they want but . . . I wouldn't want it any other way."[49]

Some Justices might routinely hear the perspectives shared in one of these briefs but not those shared in the other. If so, and if the Court is considering issues that will deeply affect the lives of these citizens and others like them, we would do well to assist the Court in understanding what is at stake.[50]

C. Kinds of Cases

To date, voices briefs have been used almost entirely in abortion rights and marriage equality cases.[51] These cases share two important, overlapping characteristics: (1) the outcome will have a direct personal impact on the intimate lives of those affected; and (2) the storytellers' experience is likely outside the Justices' experience. Abortion rights and marriage equality cases share the first characteristic because they challenge a woman's control over her own body[52] or affect the deepest and most intimate of human relationships. The briefs filed in these cases also offer perspectives far outside the personal experiences of many judges—the perspectives of those who needed or who now regret an abortion or those with personal experience with committed same-sex relationships.

A search of Supreme Court cases since *Thornburgh* has revealed only three cases outside the abortion or marriage equality context in which voices briefs were filed. In two of those cases, abortion and contraception nonetheless figured

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49. *Id.* at 7, 10-11.

50. As Judge Posner has observed, "[A]ppellate lawyers would be more effective if . . . [they] emphasized the practical stakes in the case and thus the consequences of the decision." Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1067 (2006).

51. *See* Appendix.

52. This characterization of abortion cases is described from the perspective of those seeking reproductive freedom. I cannot attempt to characterize the deeper levels of the pro-life perspective. Some pro-life advocates clearly speak from their experience of regretting their own abortions or from the experience of having had children and now imagining aborting those children. Some may speak from their experience of the pain of not being able to have children. These perspectives are directly related to the advocate's own body. But some pro-life advocates without those personal experiences speak from other perspectives—moral or religious beliefs or perhaps even a desire, conscious or not, to maintain power and protect a gendered hierarchy. At least from a pro-choice perspective, all abortion motivations relate either to the desire to protect choice over one's own body or the desire to exert control over someone else's body.

prominently.[53] Only one case with a voices brief was completely unrelated to abortion or marriage equality.[54]

Voices briefs have not been filed routinely because they would have little or nothing to offer in many cases. For instance, in *Obergefell*'s term, the Court also held that Medicaid providers do not have a cause of action to challenge a state's reimbursement rates[55] and that a bankruptcy court's order denying confirmation of a proposed repayment plan with leave to amend is not a final order enabling immediate appeal.[56] Voices briefs would serve no purpose in cases such as those. However, while voices briefs have been used primarily in two kinds of cases, they may soon be making appearances in others as well. For example, many judges have little understanding of the realities of the lives of capital defendants and convicted felons.[57] Voices briefs also may prove useful for immigration issues, police shootings, or other issues of race, class, or power disparity. It is likely that creative advocates will continue to explore the use of nonparty stories to help the Court understand the experience of those unlike themselves.

Since the use of voices briefs is likely to continue or even increase, we may well wonder whether and to what degree voices briefs influence judicial outcomes. The next section tackles that question.

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53. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), challenged congressional power to enact provisions of the Affordable Care Act. One voices brief opposed the legislation using pro-life stories to challenge the Act because it arguably would compel the filers to fund abortion. Brief on Behalf of Project Liberty, in Support of the Respondents on the Individual Mandate, *NFIB*, 567 U.S. 519 (No. 11-398), 2012 WL 664933. On the other side, two voices briefs offered stories demonstrating the real-world consequences of inadequate health coverage prior to the act. Brief on Behalf of Asian & Pacific Islander American Health Forum, et al., in Support of Court-Appointed Amicus Curiae (Severability Issue), *NFIB*, 567 U.S. 519 (Nos. 11-393, 11-400), 2012 WL 549231; Brief on Behalf of National Women's Law Center, et al., As Amici Curiae in Support of Petitioner on the Minimum Coverage Provision, *NFIB*, 567 U.S. 519 (No. 11-398), 2012 WL 160240. The second case, brought by the Little Sisters of the Poor Home for the Aged, challenged the Affordable Care Act's provisions ensuring coverage for contraceptives. One voices brief offered stories about the Sisters' good work caring for the elderly, which the Sisters might cease if they were required to facilitate contraception coverage for their employees. Brief on Behalf of Residents and Families of Residents at Homes of the Little Sisters of the Poor in Support of Petitioners, Zubik v. Burwell, 136 S.Ct. 1557 (2016) (Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, 15–191), 2016 WL 183800 (2016).

54. *Kiobel v. Royal Dutch Petroleum Co.* raised the question whether the Alien Tort Statute allows a domestic cause of action for violations of international law occurring outside the United States. Eleven amicus filers offered their personal stories of Iranian violations of international law. *See, e.g.*, Brief of Eleven Jewish Former Residents of Iran Whose Family Members "Disappeared," As Amici Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165351 (explaining that, realistically, no remedy was available to the petitioners in Iranian courts).

55. Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378 (2015).

56. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).

57. Linda H. Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and* Furman*'s High-Stakes Dilemma*, 66 MERCER L. REV. 425, 439-443 (2015).

D. Assessing Influence

The influence of any form of amicus briefing is a subject of robust debate.[58] Some judges and commentators have simply asserted their opinions that amicus briefs do or do not influence courts.[59] In another form of opinion gathering, several studies have assessed amicus influence on the basis of interviews with judges, lawyers, and law clerks.[60] One scholar has argued that the Court's policy of allowing nearly unlimited leave to file is itself an indication that the Court finds amicus briefs useful.[61] Another study compared "matched cases" in which

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58. Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When and How Much?*, 52 J. POL. 782 (1990) (finding that amicus briefs influence the Court); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC'Y REV. 807, 827 (2004) (concluding that the positive influence of most amicus briefs is "marginal"); Kearney & Merrill, *supra* note 18, at 745 ("Attitudes within the legal community about the utility and impact of amicus briefs vary widely."); Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation the Supreme Court*, 46 POL. RES. Q. 339, 351 (1993) ("cast[ing] doubt on the ability of most groups to influence the outcome of specific cases through the filing of amicus briefs"). The influence and treatment of amicus briefs has been a subject of journalistic commentary. *See e.g.*, Adam Feldman, *Amicus Briefs and Oral Arguments in the Roberts Court*, EMPIRICAL SCOTUS (Mar. 7, 2016), https://empiricalscotus.com/2016/03/07/amicus-briefs-and-oral-arguments-in-the-roberts-court/; Anthony J. Franze & R. Reeves Anderson, *Commentary: The Court's Increasing Reliance on Amicus Curiae in the Past Term*, NAT'L L.J. (Aug. 24, 2011), http://www.nationallawjournal.com/id=1202512150444/Commentary-The-Courts-increasing-reliance-on-amicus-curiae-in-the-past-term?slreturn=20160631160341; Anthony J. Franze & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, NAT'L L.J. (Sept. 3, 2014), http://www.nationallawjournal.com/supremecourtbrief/id=1202668846551/Justices-Are-Paying-More-Attention-to-Amicus-Briefs; Anthony J. Franze & R. Reeves Anderson, *The Supreme Court's Reliance on Amicus Curiae in the 2011-2012 Term*, NAT'L L.J. (Sept. 19, 2012), http://www.nationallawjournal.com/id=1202571782732/The-Supreme-Courts-reliance-on-amicus-curiae-in-the-201112-term; Tony Mauro, *Bolstered by Briefs, Liberal Justices Lash Out During Contraceptive Debate*, NAT'L L.J. (Mar. 23, 2016), http://www.nationallawjournal.com/supremecourtbrief/id=1202752957056/Bolstered-by-Briefs-Liberal-Justices-Lash-Out-During-Contraceptive-Debate; Mark Walsh, *It Was Another Big Term for Amicus Curiae Briefs at the High Court*, A.B.A. J. (Sept. 1, 2013), http://www.abajournal.com/magazine/article/it_was_another_big_term_for_amicus_curiae_briefs_at_the_high_court/.

59. Neonatology Assocs., P.A. v. Commn'r, 293 F.3d 128, 132 (3d Cir. 2002) (in which then-Judge Alito opined that "even when a party is very well represented, an amicus may provide important assistance to the court"); *see also* Jonathan Alger & Marvin Krislov, *You've Got To Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 503 (2004) (pointing to Judge Posner's view that "amicus briefs are generally repetitious" and "increase litigation costs, evade page limitations, and promote 'interest group' politics . . . ."); Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984) (quoting a practitioner asserting that "[a]micus briefs have shaped judicial decisions in many more cases than is commonly realized"); *Justice Breyer Calls for Experts To Aid Courts in Complex Cases*, N.Y. TIMES (Feb. 17, 1998), http://www.nytimes.com/1998/02/17/us/justice-breyer-calls-for-experts-to-aid-courts-in-complex-cases.html (quoting Justice Breyer's comment that "[amicus] briefs play an important role in educating judges").

60. *See, e.g.*, Victor E. Flango, Donald C. Bross & Sarah Corbally, *Amicus Curiae Briefs: The Court's Perspective*, 27 JUST. SYS. J. 180 (2006) (surveying the chief justices and appellate court clerks of thirty-nine state courts of last resort, most of whom found amicus briefs useful); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 72 (2004) (concluding from seventy interviews with former Supreme Court law clerks that "useful amicus briefs are filed often enough that [filing] proves worthwhile").

61. PAUL M. COLLINS, FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 45 (2008). Collins argues that the Court's liberal filing policy, in conjunction with its increasing workload, "suggests that the justices genuinely believe amicus briefs can aid in their decision-

one case included no amicus support while the other case had amicus support for only one side.[62] A study using a large database sought to compute the overall success rates of amicus filers.[63] Other studies have counted and analyzed cases in which the Court has cited to amicus briefs[64] or counted the number of amicus briefs filed for each side (and by whom) and compared outcomes.[65] A recent study used plagiarism detection software to identify cases in which the Court used language likely taken from an amicus brief.[66]

These comments and studies are valuable, providing important information about today's amicus practice, but all of them are subject to one or more methodological limitations. An unsupported opinion, even that of a well-known judge, is, in the final analysis, one person's view. Compiling interview responses from judges, lawyers, and clerks uses a larger sample size but still suffers from the subjectivity of opinion-gathering. The Court's liberal filing policy was more likely adopted because of the Court's workload rather than in spite of it, for it would take far longer to go through a serious process of pre-filing assessment than it currently takes a law clerk to sort through a stack of filed amicus briefs to

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making process. If they did not view amicus briefs as useful tools . . . the Court would likely deny permission to file . . . ." *Id.*

62. Songer & Sheehan, *supra* note 58. Songer and Sheehan paired cases that (1) were decided in the same term; (2) involved parties of the same status; and (3) involved the same subject matter categories. They found no evidence of amicus influence. *Id.* at 341-45.

63. Kearney and Merrill compared outcomes with disparities in amicus support. Their study, by far the largest to date, analyzed a database of 6,141 cases spanning nearly fifty years, categorized them by whether the decision below was set aside, and compared those results to the number of amicus briefs filed in support of each party. The study also tracked amicus filings by the Solicitor General, the American Civil Liberties Union, The AFL-CIO, and the States. The study concluded, in part, that amicus briefs overall *do* appear to affect Supreme Court success rates. *See* Kearney & Merrill, *supra* note 18, at 750, 787-801.

64. *See e.g.*, Sarah F. Corbally, Donald C. Bross & Victor E. Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, 25 JUST. SYS. J. 39, 53 (2004) (counting citations by state courts of last resort to amicus briefs as an "indirect indicator of the influence of amicus briefs" and finding that amicus briefs were cited in about a third of the relevant state court cases); Larsen, *supra* note 18, at 1777-79 (finding 606 citations to amicus briefs from 2008 to 2013, 124 of which were cited for assertions of legislative fact, and concluding that "Justices treat amici as experts, not as a research tool"). Some scholars have analyzed the Court's opinions in specific cases or a specific line of cases. *See e.g.*, Matthew L.M. Fletcher, *The Utility of Amicus Briefs in the Supreme Court's Indian Cases*, 2 AM. INDIAN L.J. 38 (2013); Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523 (2003) (pointing to the oral argument in *Grutter v. Bollinger*, in which questioning expressly referred to the amicus brief filed by Lt. Gen. Julius W. Becton, Jr., et al., which later became known as the "military brief"); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171 (2003) (analyzing the *Grutter* military amicus brief).

65. *See, e.g.*, Collins, *supra* note 58 (comparing the number of amicus briefs with results in the cases); Kearney & Merrill, *supra* note 18, at 769-71 (citing Steven Puro, The Role of Amicus Curiae in the United States Supreme Court: 1920-1966, (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with the University of Pennsylvania Law Review)); *id.* at 788.

66. Paul M. Collins, Jr., Pamela C. Corley, & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917 (2015).

decide which warrant further attention. Matching cases based simply on procedural and subject matter similarities is surely a dicey undertaking,[67] and comparing outcomes to amicus filings fails to account for the content of opinions[68] and may reflect the respective strength on the merits rather than the influence of the amicus briefs.

Conclusions drawn from analyzing Supreme Court opinions are also inherently limited. A judge does not write an opinion to tell us how he or she became persuaded of the opinion's outcome. The influences that account for that decision happened before the opinion was written and largely in private. The purpose of the opinion, rather, is to *justify* the decision in a public document. Thus, the opinion will cite to sources the judge believes will be most persuasive to the opinion's readers.[69] The number of citations to amicus briefs likely tells us less about the briefs' influence than about the opinion-writer's strategic persuasive choices.[70]

Finally, "influence" is a much larger and more multifaceted concept than studies have yet captured. A brief might influence whether a party wins or loses or the scope of the decision rendered in the case. It might influence the legal path the Court selects to justify that outcome, such as the selection of a particular standard of review. Or it might influence a key policy argument on which the Court relies or a particular assessment of the facts. It might even influence the tone of respect or disrespect with which the opinion is written.[71] All of these kinds of influences are both likely and important, but none is especially susceptible to qualitative or quantitative analysis.

Comprehensively assessing amicus influence, then, is probably impossible, and that is especially true for amicus voices briefs. It is possible only to speculate by reading the tea leaves after an oral argument or reading between the lines in an occasional opinion.

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67. Kearney and Merrill observed that the Songer-Sheehan study "has potentially serious limitations," in part because the study's matching methodology was "very crude;" for example, "all cases involving 'labor management disputes' were regarded as presenting the 'same issue,' as were all cases involving 'judicial power.'" Kearney & Merrill, *supra* note 18, at 771 n.95.

68. Collins, Corley & Hamner, *supra* note 66, at 918 (noting that most studies "do not address the content of the Court's opinions, which is the most significant means by which the Court contributes to legal and social policy").

69. Left for another day is the question of whether and to what degree the Justices understand their own analytical processes and the unconscious frames that influence their own decision making.

70. One study ventures beyond analysis of amicus influence to draw conclusions about models of Supreme Court judging. Kearney & Merrill, *supra* note 18. The article identifies three possible models: (1) the traditional legal model, which attributes a Justice's decisions to his or her views of the authoritative sources of law, such as governing text, precedent, and policy arguments; (2) the attitudinal model, which would attribute a Justice's decisions to his or her preexisting political beliefs; and (3) the interest group model, which would attribute a Justice's decisions to his or her desire to satisfy particular organized groups. *Id.* at 774-87. The study concludes "cautiously" that its results "provid[ed] more support for the legal model than for either the attitudinal or interest group models." *Id.* at 750. Interestingly, the interest group model is strikingly similar to the concept of "response involvement" identified by Elaboration Likelihood Model (ELM) theorists in which a decision maker is influenced by what others may think of the decision. *See infra* note 183.

71. *See infra* notes 220-223 and accompanying text.

For example, we can infer possible influence of voices briefs in the abortion context.[72] The first two voices briefs were filed in 1985 (on the pro-choice side in *Thornburgh*) and 1989 (on the pro-choice side in *Webster*). These voices briefs shared grim stories from hundreds of women who had sought illegal abortions out of desperation, or whose abortion had allowed them to escape appalling circumstances or enabled them to fulfill existing responsibilities to dependent family members. Then, in 1992, the Court took up *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[73] One scholar has identified a key portion of Justice Kennedy's *Casey* opinion, where we find echoes of the pro-choice voices briefs.[74] Justice Kennedy[75] wrote:

> Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[76]

Justice Kennedy's understanding of women's "intimate and personal suffering" may have come in part from the stories women had shared with the Court.

Then, following the filing of a pro-life voices brief with affidavits from women who later regretted their abortions, Justice Kennedy famously wrote in the 2007 *Carhart* opinion: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[77] Again, we must wonder whether these comments were influenced by the voices briefs filed in *Thornburgh*, *Webster*, and *Carhart*.[78]

At least one other Justice may have been influenced as well.[79] Justice Ginsburg described the abortion issue as a matter of full citizenship, just as the *Thornburgh* NARAL brief had framed the issue:[80]

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72. Edwards, *supra* note 10, at 1344-45.

73. 505 U.S. 833 (1992).

74. Reva B. Siegel, *Abortion and the "Woman Question": Forty Years of Debate*, 89 IND. L.J. 1365, 1377-78 (2014).

75. Voices briefs undoubtedly are intended primarily for Justices like Justice Kennedy—those perceived to be swing voters on the issue. Confirmed pro-life or pro-choice Justices are unlikely to re-think their votes after reading nonparty stories. They might, however, moderate the tone they adopt in writing either the opinion of the Court or their own concurring or dissenting opinions. *See infra* notes 220-223 and accompanying text.

76. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992).

77. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

78. *But see* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 352-53 (2008) (asserting that the *Carhart* voices brief "likely did not play a dispositive role in the outcome").

79. Given Justice Ginsburg' well-known commitment to reproductive rights, it is unlikely that the voices brief influenced her to change her opinion. Rather, we are here speaking of the kind of influence that affects the writing of the opinion. *See supra* text accompanying note 71.

80. *See supra* note 27 and accompanying text; *infra* notes 101, 227-235 and accompanying text.

> As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." . . . Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.[81]

As recently as *Obergefell*, we may have seen signs of influence. In *Obergefell*, nine voices briefs were filed in support of marriage equality. The briefs vividly recounted stories of the love, struggle, and suffering of committed same-sex couples and their children. As they told their stories, the couples explained why marriage is important to them, what it brings or would bring to their lives, to their relationships, and to their families. They wanted to marry for all the reasons that prompt any couple to want to marry. Those themes were eloquently reflected in the final paragraph of Justice Kennedy's opinion:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[82]

The paragraph's text mentions only "the petitioners," but it may not be too much of a reach to think that Justice Kennedy had others in mind as well.

Even Justice Scalia seemed to credit some of the *Obergefell* voices briefs, at least the seven filed in opposition to marriage equality. Those briefs had told stories in which same-sex relationships were said to have caused harm to children. In oral argument, when Solicitor General Verrilli was rebutting the States' concern about the welfare of children, the following exchange occurred:

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81. *Carhart*, 550 U.S. at 171-72 (Ginsburg, J., dissenting) (citations omitted).

82. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). Justice Kennedy also noted that marriage "safeguards children and families," echoing the stories of amicus filers. *Id.* at 2600.

> General Verrilli: All of the evidence so far shows you that there isn't a problem, and . . . the States' argument really is quite ironic in this respect that it's going to deny marriage, the State - -
>
> Justice Scalia: That - - that's quite a statement. All of the evidence shows there is no problem. . . .
>
> General Verrilli: I - - I think all of the leading organizations that have filed briefs have said to you that there is a consensus in that, and –
>
> Justice Scalia: Well, I think some of the - - some of the briefs contradicted that.[83]

Of course, all this speculation is merely that—speculation. But such inferences may be the best we can do to assess influence. And even if we cannot evaluate their direct influence on any particular Justice, it is nonetheless important to preserve a place for voices briefs. As Part IV will explain, cognitive theory shows that stories may be the only way to counter the effects of unconscious preexisting schemas that inevitably influence human decision making. And as Part V will remind us, the ability to be heard is fundamental to effective government, especially when the affected citizen does not prevail.

E. Voices Briefs and Traditional Amicus Roles

Over the years, Supreme Court amicus filers have served multiple important roles, including these:

- Adding legal sources or traditional legal arguments not made by the parties;
- Supplementing the record with policy facts such as economic and social science studies;
- Raising policy matters and other possible implications of the Court's decision;
- Providing the benefit of special expertise;
- Underscoring by their very participation the importance of the issues to be decided;
- Demonstrating the scope and variety of affected persons or entities;

83. Transcript of Oral Argument at 35, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf.

- Representing marginalized groups that might not otherwise be heard;
- Taking a position on behalf of the public interest;
- Advocating on behalf of litigants in related cases; and
- Offering input from affected industries or enterprises.[84]

Voices briefs fulfill many of these traditional amicus roles. The *Obergefell* voices briefs listed in the Appendix provide examples. Some take positions on behalf of the nation's common interest. For example, one set of stories argued for "a country where all gay men and lesbians are constitutionally guaranteed the right to marry and are able to access the same dignity, status, and responsibility" as other married couples.[85] Another set used their stories to argue that constitutional protection for same-sex marriage would "inexorably result in additional violations of free speech rights," and that the court should "reaffirm the importance of free debate and free inquiry in this democratic Republic."[86]

The briefs added sources and arguments not made by the parties. For example, the brief on behalf of Same-Sex Attracted Men and Their Wives added the arguments that "man-woman marriage laws do not . . . exclude same-sex attracted men and women from the institution of man-woman marriage."[87] A brief in support of marriage equality added the long history of "a culture and language of animus against LGBT Americans."[88]

The briefs raised policy arguments and possible implications of the Court's decision. For example, one brief argued for the importance of biological parenting.[89] Several briefs offered stories to show that children benefit from marriage equality and are harmed by its denial.[90] Other voices briefs offered stories to

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84. *See generally* REAGAN W. SIMPSON & MARY R. VASALY, THE AMICUS BRIEF: ANSWERING THE TEN MOST IMPORTANT QUESTIONS ABOUT AMICUS PRACTICE 24-31 (4th ed. 2015); Flango, Bross & Corbally, *supra* note 60; *see also* Anderson, *supra* note 18, at 367-369; Larsen, *supra* note 18, at 1757-61; Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1610-11 (1999).

85. Brief for Kristin M. Perry et al. as Amici Curiae in Support of Petitioners at 26, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048444.

86. Brief of Amici Curiae Religious Organizations, Public Speakers, and Scholars Concerned About Free Speech in Support of Respondents at 10, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1534343.

87. Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents & Affirmance, *supra* note 48, at 7.

88. Brief of Mattachine Society of Washington, D.C. as Amicus Curiae in Support of Petitioners at 5, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048438.

89. Brief of Amici Curiae Organizations that Promote Biological Parenting in Support of Respondents, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1569761.

90. Brief of Amicus Curiae Marriage Equality USA in Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022683; Brief of Amici Curiae Family Equality Council, Colage, and Kinsey Morrison in Support of Petitioners, Addressing the Merits and Supporting Reversal, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022686; Brief of PFLAG, *supra* note 45; Brief of The County of Cuyahoga, Ohio as Amicus Curiae in Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 981535.

show the opposite.[91] They also demonstrated the scope and variety of affected persons or entities, including litigants in related cases.[92] Others shared the stories of marginalized groups that might not otherwise be heard. For example, one brief offered the stories of individuals who had been subjected to sexual-orientation change therapies.[93]

Finally, voices briefs can supplement the record with what are essentially social and policy facts. The stories play a role much like that played by the social science information in the historic "Brandeis Brief"[94] or the Appellants' brief in *Brown v. Board of Education*.[95] The policy role is the primary role of voices briefs, but the current role of social science information in the appellate process is both complex and controversial. Social science has played a recognized appellate role for over a century, but, even aside from possible jurisprudential objections,[96] common beliefs about social science's judicial role may be naïve. They may be based, in part, on inaccurate assumptions about the nature of the information offered in today's briefs and relied upon by today's Court. As Parts II and III will show, a closer look at current practice leads to the perhaps surprising conclusion that individual narratives may be more similar to today's social science information than it would appear.

II. POLICY FACTS IN THE FORM OF SOCIAL SCIENCE

The use of social science information on appeal rests, in part, on the sometimes misunderstood distinction between adjudicative (evidentiary) facts and legislative (policy) facts. Adjudicative facts are the case-specific facts about the events and the named parties. Adjudicative facts are determined at the trial court

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91. Brief of Amici Curiae Organizations that Promote Biological Parenting, *supra* note 89; Brief of Amici Curiae Robert Oscar Lopez and B. N. Klein in Support of Respondents, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519053 (arguing that children of same-sex couples are harmed); Brief of Amicae Curiae Heather Barwick and Katy Faust in Support of Respondents, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1534345; Brief of Amicae Curiae Dawn Stefanowicz and Denise Shick in Support of Respondents, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519047.

92. Brief of Ninety-Two Plaintiffs in Marriage Cases in Alabama, Alaska, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota and Texas as Amici Curiae in Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL1022702; Brief for Kristin M. Perry et al., *supra* note 85.

93. Brief of Amici Curiae Survivors of Sexual Orientation Change Therapies in Support of Petitioners, Urging Reversal, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1021452.

94. *See infra* notes 104-110 and accompanying text.

95. 347 U.S. 483 (1954).

96. For instance, the "balls and strikes" view of the judicial role at least purports to reject social and policy considerations of what the law should be rather than what it is. As Chief Justice Roberts famously declared, "[I]t's my job to call balls and strikes and not to pitch or bat." John Roberts, *My Job Is To Call Balls and Strikes and Not To Pitch or Bat*, CNN, (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

level, using the rules of evidence. Legislative facts, however, are facts that provide context for understanding the interpretive issues raised by the case.[97] Legislative facts can and often are raised for the first time on appeal and are not subject to evidentiary rules. The distinction between legislative facts and adjudicative facts has long been accepted as part of traditional legal method.[98] Legislative facts are used to establish social context, such as the harmful effects of racial segregation on educational achievement.[99] Social science information is one of the most common sources for legislative (policy) facts, and the Court has often relied on social science to support its decisions.[100]

Voices briefs offer non-party stories as legislative facts, not as adjudicative facts. The original voices brief filed in *Thornburgh* explained how the stories related to record evidence:

> While these letters do not constitute sworn testimony or record evidence, they do provide an invaluable source of information about the lives of women who choose to have an abortion. When abortion is examined in the context of women's lives, the constitutional foundations for a woman's right to decide "whether or not to terminate her pregnancy" become obvious. What also becomes clear is that this Court's decision in *Roe v. Wade* is firmly rooted in our nation's most fundamental traditions of personal integrity and human dignity.[101]

The stories shared in a voices brief are not social science, of course. At its best, social science presents empirically verified information compiled and analyzed by a researcher who is as close to neutral as possible. The best studies use double-blind processes and well-crafted instruments. They compile information from large data sets. They account for outliers and otherwise unreliable re-

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97. *See generally* Paul J. Kiernan, *Better Living Through Judicial Notice*, 36 LITIGATION 43 (2009). Judge Posner has identified a number of factual categories:

> [O]ften what is left out of a brief is background material . . . that would . . . reassure us that we understood the real-world setting of the case. Those are not "adjudicative facts," which if contested can reliably be established (it is believed) only by the adversary process of a trial . . . . Besides adjudicative facts, . . . there are . . . also "legislative facts," which are facts that bear on the design or interpretation of legal doctrines.

Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQUESNE L. REV. 3, 11 (2013).

98. *See* Richard Cappalli, *The Disappearance of Legal Method*, 70 TEMPLE L. REV. 393, 400, 405 (1997). The distinction between adjudicative facts and legislative facts is not always clear, however. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

99. John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1716 (2008).

100. *See e.g.*, Hall v. Florida, 134 S. Ct. 1986, 1993 (2014); Roper v. Simmons, 543 U.S. 551, 569-70 (2005); Atkins v. Virginia, 536 U.S. 304, 318 (2002).

101. NARAL Brief, *supra* note 27, at 5 (internal citations omitted).

sponses. They minimize inherent subjectivity. They use techniques such as multiple regression analyses to exclude other potentially causal relationships.[102] Non-party stories offered in voices briefs do not use these methods.

But neither do many of the social science studies offered in Supreme Court briefs.[103] The first social science brief was the celebrated "Brandeis Brief"[104] filed in *Muller v. Oregon*.[105] The issue in *Muller* was whether Oregon could constitutionally restrict working hours for women based on a state interest in protecting women's health.[106] The Brandeis Brief's 101 pages consisted almost entirely of non-legal information, such as statements by doctors, academics, anonymous government employees, and co-workers relating observations of and opinions about the lives of women workers. Virtually all of the named sources were men telling stories about women they had known. The brief includes page after page of entries such as these:

> *Mr. B—, a foreman of a printing establishment:*
>
> "Girls must sit at the 'case.' I never knew but one woman, and she a strong, vigorous Irishwoman, of unusual height, who could stand at the case like a man. Female compositors, as a rule, are sickly, suffering much from backache, headache, weak limbs, and general 'female weakness.'"[107]
>
> *A male mule-spinner (a man who operated a spinning machine in a cotton mill), describing the women he worked beside:*
>
> "I have noticed that the hard, slavish overwork is driving those girls into the saloons, after they leave the mills evenings . . . good, respectable girls, but they come out so tired and so thirsty and so exhausted . . . . Wherever you go . . . near the abodes of [overworked employees], you will always find the sign of the rum-shop."[108]

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102. Social scientists disagree about the degree to which social science should aspire only to the methods used by the physical and natural sciences rather than embracing the more interpretive methods of some researchers. Robert P. Burns, *Social Science and the Ways of the Trial Court: Possibilities of Translation*, in ELIZABETH MERTZ, WILLIAM K. FORD & GREGORY MATOESIAN, *TRANSLATING THE SOCIAL WORLD FOR LAW: LINGUISTIC TOOLS FOR A NEW LEGAL REALISM 212* (2016). This Article does not take a position on those questions. Rather, the point is to show that these more interpretive methods have long and often been presented to the Court as part of constitutional argument.

103. *See generally* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993); Larsen, *supra* note 18.

104. Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety.

105. Muller v. Oregon, 208 U.S. 412 (1908).

106. *Id.* at 417.

107. Brief for Defendant in Error, *supra* note 104, at 38.

108. *Id.* at 45.

An anonymous source quoted in a report from the Maine Bureau of Industrial and Labor Statistics:

> "Many saleswomen are so worn out, when their week's work is ended, that a good part of their Sundays is spent in bed, recuperating for the next week's demands. And one by one girls drop out and die, often from sheer overwork. This I know from observation and personal acquaintance."[109]

Another anonymous speaker at a legislative session:

> "The woman wage-earner, gentlemen, does not always live at the mill-gates; she is therefore obliged to make a half or three-quarters' hour journey before she arrives; consequently she will leave home at half-past five in the morning, only to return at half-past eight or nine o'clock in the evening. Is that living? Under such circumstances can a woman truly care for her children and her home?"[110]

Only two paragraphs quote a woman describing her own experience, her own health, her own family, or her own economic situation. The other 101 pages consist of quotations from anonymous speakers or from speakers whose expertise is absent or impossible to discern and whose reliability and neutrality are unknown. Nearly all the quoted sources are speaking entirely out of their own subjectivity. On the question of reliability, the "social science" information in the iconic Brandeis Brief cannot be considered more reliable than the non-party stories of today's voices briefs.

While social science research has improved since 1908, the social science information in modern Supreme Court briefing does not hold itself to those improved standards.[111] In fact, it often differs little from stories presented in voices briefs. The two social science amicus briefs filed in *Citizens United* are instructive. The first of two briefs for the Institute for Justice presented "empirical information" purporting to show that disclosure requirements chill political

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109. *Id.* at 30.

110. *Id.* at 51.

111. An exception is the *Obergefell* brief filed on behalf of the American Sociological Association (ASA), a professional organization of sociologists. The ASA publishes nine peer-reviewed journals and is bound by state-of-the-art standards of research methodology and objectivity. *See* Brief of Amicus Curiae American Sociological Association in Support of Petitioners at 1, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048442. The ASA's brief presents social science research that meets those standards and critiques the social science arguments made by other filers.

speech.[112] The brief relied on a 2007 study by Dr. Dick Carpenter,[113] who happens to serve as the amicus-filer's very own "Director of Strategic Research."[114] Dr. Carpenter gathered individuals (we have no idea how) and questioned them about whether they feared reprisal for their political speech. We do not know how the questioning was conducted or what instrument, if any, was used. Dr. Carpenter described the interviewees' statements to show that they did indeed fear reprisal. The results he reported from these interviews congenially supported his organization's legal arguments. As part of its social science presentation, the brief also provided what it called "anecdotal evidence" taken largely from newspaper articles relating the stories of third parties.[115] These newspaper reports were offered to show that the fear of reprisal is "real and reasonable."[116]

The first of two briefs filed by the Center for Competitive Politics provides another example of a brief that relies on newspaper stories as part of its social science analysis.[117] The brief relates media coverage of stories of alleged retribution for political donations, presenting this media coverage as objective fact, not subjective narrative. Yet these stories differ little from stories told in voices briefs.

These examples raise the question of just how different voices briefs are from today's social science briefs. Newspaper articles, op-eds, and statements made in focus groups are no more reliable when presented as social science than when presented as stories. Nor is it more reliable to hear someone's story through the voice and perspective of a third party rather than directly from the person who lived that experience herself.[118]

Further, for voices briefs offered to provide social context, reliability in the classic evidentiary sense may not be the most important question. The point of the stories in a voices brief is not to establish evidentiary facts but rather to share the experience and human perspective of the speaker.[119] As one scholar has ob-

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112. Brief of the Institute for Justice as Amicus Curiae in Support of Appellant, Citizens United at 6-7, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 147860.

113. Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, INST. FOR JUST. 5-6 (Mar. 2007), http://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf.

114. *Id.* at 8. *See also Dick M. Carpenter Biography*, INST. FOR JUST., http://ij.org/staff/dick-m-carpenter-ii-ph-d/.

115. Brief of the Institute for Justice, *supra* note 112, at 14.

116. *Id.* at 13.

117. Brief of Amicus Curiae Center for Competitive Politics in Support of Appellant, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 132719.

118. In fact, in at least some legal settings, third-party reporters are excluded in favor of the speaker herself. The evidentiary rule of hearsay is based on the belief that, generally, first-person statements are more reliable than third-party descriptions of those statements. FED. R. EVID. 801.

119. This role is to be distinguished from the reporting of false or unsupported social science or evidentiary facts ("fake news"), such as President Trump's original claim that he won the popular vote by a landslide, *see* Glenn Kessler, *Trump's Repeated Claim That He Won a 'Landslide' Victory*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/30/trumps-repeated-claim-that-he-won-a-landslide-victory/?utm_term=.7b9d0772017c, or that he would have won the popular vote had not millions of unauthorized immigrants voted illegally, *see* Michael D. Shear & Emmarie

served in another context: "Helpfulness cannot be reduced to 'reliability' understood in the ways in which *Daubert* at least seemed to imply. . . . There is no categorical reason why social scientific perspectives cannot contribute to the interpretive enterprise and the evaluative enterprise as well."[120] The same may be said of the personal stories related in a voices brief.

Voices briefs, then, may not be functionally different from commonly accepted social science briefs that rely on stories from focus groups, newspaper articles, legislative testimony, and third-party reports describing someone else's experience. The point here is not to argue that the flaws in social science briefs render them unhelpful. It is instead to point out that voices briefs should be compared to an accurate understanding of modern amicus briefing, not a fantasy of social science briefing in a utopian world.

III. OTHER FORMS OF POLICY FACTS

New law students may imagine a pristine form of appellate deliberation in which judges rely solely on constitutional and statutory text, judicial precedent, and policy arguments in the form of reliable social science. But legal realists know that judges also rely on a limitless batch of other information, some presented in the briefs and some completely absent from the litigants' arguments. A survey of judicial opinions shows the variety of such facts and their sources,[121] many of which were not included in the litigants' briefs but rather were the product of independent factual research by the Court.[122] One scholar has noted, over a span of 15 years, more than 100 Supreme Court opinions that cite to one or multiple factual sources not found in the record or the briefs.[123] Examples include:

- Google, Wikipedia, and other websites;[124]

Huetteman, *Trump Repeats Lie About Popular Vote in Meeting With Lawmakers*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html.

120. Burns, *supra* note 102, at 212 (referring to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), which decided the standard for admitting expert testimony at trial).

121. This quest for facts may not be surprising, given the reality that the Court's work is set in a relatively low-information environment. *See* Ryan Salzman, Christopher J. Williams & Bryan T. Calvin, *The Determinants of the Number of Amicus Briefs Filed Before the U.S. Supreme Court, 1953-2001*, 32 JUST. SYS. J. 293, 296, 298 (2011).

122. "It is a matter of common knowledge that courts occasionally consult sources not in evidence, ranging anywhere from dictionaries to medical treatises." Johnson v. United States, 780 F.2d. 902, 910 (11th Cir. 1986).

123. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1262 & n.37, 1272-77 (2012) (appendix on file with the Virginia Law Review).

124. *See, e.g.*, Flava Works, Inc. v. Gunter, 689 F.3d 754, 757 (7th Cir. 2012) (citing a Wikipedia article about YouTube); United States v. Ford, 683 F.3d 761, 768 (7th Cir. 2012) (citing a Wikipedia article about DNA profiling); Prude v. Clarke, 675 F.3d 732, 734 (7th Cir. 2012) (citing a Wikipedia article about anal fissures). Citation to Google searches and Wikipedia has prompted considerable commentary. *See, e.g.*, Daniel J. Baker, *A Jester's Promenade: Citations to Wikipedia in Law Reviews, 2002-*

- books, magazines, and pamphlets;[125]
- articles in academic journals;[126]
- medical treatises;[127]
- a personal survey of violent video games;[128]
- Gallup Poll results (not cited in the resulting opinion);[129]
- historical sources;[130]
- updating an incomplete study by letters from the Court to state officials in three states;[131]
- newspapers;[132] and
- photographs from the web.[133]

2008, 7 J.L. & POL'Y FOR INFO. SOC'Y 361 (2012); Coleen Barger, *Challenging Judicial Notice of Facts on the Internet Under Federal Rule of Evidence 201*, 48 U.S.F. L. REV. 43, 70 (2013) ("[E]ven Wikipedia is coming to be seen as an acceptable source for certain kinds of data."); Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. APP. PRAC. & PROCESS 191 (2010); Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 ST. JOHN'S L. REV. 633 (2010); Diane Murley, *In Defense of Wikipedia*, 100 L. LIBR. J. 593 (2008); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1 (2009); R. Jason Richards, *Courting Wikipedia*, 44 TRIAL 62 (2008).

125. *See infra* notes 147-155 and accompanying text.

126. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 858 (2011) (Breyer, J., dissenting) (gathering in two appendices academic articles on the psychological harm of playing violent video games).

127. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 129-62 (1973); *see also supra* note 159-160 and accompanying text.

128. *Brown*, 564 U.S. at 816-21 (Alito, J., concurring). Justice Alito wrote:

> These games feature visual imagery and sounds that are strikingly realistic . . . . In some of these games, the violence is astounding. . . . The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews.

Id. at 816-819. Justice Alito's opinion was peppered with citations to websites like slashgear.com and popularmechanics.com.

129. Prior to writing the Court's opinion in *Roe v. Wade*, Justice Blackmun collected Gallup Poll results showing that a majority of Americans favored abortion rights. Ken I. Kersch, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey *by Linda Greenhouse*, COMMENTARY (July 1, 2005), http://www.commentarymagazine.com/article/becoming-justice-blackmun-by-linda-greenhouse/.

130. For example, Justice Thomas cited to fifty-seven extra-record sources to show that the Founders believed that parents had complete authority over their children's development. *Brown*, 564 U.S. at 822-35 (Thomas, J., dissenting); *see* Larsen, *supra* note 123, at 1261-62.

131. Graham v. Florida, 560 U.S. 48, 63-64 (2010) (updating an incomplete study).

132. *Id.*; Larsen, *supra* note 123, at 1271 (noting the Court's citation to newspaper articles from local counties reporting sentences of juvenile offenders).

133. *See e.g.*, Alison Frankel, *Can Federal Judges Base Rulings on Their Own Investigations?*, REUTERS (Mar. 21, 2014), http://blogs.reuters.com/alison-frankel/2014/03/21/can-federal-judges-base-rulings-on-their-own-investigations/; *infra* text accompanying note 139. For commentary and analysis of nontraditional sources, see generally Adam Aft, Tom Cummins & Joshua Cumby, *Web 2.0 Citations in the Federal Courts*, 3 J.L. (2 J. LEGAL METRICS) 31 (2013) (analyzing citation of user-generated content); Coleen M. Barger, *Accessing the Law: On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1689-91 (2000) (finding United States Supreme Court citation to "authorities from all corners of the information galaxy"); John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 L. LIBR. J. 427 (2002) (finding a pattern of use of nonlegal materials); Larsen, *supra* note 123; Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 920 (2011)

Judge Richard Posner has become the poster-child for extra-record research. In *Rowe v. Gibson*, for example, an inmate argued that prison officials were deliberately indifferent to his medical condition.[134] To analyze Rowe's medical arguments, Judge Posner cited to internet sources such as the National Institutes of Health, the Mayo Clinic, WebMD, and Wikipedia.[135] The opinion prompted a kerfuffle among the panel itself[136] and in public commentary.[137] In *Grayson v. Schuler*,[138] a case arguing for a prisoner's right to wear his hair in dreadlocks, Judge Posner included a web photograph along with the comment, "Dreadlocks can attain a formidable length and density, as shown in this photograph of the late Jamaican musician Bob Marley (a Rastafarian):"[139]

(finding a significant recent increase in citation of nonlegal sources in judicial opinions); Jeremy Patrick, *Beyond Case Reporters: Using Newspapers To Supplement the Legal-Historical Record (A Case Study of Blasphemous Libel)*, 3 DREXEL L. REV. 539, 539-40 (2011) (finding increased citation of non-legal sources); Frederick Schauer & Virginia Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 495 (2000) (same); William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323 (2006); *see also* Barger, *supra* note 124 (finding same phenomenon in the context of formal judicial notice).

134. Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015).

135. *Id.* at 623-24, 626-27.

136. *Id.* at 635 (Rovner, J., concurring); *id.* at 635-36 (Hamilton, J., concurring in part and dissenting in part).

137. Aaron S. Bayer, *When Judges Rely on Their Own Online Research*, NAT'L L.J. (Sept. 14, 2015), http://www.nationallawjournal.com/id=1202736993571/When-Judges-Rely-on-Their-Own-Online-Research?slreturn=20160615172546; David Lat, *Benchslaps Fly Over Judges Doing Factual Research on the Internet*, ABOVE L. (Aug. 20, 2015), http://abovethelaw.com/2015/08/benchslaps-fly-over-judges-doing-factual-research-on-the-internet/; Roland Nadler, *Posner vs. Hamilton on Google-Happy Judges*, STAN. L. SCH.: L. & BIOSCIENCES BLOG (Sept. 14, 2015), https://law.stanford.edu/2015/09/14/posner-vs-hamilton-on-google-happy-judges/; Thomas L. Shriner, Jr., *Dr. Posner Will See You Now: 7th Circuit Judges Reignite a Spirited Debate over Judicial Internet Research*, WIS. APP. L. (Aug. 20, 2015), https://www.wiappellatelaw.com/2015/08/20/dr-posner-will-see-you-now-7th-circuit-judges-reignite-a-spirited-debate-over-judicial-internet-research/; Ed Whelan, *Posner's Dubious Prescription*, NAT'L REV.: BENCH MEMOS (Aug. 20, 2015), http://www.nationalreview.com/bench-memos/422825/posners-dubious-prescription-ed-whelan.

138. 666 F.3d 450 (7th Cir. 2012).

139. *Id.* at 452.

Judge Posner has even argued for a variety of appellate fact investigation.[140] For instance, he recently used his staff to perform in-chambers experiments. *Mitchell v. JCG Industries, Inc.* raised the question of whether time spent "donning and doffing" safety equipment entitled employees to overtime pay.[141] Apparently unsatisfied with the trial court record on how much time was at issue, Judge Posner purchased the safety equipment and videotaped his office staff as they proceeded to "don" and "doff."[142] Based in significant part on his own in-chambers experiment, Judge Posner concluded that employers need not pay for time spent donning and doffing work-required clothing.[143]

If appellate courts can perform private in-chambers experiments directly pertaining to the *evidentiary* facts at issue—experiments unknown to the parties and therefore not subject to refutation or response—surely *policy* facts offered in publicly available briefs, which are subject to rebuttal by any party or other amicus filer, should constitute acceptable argument.[144]

Though some of Judge Posner's independent factual research is, perhaps intentionally, more striking, such extra-record explorations are not new and are not limited to circuit courts.[145] Supreme Court Justices have long relied on extra-record factual research.[146] Here are just a few unremarkable examples:

- In *Kumho Tire Co., Ltd. v. Carmichael*, Justice Breyer described steel-belted radial tires at some length, even including a drawing of tire construction.[147] He relied on this 1998 soft-back book still easily available for a popular market from Amazon Books:[148]

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140. Judge Posner has criticized a norm against judicial research into the facts. RICHARD A. POSNER, REFLECTIONS ON JUDGING 136-143 (2013).

141. 745 F.3d 837, 842 (7th Cir. 2014).

142. *Id.* at 842.

143. *Id.* at 845-46.

144. For example, Fed. R. Evid. 201(e), the related rule on judicial notice, requires that parties be permitted the opportunity to be heard when the court is inclined to take judicial notice of a fact. Professor Barger has observed that taking judicial notice "without observing the niceties of due process [giving the other party notice and an opportunity to be heard] may constitute an abuse of discretion." Barger, *supra* note 124, at 68. *See also* Garcia, *supra* note 78, at 347 (arguing that information provided in amicus briefs is preferable because it is visible).

145. *See, e.g.*, United States v. Bari, 599 F.3d 176, 180 (2d Cir. 2010):

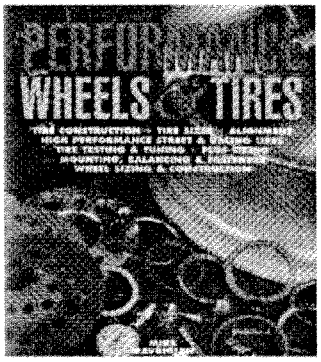
> Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search.

Id., *quoted in* Barger, *supra* note 124, at 43.

146. *See generally* Larsen, *supra* note 18.

147. 526 U.S. 137, 142-43 (1999).

148. *Id.* Justice Breyer attributed the drawing to MIKE MAVRIGIAN, PERFORMANCE WHEELS & TIRES 81, 83 (1998).



- Chief Justice John Roberts relied on Matthew Levitt's book on Hamas[149] in the majority opinion in *Holder v. Humanitarian Law Project*.[150] Roberts quoted Levitt's book as proof that "investigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts."[151]

- In *Safford Unified School District No. 1 v. Redding*, a case declaring unconstitutional the strip-search of a middle-schooler, Justice Thomas dissented.[152] He relied on a magazine article titled *Get Teens off Drugs*[153] to justify "a search extending to any area where small pills could be concealed."[154] He declared that

149. MATTHEW LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD (2006).

150. 561 U.S. 1, 30 (2010).

151. *Id.*

152. 557 U.S. 364 (2009) (Thomas, J., dissenting).

153. *Id.* at 395 (citing Ken Schroeder, *Get Teens Off Drugs*, EDUC. DIG. 75 (Dec. 2006)).

154. *Id.* at 398.

> the middle-schooler "would not have been the first person to conceal pills in her undergarments. . . . Nor will she be the last after today's decision, which announces the safest place to secrete [sic] contraband in school."[155]

Judges are not only influenced by sources they locate outside the briefs. Legal realists know that judges are influenced also by their own cultural knowledge and life experience. Personal experiences have left their footprints in some of the Court's most influential opinions. Justice Stewart's famous pornography test articulated in *Jacobellis v. Ohio* ("I know it when I see it"[156]) likely was influenced by his World War II experience as a Navy lieutenant.[157] Woodward and Armstrong describe Stewart's experience of the varieties of pornography:

> He had seen it during World War II, when he served as a Navy lieutenant. In Casablanca, as watch officer for his ship, he had seen his men bring back locally produced pornography. He knew the difference between that hardest of hard core and much of what came to the Court. He called it his "Casablanca Test."[158]

In another well-known example, Justice Blackmun traveled to the Mayo Clinic to conduct his own medical research before writing his opinion in *Roe v. Wade*.[159] He wrote to the Mayo Clinic librarian to inquire whether "your well-equipped library [would] have anything about the history of abortion. You can imagine why I ask."[160]

We know about these examples because they have been the subject of investigation, and of course they are but speculations about a complex process. But the speculations are reliable enough to serve as the visible tip of a massive iceberg. Virtually unknown, and therefore unavailable for refutation and response, are the influences on judges of standard cultural products such as the books they have read; the movies they have seen; the experiences of their friends and family and of themselves; and the attitudes and opinions of social and political groups with whom they associate and identify.

The Introduction to this Article asserted that constitutional decisions should not be made in a hermetically sealed environment. As this Part has observed and as the next section more fully explains, we need not worry. There is no such thing

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155. *Id.* at 390.

156. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

157. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 194 (1979).

158. *Id.*

159. Roe v. Wade, 410 U.S. 113, 129-62 (1973).

160. Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 1075, 1088 n.89 (2005) (quoting Harry A. Blackmun Papers, box 151).

as a hermetically sealed judicial environment. As it turns out, the problem may not be too much information, but rather too little. Voices briefs do their work in the midst of extra-legal judicial fact-finding and in the context of a judge's preexisting cultural knowledge and life experience. The advocacy process must be able to supplement or challenge that extra-record information, for it is otherwise unreachable. It is time to explore just what voices briefs seek to do and how they seek to do it.

IV. HOW NON-PARTY STORIES PERSUADE[161]

> *We inhabit a nomos–a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . For every constitution there is an epic, for each decalogue a scripture.*
>
> -Robert Cover[162]

Robert Cover was among the first to point out the world-creating role of narrative, but in his era, little cognitive work explained how this normative universe works. Such is not the case today. As Steven Winter writes:

> There is a virtual revolution going on within the cognitive sciences. . . . [New cognitive science research] alters the contours of entire debates in disciplines such as law . . . . The promise of cognitive theory lies precisely in its ability to make explicit the unconscious criteria and cognitive operations that structure and constitute our judgment. It is by laying bare these cognitive structures and their impact on our reasoning that we can best aid legal actors—whether advocates or decision-makers—who wish to understand the law better so that they can act more effectively.[163]

These unconscious operations take the form of schemas—preexisting cognitive patterns providing interpretive frameworks through which we perceive and judge the world.[164] A schema organizes people, places, and events into roles the schema has made familiar.[165] The resulting perceptions seem to be natural and

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161. A version of this sub-section appeared in Linda H. Edwards, *Where Do the Prophets Stand?* Hamdi, *Myth, and the Master's Tools*, 13 CONN. PUB. INT. L.J. 43, 49-53 (2013).

162. Robert M. Cover, *The Supreme Court 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

163. STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND xi–xiii (2001).

164. The term "schema" can have different meanings in different disciplines. Here, the term is used in its rhetorical sense as an embedded knowledge structure rather than, for instance, as an "expert" schema referring to a heuristic or framework used as a shortcut by experts in a specific field. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700-01 (1994); *see generally* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259 (2009).

165. Berger, *supra* note 164, at 265.

true—simply an objective observation of the state of affairs. Once within the frame of such a cognitive structure, escape is difficult. The schema both highlights information that seems consistent with the schema, and hides inconsistent information.[166] Thus, the structure reinforces its own inherent cultural values and perspectives.

A culture's master stories provide the most common and effective schemas.[167] We are hard-wired to organize the world into stories,[168] and there is reason to suspect that deductive reasoning processes arise derivatively from such preexisting frames.[169] Cultural stories mediate new events, infusing them with shared social meaning.[170] They channel new events into that well-worn path.[171] The outcome will seem both true and inevitable.[172]

Critical theorists have observed schema in action for years.[173] What may be less well-known, however, is the startling finding that a schema does its world-creating work before we become aware of the information it organizes. In other words, as a matter of biology, it may not be possible to perceive a schema-free set of new facts. Research by University of Texas neurobiologist Dr. David Engleman demonstrates the point:

> Engleman's research has shown that the brain lives just a little bit in the past. A human brain collects a lot of information and then pauses for a moment to organize it before releasing the processed information to the conscious mind. "Now" actually happened a little while (several milliseconds) ago.

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166. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 10-11 (1980); *see generally* WINTER, *supra* note 163.

167. Berger, *supra* note 164, at 268; Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 457–58 (1996).

168. JEROME BRUNER, ACTS OF MEANING 45 (1990); ROBERT P. BURNS, A THEORY OF THE TRIAL 159 (1999)

169. Berger, *supra* note 164, at 268; Brown, Williams, & Baumann, *supra* note 167, at 457–58; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 54, 57–59 (2008). *See generally* Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996).

170. *See generally* Edwards, *supra* note 161; *see also* Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Over-reliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259–63 (2010).

171. WINTER, *supra* note 163, at 106–13; Steven L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1629 (2001); *see also* Berger, *supra* note 164, at 268 (analyzing how familiar knowledge structures impact custody decisions).

172. Berger, *supra* note 164, at 265; *see, e.g.*, David F. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, 4 CLINICAL L. REV. 163, 167, 177-83 (1997) (explaining how prior knowledge and experience operate to fill in the gaps of stories and thus create particular interpretations).

173. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2418 (1989).

> To demonstrate this for yourself, tap your finger on a tabletop at arm's length. Light travels faster than sound. So the sight actually reached you a few milliseconds before the sound. However, your brain synchronized the two to make them *seem* simultaneous. The same thing happens when you watch someone's lips move as they speak. During these microsecond pauses the brain/mind constructs a plausible story to make the incoming information make sense. Sensory impressions enter the brain; stories exit to the conscious mind for interpretation and action. A significant part of what the brain does for the conscious mind is structure experience into story.[174]

In other words, at the moment we become aware of a set of facts, we have already adopted a perspective. The question is not *whether* we see the situation through a lens, but *which* lens focuses our view. The danger is, of course, that we are often oblivious to our own unconscious frames. If a judge does not understand that there is more than one "true" story, the judge will remain unconsciously captive to a set of unexamined assumptions based on preexisting narrative schema.

The idea that there exists no neutral moment—no moment when a judge's perception is unaffected by one cultural frame or another—casts an illuminating light on the purpose of a voices brief. The stories in a voices brief do not attempt to manipulate a previously neutral judge. The question is not whether to impose a partisan frame but rather whether a preexisting, unexamined partisan frame will remain impervious to challenge.

Attempting to counteract the world-creating influence of a preexisting cultural narrative is a difficult task, but it may be critically important. Not only is it necessary to unsettle a preexisting schema before a judge can recognize other possible perspectives, but, ironically, the more we value traditional merits arguments, the more important it may be to find a place for narrative persuasion. To understand why, we need to learn some terms and concepts.

Cognitive studies have examined how human beings evaluate competing arguments. Perhaps the most influential single theory of the persuasive effects of messages is a concept called the Elaboration Likelihood Model (ELM).[175] The

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174. KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 22 (2007).

175. E-mail from Michael D. Slater to author (Feb. 9, 2017) (on file with the author). Dr. Slater is a Distinguished Professor of Social and Behavioral Science and Professor of Communication at The Ohio State University and a recognized ELM scholar whose Google Scholar citation count totaled 8,434 as of March 2017. *Michael D. Slater*, GOOGLE SCHOLAR, https://scholar.google.com/citations?user=1ncvrH4AAAAJ&hl=en. ELM pioneers include Dr. Richard E. Petty (Distinguished University Professor of Psychology at The Ohio State University) and Dr. John T. Cacioppo (Tiffany and Margaret Blake Distinguished Service Professor at the University of Chicago, Department of Psychiatry and Behavioral Neuroscience). Drs. Petty and Cacioppo wrote the seminal paper on ELM in 1986. *The Elaboration Likelihood Model of Persuasion*, *in* 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123-205 (Leonard Berkowitz ed., 1986). This paper alone had been cited by other scholars more than 7,400 times as of March 2017. *The Elaboration Likelihood Model of Persuasion*, GOOGLE SCHOLAR,

ELM identifies a spectrum for how a message recipient (in our case, a reader) processes an argument.[176] At opposite ends of the spectrum are *central route processing* and *peripheral route processing*.[177] Central route processing is marked by careful, critical evaluation of the merits. A reader using central route processing tests the advocate's arguments and also generates her own thoughts about the merits.[178] Central route processing is the kind of traditional merits analysis we hope a judge will use as the core of judicial decision making.

Peripheral route processing is marked by low(er) elaboration. A reader using low elaboration relies more on familiar attitudes and patterns of thought and less on traditional forms of merits analysis.[179] Professor Kathryn Stanchi, the leading scholar in applying ELM to legal advocacy, describes peripheral processing as "less thoughtful and engaged" and as "often based on heuristics or shortcuts unrelated to the substantive merits of the message."[180] Peripheral route processing reduces the role of traditional merits arguments, an unappealing result for a judicial system that should rely heavily on authoritative text, precedent, analogy, and policy.

But advocates may be able to move a judge closer to high elaboration.[181] To understand how, we turn to the science of involvement. Reader involvement, as it turns out, affects the impact of an argument. Scholars have studied two kinds of involvement that are especially relevant here. Decision makers experience *outcome-relevant* involvement when they perceive a personal stake in the issue—for instance, when the decision will affect themselves or those for whom they care.[182] Decision makers experience *value-relevant* involvement when the

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https://scholar.google.com/citations?view_op=view_citation&hl=en&user=y4MYDxQAAAAJ&citation_for_view=y4MYDxQAAAAJ:SnGPuo6Feq8C. In 2012, Drs. Petty and Cacioppo published *Communication and Persuasion: Central and Peripheral Routes to Attitude Change*, which already had been cited more than 8,100 times as of March 2017. COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE, GOOGLE SCHOLAR, https://scholar.google.com/citations?view_op=view_citation&hl=en&user=y4MYDxQAAAAJ&citation_for_view=y4MYDxQAAAAJ:u5HHmVD_uO8C.

176. Michael D. Slater, *Involvement as Goal-Directed Strategic Processing: Extending the Elaboration Likelihood Model*, *in* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 175 (James Price Dillard & Michael Pfau eds. 2002). While this section will cite to some of the original sources, those sources first came to my attention in Professor Kathryn Stanchi's work, and she deserves general attribution for this entire section. *See generally* Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411.

177. DANIEL O'KEEFE, PERSUASION: THEORY AND RESEARCH 139-41 (1990); Steve Booth-Butterfield & Jennifer Welbourne, *The Elaboration Likelihood Model: Its Impact on Persuasion Theory and Research*, *in* THE PERSUASION HANDBOOK, *supra* note 176, at 157-58.

178. Booth-Butterfield & Welbourne, *supra* note 177, at 156-57.

179. *Id.* at 156.

180. Stanchi, *supra* note 176, at 436.

181. Booth-Butterfield & Welbourne, *supra* note 177, at 160 (finding that message-recipient involvement can be "situationally induced").

182. Slater, *supra* note 176, at 177; Stanchi, *supra* note 176, at 440-41 (noting that a recipient's thoughtfulness increases as the level of personal relevance increases). *See generally* Andrew J. Cook, Kevin Moore & Gary D. Steel, *The Taking of a Position: A Reinterpretation of the Elaboration Likelihood Model*, 34 J. THEORY SOC. BEHAV. 315, 316 (2004).

issue is more distant, impacting instead abstract personal values.[183] A message recipient can be influenced simultaneously and to varying degrees by each kind of involvement.[184]

Studies show that the kind of involvement a reader feels plays a role in how the reader processes information. Outcome-relevant involvement leads to greater central route processing.[185] Thus, readers who feel a personal stake in the matter, perhaps because the outcome will affect individuals they care for, will tend to devote more attention to traditional merits arguments, actively testing the ideas presented and generating their own responses. Value-relevant involvement, however, encourages peripheral processing.[186] Value-relevant readers tend to process information peripherally, in more of a "knee-jerk" response,[187] with less attention to an argument's strength on the merits. In fact, Michael D. Slater, a nationally-recognized ELM researcher, has commented that an appeal to values may be a way to "short-circuit intelligent debate."[188]

Here is how that short-circuiting works. When the reader's pre-existing values are consistent with the advocate's position, the value-relevant reader is likely to embrace the advocate's traditional merits arguments with little question.[189] But if the reader's preexisting values are inconsistent, a strong merits argument actually can be counterproductive. Because it threatens the reader's values, a strong merits argument can arouse resistance and actually move the reader further away[190]—a kind of boomerang effect. A resistant value-involved reader rejects the merits argument and generates her own counterarguments.[191] Worse yet, the unsuccessful merits argument might even trigger an inoculation effect, in which the reader develops what are essentially antibodies to the argument, making her even more resistant to future merits arguments.[192] Judicial decision making should value traditional merits arguments, not discount them, but a strong

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183. Slater, *supra* note 176, at 177. A third kind of involvement is "response involvement," which stems from knowing that the decision will be public and that others will form opinions about whether it is correct. Stanchi, *supra* note 176, at 441. That kind of involvement may well be relevant here, but it has not been sufficiently studied to support speculation about how it might function in a judicial setting.

184. Stanchi, *supra* note 176, at 441.

185. *Id.* at 444.

186. *Id.*

187. *Id.* at 452.

188. *Id.* at 441.

189. *Id.*

190. *Id.* at 441-42 (referring to the effect as "value-protective processing").

191. *Id.*

192. The theory of inoculation posits that an advocate can encourage resistance to opposing arguments by exposing the message recipient to a less effective version of the argument. Inoculation has not been tested in combination with a value-relevant reader who generates counter-arguments, but the two theories may well interact, resulting in an even more negative reaction to traditional merits arguments. *See* Quentin Brogdon, *Inoculating Against Bad Facts: Brilliant Trial Strategy or Misguided Dogma?*, 63 TEX. B.J. 443, 447 (2000); Michael J. Saks, *Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why*, 101 YALE L.J. 1177, 1187-1188 (1992) (reviewing ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS (1990)); *see generally* Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 281 (2008).

merits argument has exactly the opposite effect on a resistant value-involved reader.

So far these findings are discouraging but not remarkable. Many lawyers would view these findings as consistent with their experience. But one finding is surprising, and it explains why voices briefs can play a useful role. While strong merits arguments may push a value-involved judge further away, arguments that include anecdotal (narrative) messages can trigger central-route processing. Thus, unlike a logically compelling merits argument, anecdotal messages may allow the advocate to counter the effects of negative preexisting bias.[193]

For instance, one study divided college students into two groups based on the degree to which they were inclined to accept the social use of alcohol.[194] The study then compared the effects of messages critical of alcohol use. One message relied on statistics supporting the negative message about alcohol use. The other related a short story about the consequences of alcohol use on a fellow student. As Professor Stanchi explains, "[t]he value-protective message recipients demonstrated belief change when confronted with the narrative evidence and were less persuaded by the statistics. The statistics . . . served only to encourage counter-arguing."[195] The group already predisposed to agree with the message, however, engaged in "classic central processing" of the statistical evidence.[196] The study showed that "statistical evidence is superior for reinforcing beliefs of those already inclined to believe the message, and anecdotal evidence [personal narrative] is superior for influencing a much more difficult audience—those who disagree with the message."[197]

How might anecdotal argument work in a judicial setting? Consider a judge who values a pro-life stance. In an abortion case, this judge might not experience outcome involvement because he has never needed an abortion himself and, as far as he knows, neither has anyone with whom he identifies. When he thinks of those who might need an abortion, he may think of a set of stereotypes about women who are sexually irresponsible—people unlike himself or those with whom he identifies. Thus, lacking any outcome-relevant stake in the question, the judge may rely more completely on his preexisting pro-life values. The primary purpose of a voices brief is to expand that judge's realm of identification to include groups not previously a part of the judge's personal world. A resistant, value-involved judge is likely to think "this case is about *them*" rather than "this case is about some of *us*." Voices briefs can introduce the judge to these "others" in order to encourage meaningful merits analysis for all parties. Otherwise, some parties may receive a different kind of justice produced by a different kind of legal analysis than that offered to other parties.

193. Stanchi, *supra* note 176, at 442.
194. Slater, *supra* note 176, at 184.
195. Stanchi, *supra* note 176, at 442 (*citing* Slater, *supra* note 176, at 180, 184, 188).
196. *Id.*
197. Slater, *supra* note 176, at 185.

In fact, a robust scholarship supports the idea that judicial outcomes can be negatively affected by "us-them" thinking. In recent years, scholars have produced important work on the role of emotion and the necessity of empathy and moral imagination in judging (and therefore in advocacy).[198] For example, Terry Maroney has debunked erroneous negative views of emotion and explored legitimate roles for emotion in judicial decision making.[199] In *The Persistent Cultural Script of Judicial Dispassion,* Professor Maroney provides a powerful defense of empathy's role in judging. Susan Bandes has defended the role of emotion in judging, critiqued problematic uses of emotion, and explored the necessity of moral imagination[200] in legal deliberations.[201] No lesser light than Martha Nussbaum, one of the nation's most valued public intellectuals, has explored the importance of moral imagination and empathy in law.[202] Mark Johnson, another leading scholar of philosophy, has also argued for the importance of moral imagination in all human deliberations,[203] and leading scholars in cognitive linguistics have deconstructed seemingly unassailable rational assumptions.[204] Other legal scholars have weighed in on these issues as well, identifying legitimate

198. *See generally* Terry A. Maroney, *A Field Evolves: Introduction to the Special Section on Law and Emotion*, 8 EMOTION REV. 3 (2016).

199. *See, e.g.*, Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 849 (2009); Terry Maroney, *The Emotionally Intelligent Judge: A New (and Realistic) Ideal*, 49 CT. REV. 100 (2013); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011); Terry A. Maroney, *Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?,"* 93 TEX. L. REV. 317 (2015); Terry A. Maroney & Philip Ackerman-Lieberman, *"As a Father Shows Compassion for His Children": Ancient and Contemporary Perspectives on Judicial Empathy*, 3 J.L. RELIGION & ST. 240 (2014); Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142 (2014).

200. "Moral imagination is the ability to understand one's own limitations, the limitations of perspective, the range of values at stake, and the possibilities for change inherent in the situation. It is the ability to understand that things might be ordered differently, a way out of arid formalism and closed systems." Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 24 (2011). Fundamental to moral imagination is the effort to understand the perspectives of others. *Id.*

201. *See, e.g.*, THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004); Susan Bandes, *What's Love Got to Do With It?*, 8 WM. & MARY J. WOMEN & L. 97 (2001); Susan A. Bandes, *Civil Liberties and the "Imaginative Sustenance" of Jewish Culture*, 16 RUTGERS J.L. & RELIGION 238 (2015); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133; Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317 (2015); Bandes, *supra* note 200; Susan A. Bandes, *Moral Shock and Legal Education*, 65 J. LEGAL EDUC. 298 (2015); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161 (2012); Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003 (2014).

202. *See, e.g.*, MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004); MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

203. *See generally* MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS (1993).

204. *See generally* GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR (1989).

roles for empathy and emotion in legal deliberations.[205] Scholars of law and narrative have pointed out the role of stories in establishing narrative identification,[206] and rhetoric scholars have pointed to the importance of rhetorical listening—the act of listening to learn another's point of view rather than to formulate an argumentative response.[207]

It is important not to over-claim here. First, no responsible scholar would argue that a flood of storytelling would or should overcome all other judicial influences. Judges must do more than understand the perspectives of those with experiences different from their own. First and foremost, they must analyze controlling text and precedent, account for other compelling policy concerns, and remain true to the role of the judiciary in a three-branch system of government.

Second, a relentless flood of moving stories may reduce or even reverse the stories' intended effect. In at least some settings, repeated traumatic stories can eventually produce indifference to accompanying appeals.[208] For instance, judges who have heard countless capital appeals may become weary and eventually immune to the tragic scenarios commonly presented by defense lawyers.[209]

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205. *See, e.g.*, Peter Brandon Bayer, *Not Interaction But Melding—The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033 (2001); Justin D'Arms, *Empathy and Evaluative Inquiry*, 74 CHI.-KENT L. REV. 1467 (2000); Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045 (2006) (reviewing NUSSBAUM, HIDING FROM HUMANITY, *supra* note 202); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006); Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974 (2001); Andrea McArdle, *Using a Narrative Lens To Understand Empathy and How it Matters in Judging*, 9 LEGAL COMM. & RHETORIC 173 (2012); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605 (1996).

206. Linda H. Edwards, *The Humanities in the Law School Curriculum: Courtship and Consummation*, 51 WAKE FOREST L. REV. 355, 374 (2016); Linda H. Edwards, *Speaking of Stories and Law*, 13 J. LEGAL COMM. & RHETORIC 157, 165-66 (2016). *See generally* Copeland, *supra* note 47 (discussing the use of narrative to render the lives of LGBT individuals less foreign to mainstream political deliberations); Edwards, *supra* note 10.

207. *See, e.g.*, KENNETH BURKE, A RHETORIC OF MOTIVES (1969) (identifying the necessity of narrative identification in persuasion); Linda L. Berger, *A Rhetorician's Practical Wisdom*, 66 MERCER L. REV. 459, 469-76 (2015); Elizabeth C. Britt, *Listening Rhetorically to* Defending Our Lives*: Identification and Advocacy in Intimate Partner Abuse*, 10 L. CULTURE & HUMAN. 155 (2012); Jack L. Sammons, *The Georgia Crawl*, 53 MERCER L. REV. 985, 985-87 (2002).

208. One variety of this phenomenon is "compassion fatigue," which has been defined as fatigue or apathy "resulting from . . . constant appeals from charities." *Compassion Fatigue*, DICTIONARY.COM, http://www.dictionary.com/browse/compassion-fatigue?s=t. The ABA has identified compassion fatigue as a problem for legal professionals who receive repeated requests for assistance from those in traumatic situations. *Compassion Fatigue*, AM. B. ASS'N, http://www.americanbar.org/groups/lawyer_assistance/resources/compassion_fatigue.html.

209. Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 346 (2012) ("Capital defense lawyers routinely present evidence regarding the impoverished, abusive, and chaotic families whence their clients came, hoping jurors will find the client less culpable given the client's childhood deprivations.").

In some settings, the traditional heartrending mitigation story can backfire, producing a reaction opposite from the intended result.[210] We may well wonder whether the flood of stories in abortion cases—where twenty-one voices briefs have been filed—may have reached a saturation point, at least for the Justices who have been exposed to those briefs over the span of many years. Much more study remains to be done before we fully understand common human reactions to repeated tragic stories, an undoubtedly complex question with many human and situational variables.

Third, involvement studies have not yet focused on *judicial* decision making, which is surely different in significant respects. We have a great deal to learn about how involvement might operate in a judicial setting. But until we learn more, we should take care to preserve a place for a form of argument that may help counter the effects of preexisting values bias and maximize the impact of traditional merits arguments.

V. CONSTITUTIONAL DELIBERATION IN THE PUBLIC SQUARE

In addition to the uses we have seen, voices briefs may also play important roles for at least three other varieties of judicial actors and interested groups.

First, for those most intimately affected by the Court's decision, it is important to be heard.[211] In fact, being heard may be more important in defeat than in victory. The right to be heard is a fundamental precept of good government,[212] but it is more. It is a deep human need.[213] That need is at the heart of due process concepts, all dispute resolution systems, and all effective public discourse. For example, telling one's story is a core practice of restorative justice, a process designed to facilitate some degree of healing by inviting affected parties to share their own stories and to listen to the stories of others.[214] Similarly, truth and rec-

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210. *Id.* (taking note of "the more radical position that traditional mitigation discourse may increase the empathic divide that already exists between white jurors and black capital defendants").

211. This need to be heard is present in all disputes but may be greatest in two situations: (1) in cases where the outcome will have a deeply personal impact on the intimate lives of those affected; and (2) in cases where those telling their stories are living lives vastly different from a judge's experience. To date, voices briefs have been used almost entirely in cases forming a sub-set of the first category—cases threatening a woman's control over her own body and cases threatening the deepest of human relationships. *See supra* text accompanying notes 51-57; *see also* Appendix.

212. Garcia, *supra* note 78, at 343-47.

213. *See* TERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS 4 (2006) (describing the truth commission participants' need for their stories to be officially heard and acknowledged); RESTORATIVE JUSTICE TODAY: PRACTICAL APPLICATIONS 206-07 (Katherine S. van Wormer & Lorenn Walker eds., 2013) (describing the process of "[u]nearthing the previously silenced voices of victims" to facilitate healing through storytelling).

214. TONY FOLEY, DEVELOPING RESTORATIVE JUSTICE JURISPRUDENCE: RETHINKING RESPONSES TO CRIMINAL WRONGDOING 75-95 (2014). Restorative justice encourages "moral learning" through personal encounters that can "activate [the] process of moral development." *Id.* at 75.

onciliation commissions create fora for sharing stories to address the consequences of seriously polarized, painful, and sometimes violent situations.[215] Their purposes are many, but they include the recognition of personhood and dignity. Even if the Court is not persuaded on the merits—in fact, especially then—those affected need to feel heard.[216]

And winning and losing, after all, are often about more than any single case. Since most controversial topics come before the Court again and again and since many Justices will hear multiple cases on topics like abortion or LGBTQ rights, most sophisticated issue advocates try to do more than win a favorable decision in the pending case.[217] They make arguments today that may bear fruit tomorrow. Voices briefs can be part of a long-term strategy of persuasion, and judges do sometimes change their minds. For example, after twenty years of acceptance of the death penalty, Justice Blackmun famously wrote, in a "rather ordinary case among many,"[218] that "[f]rom this day forward I no longer shall tinker with the machinery of death."[219]

Second, voices briefs can serve important roles even for the Justices who find themselves firmly on one wing of the Court—Justices unlikely to be persuaded to change their minds on the merits.[220] Voices briefs filed in support of a Justice's preexisting leaning may provide support for that position, as in the *Obergefell* oral argument example.[221] And voices briefs filed in support of the opposite position nonetheless may affect the tone and content of an unfavorable opinion. Ideally, voices briefs would encourage a Justice to write an opinion that recognizes and respects opposing views. Opinions that recognize the arguments on both sides are more persuasive, showing that the Court fairly and seriously considered all arguments—and persuasion is, after all, one of the most important purposes of a judicial opinion.

Third, the Court has a responsibility to model better public discourse for this fractured nation. The Court's opinions should avoid exacerbating the nation's deep divides. What's more, they should show us how to listen and talk to each other when we disagree. An opinion that recognizes and respects all positions can provide a modicum of healing because readers who lose at least will feel

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215. *Truth and Reconciliation Commissions*, INT'L JUST. RESOURCE CTR., http://www.ijr-center.org/cases-before-national-courts/truth-and-reconciliation-commissions/.

216. PHELPS, *supra* note 213, at 52-73 (explaining the special need for storytelling when the state cannot grant the relief sought).

217. *See* Lynn M. Paltrow, *Missed Opportunities in* McCorvey v. Hill*: The Limits of Pro-Choice Lawyering*, 35 N.Y.U. REV. L. & SOC. CHANGE 194, 201 (2011) ("Winning in the short term . . . is not always the point.").

218. Linda Greenhouse, *Death Penalty Is Renounced by Blackmun*, N.Y. TIMES (Feb. 23, 1994), http://www.nytimes.com/1994/02/23/us/death-penalty-is-renounced-by-blackmun.html.

219. Callins v. Collins, 510 U.S. 1141, 1145 (1994).

220. For example, it is unlikely that voices briefs could cause Justice Sotomayor to change her attitude toward abortion or voter identification regulations, or cause Justice Thomas to change his attitude toward marriage equality or gun control measures.

221. *See supra* note 83 and accompanying text.

heard, and readers who win may come away with a greater understanding of those on the other side of the issue.

This discursive process is at the heart of the feminist concept of rhetorical listening. As modern feminist scholarship explains, rhetorical listening is a conscious choice to be open to the perspective of another. Instead of reading merely to devise a reply, we read to understand another's experience.[222] Closely related to restorative justice,[223] rhetorical listening invites affected parties to share their own stories and to listen to the stories of others, a goal that might be worthy of more attention when the Court is deciding highly charged issues of constitutional law.

In recent years, the Court has acknowledged and relied upon a *legal* concept of dignity.[224] What I am suggesting here is *procedural* dignity. Procedural dignity applies equally to both sides. A Justice firmly committed to marriage equality might not understand why opponents want to impose their personal choice as a matter of law upon others. Reading the brief filed by Same-Sex Attracted Men and Their Wives in *Obergefell* might help that Justice understand how the situation looks to at least some opponents of marriage equality.[225] She might sense that these young men are trying to preserve a world whose structures support their daily struggle to choose a different life—to marry a woman, have a family with her, and live in a community that validates their choice. Such a Justice might even imagine a sense of desperation beneath the stories of these young people as they try so hard to hang on to a world fast slipping away. When that Justice sits down to write her opinion, she might be more inclined to treat those young people with respect and empathy, even as she rules against their arguments.

To be clear, the assertion here is not that the Supreme Court should become a forum for touchy-feely therapy, nor that allowing public storytelling will magically heal the deep divides that afflict the nation's common life. Rather, while going about its normal deliberative process, the Court might choose to be more aware of the effect of its language on other public discourse. A caustic tone in Supreme Court opinions is not helpful either for democratic governance in general or for the public's respect for the Court itself.[226]

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222. *See generally* KRISTA RATCLIFFE, RHETORICAL LISTENING: IDENTIFICATION, GENDER, WHITENESS (2005).

223. *See supra* notes 214-216 and accompanying text.

224. *See* Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3 (2015) (tracing an expanding legal concept of dignity through the holdings of four cases raising issues of LGBT rights).

225. Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents & Affirmance, *supra* note 48.

226. Greenhouse, *supra* note 41 (citing a poll showing that more people disapprove of the Supreme Court (50%) than approve of it (45%)).

VI. THE THEORETICAL PLACE OF NON-PARTY STORIES

If voices briefs can serve these crucial roles, it becomes all the more important to ask whether these briefs are precluded by procedural rules or legal theory. As this Part will show, they are not. No formal rule limits the filing of any kind of amicus brief, but we still must ask whether these briefs run afoul of long-established principles and test them against traditional theories of legal reasoning, jurisprudence, and constitutional interpretation. The treatment here of this expansive question must be introductory only, but can begin what should ultimately become a more robust discussion.

A. Basic Forms of Legal Reasoning

Most legal analyses begin by considering what the governing rule or standard might mean in a given situation. Perhaps surprisingly, voices briefs can play a supporting role in analyzing a constitutional standard. The *Thornburgh* NARAL brief is instructive.[227] In *Meyer v. Nebraska*,[228] the 1923 case challenging a state law restricting foreign-language education, the Court declared:

> Without doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[229]

The NARAL brief used these six aspects of liberty as the organizing structure for its stories. Beneath headings for each aspect of liberty, the brief shared stories demonstrating how the right to an abortion implicates that liberty interest. The final subsection, discussing "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,"[230] shared stories of women simply trying to live the kinds of fulfilling and responsible lives men could take for granted.[231] As one woman explained:

> I kept being struck by the ultimate unfairness of it all. I could not conceive of any event which would so profoundly impact upon any man. Surely my husband would experience some additional financial burden,

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227. NARAL Brief, *supra* note 27; *see generally* Edwards, *supra* note 10.
228. 262 U.S. 390 (1923).
229. NARAL Brief, *supra* note 27, at 22-23 (quoting *Meyer*, 262 U.S. at 399).
230. *Id.* at 28 (quoting *Meyer*, 262 U.S at 399).
231. *Id.* at 28-30.

> and additional "fatherly" chores, but his whole future plan was not hostage to this unchosen, undesired event. Basically his life would remain the same progression of ordered events as before.[232]

As we have seen, many stories in voices briefs also support policy-based reasoning. They demonstrate the harm of one possible constitutional result or the other. For example, in *Thornburgh,* the Reagan Administration's Solicitor General articulated the question at hand as whether to "return the law to the condition" before *Roe*.[233] NARAL's brief sought to remind the Court of "the condition"[234] before *Roe*:

> Before this Court's decision in *Roe v. Wade*, state governments were free to substitute their political judgments for the personal, moral judgments of women and the medical judgments of doctors. . . . Women obtained illegal abortions despite the illegality and grave risks involved, as these excerpts from the letters reveal:
>
> > I remember Tijuana. I remember bugs crawling on walls as I waited for the "second part" of my abortion to take place. . . . I was sent to a "hotel" to wait three hours—a stinking cesspool of urine, sweat, filthy sheets and bugs—unidentifiable crawling creatures all over the walls, floors and crevices. . . . Where else could I have gone in 1963?[235]

Finally, voices briefs may play an especially important role when the Court is considering a broad holding—a holding that will apply to many individuals in a variety of situations. In such cases, courts typically create and analyze hypotheticals. As Akhil Amar has observed:

> Hypotheticals are the grist of legal reasoning and form an implicit or explicit part of virtually every legal case ever decided and every legal issue ever analyzed outside a courtroom. Even if a judge is sure that the plaintiff in the case at hand—call it case A—deserves to win, the judge must decide how broadly or narrowly to rule. If she adopts a broad rule, plaintiffs in later cases B and C will also deserve to win under the sweeping logic she announces. By contrast, a narrow rule in case A might mean that plaintiffs in later cases B and C will likely or surely lose. . . .

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232. *Id* at 29.

233. Brief for the United States as Amicus Curiae in Support of Appellants at 24, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379), 1985 WL 669620.

234. NARAL Brief, *supra* note 27, at 8.

235. NARAL Brief, *supra* note 27, at 8-9.

> [A] good judge will think carefully about these now-hypothetical cases in crafting the proper rule for the case at hand—case A.[236]

If hypotheticals—the stories of *fictional* non-parties and situations created entirely by the Court's lively imagination—have long been accepted as "the grist of" traditional judicial reasoning, the actual stories of real-life non-parties are surely appropriate as well.[237] Like hypotheticals, non-party stories convey a sense of those who may be affected by the Court's decision. Surely it is at least as helpful to consider actual individuals as it is to consider imaginary individuals.[238]

B. Legal Theory

The broad tent of legal realism, today's most widely accepted jurisprudential theory, sees law as the indeterminate product of a relatively subjective process. Holmes's famous description of early legal realism ("The life of the law has not been logic: it has been experience")[239] strikes a familiar note in the context of voices briefs, which present the Court with human experience. Legal realists believe that law is made by people as the need arises.[240] Realism sees law as reflecting historical, social, political, anthropological, psychological, and economic factors. One might say that legal realism forever unmasked the humanity, complexity, and malleability of the law.[241] Stories of human experience can touch all the factors that, in the realist's view, combine to account for a legal outcome.

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236. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY xiii-xiv (2012).

237. *Id.* at xiii.

238. In fact, this imaginative process has a recognized narrative pedigree. Gary Saul Morson, a literary critic and a leading scholar of Russian and comparative literature, has dubbed this activity "sideshadowing." GARY S. MORSON, NARRATIVE AND FREEDOM: THE SHADOWS OF TIME 6-9 (1994). Sideshadowing defines a field of possible stories, not merely what *did* happen in a particular case but what *might* have happened. These other possible stories shadow the actual stories and demand adjudicative attention, freeing the law from captivity by the stories of the present litigants. *See* Edwards, *supra* note 169, at 26 (discussing the role of "sideshadowing" in enlaring policy considerations); *see also* LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS (4th ed. 2015) (providing a more general description of the history of legal theory in America).

239. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Harvard Univ. Press 2009) (1881); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW li, lv-lviii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

240. CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY 275 (2007) ("[A] good judge unconsciously predicts a law according to the result it will have upon the community at large.").

241. As one scholar noted, realism's critique of formalism "cut so deeply into the premises of American legal thought that no amount of enlightened policy making and informed situation sense could ever really put Humpty Dumpty together again." Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 27 (David Kairys ed., 1982).

Another jurisprudential school—legal process—is seldom mentioned expressly in current jurisprudence but has had a lasting influence on legal theory and law. The legal process school values neutral, fair standards for *how* decisions are made:[242] judges should curb their own preferences in favor of neutrality. At first glance, the concern for a neutral process might suggest that we should leave narrative out of the picture, but since the court's legal interpretation will bind parties and non-parties alike, fairness requires a voice for non-parties as well. And as Section V explained, cognitive studies indicate that the best way to minimize inevitable subjectivities may be to expand—not contract—the pool of stories.[243] If so, the paramount concerns of the legal process school would be best served by preserving a place for voices briefs.

The critical schools (critical legal studies, critical race theory, and feminist legal theory) support the use of voices briefs as well. Critical theory considers law to be produced largely from the perspectives of those in power.[244] It views legal reasoning as a *post hoc* rationalization rather than a method of decision making.[245] Therefore, instead of articulated rules, which are, after all, simply political artifacts, critical theorists turn to narratives about the experiences of marginalized groups.[246] Voices briefs can be the vehicle for relating those stories.

Narrative has a particularly close relationship with feminist theory. For over thirty years, feminist scholars have recognized narrative's key role in women's moral choices. In 1982, Carol Gilligan published her groundbreaking book, *In a Different Voice: Psychological Theory and Women's Development*, in which

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242. BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 159 (1994).

243. *See* discussion *supra* Part IV. On a similar note, voices briefs can help to address the inherent advantage of organizational plaintiffs, who have complete freedom to choose the most appealing individuals to become the named plaintiffs and therefore the human faces of the litigation. Non-party stories also can help to level the playing field when the issues affect marginalized or unappealing groups or implicate social and political issues on which judges will already have a preexisting leaning if not a confirmed opinion, thus enhancing procedural fairness.

244. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988) ("[A]ntidiscrimination law represents an ongoing ideological struggle in which the occasional winners harness the moral, coercive, consensual power of law."); *see also* KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 129-33 (1996).

245. *See, e.g.*, PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS ix (1987) (arguing in favor of a "critical concept of legal discourse as a language of power, as the pursuit of control over meaning and as instrument and expression of domination."); VANDEVELDE *supra* note 244, at 131 ("CLS scholars view legal doctrine as constituting an elaborate facade of legitimacy and inevitability that masks the political and contingent nature of judicial decisions.").

246. For example, in *The Alchemy of Race and Rights*, Patricia Williams eschews the traditional academic style in favor of a form of personal diary written in the first-person and filled with personal and sometimes emotional anecdotes and reactions, often illustrating her points from her own experience. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991). Her very choice of style conveys a jurisprudential point, although it precludes easy summary or proof-texting citations to her theses. *See also* Edwards, *Speaking of Stories and Law*, *supra* note 206, at 160-63; *see generally* Edwards, *supra* note 161.

women's stories were treated for the first time as an important part of moral development and decision making.[247] In 1986, four developmental psychologists published *Women's Ways of Knowing: The Development of Self, Voice, and Mind*, in which voice plays a crucial role in women's methods of constructing knowledge.[248] If narrative is instrumental in meaning-making for women, the silencing of narrative[249] is a potentially gendered act.[250] Thus, if we want a judicial system that dispenses justice to all its citizens, including women, we should think long and hard before silencing stories in the judicial process.

C. Theories of Constitutional Interpretation

In constitutional cases, the most relevant theoretical questions often involve theories of constitutional interpretation rather than more general theories of jurisprudence. Many scholars identify interpretive bases by analyzing long-accepted judicial practice—a kind of Aristotelian process in the sense that it observes what is being done and works up the ladder of abstraction from there. For these scholars, constitutional interpretation is a rhetorical *practice,* and the interpretive methods grow from the practice itself.[251]

For example, Philip Bobbitt has identified six interpretive norms (modalities) to infuse underdetermined constitutional language with meaning: the historical, textual, structural, doctrinal, ethical, and prudential modalities.[252] Bobbitt's ethical and prudential modalities are the most natural theoretical homes for

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247. As part of studying women's moral development, for perhaps the first time in social science literature, Gilligan's book allowed women to tell their own stories in their own voices and with their own dignity and integrity. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

248. MARY FIELD BELENKY ET AL., WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986). The book identifies five epistemological methods and their roles in women's mental processing. The first is silence. *Id.* at 23-34. According to the authors, when women are silent, they tend to experience themselves as unable to construct or process knowledge and instead as subject to the authority of others. Women spoke of the importance of having a voice, both metaphorically and literally. They spoke of being silenced, feeling "deaf and dumb," and having no words, in contrast to speaking up, talking and listening, and saying what they mean. *Id.* at 24. By contrast, "[c]onstructed knowledge," another epistemological method, values contextual knowledge and both subjective and objective strategies of understanding. *Id.* at 131-52

249. RATCLIFFE, *supra* note 222, at 79 ("[D]ysfunctional silence . . . resincrib[es] a powerful cultural desire in the U.S. *not* to talk publicly and cross-culturally about how gender and race intersect.").

250. BELENKY ET AL., *supra* note 248, at 17-20.

251. Ian Bartrum, *The Modalities of Constitutional Argument: A Primer*, *in* LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 203-215 (2012).

252. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991). An even more flexible approach to constitutional interpretation arises from the idea of the "living" or "evolving" constitution. Proponents of a living constitution understand the document to be designed to change with the times. Terms like "due process" are thought to establish fundamental values to be applied by contemporary judges to contemporary times. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); *see also* KATHERINE A. CURRIER & THOMAS E. EIMERMANN, THE STUDY OF LAW: A CRITICAL THINKING APPROACH 135 (2009). If voices briefs can play a legitimate role in a modalities approach, they are even more certainly legitimate in a living constitution approach.

voices briefs. The ethical modality looks to fundamental moral commitments reflected in the Constitution, and the prudential modality balances competing interests (costs and benefits), attempting to accommodate those interests in a useful and reasonable way.[253] The stories in voices briefs demonstrate the human costs and benefits of a particular constitutional result, thus helping to address the concerns of the prudential modality.[254]

Another leading constitutional scholar, Akhil Amar, has developed a richly textured set of philosophical and social commitments that influence constitutional interpretation.[255] Amar argues that constitutional "text itself, when properly approached, invites recourse to certain nontextual—unwritten—principles and practices."[256] He writes that we should "read between the lines," understanding "the difference between reading the Constitution *literally* and reading the document *faithfully*."[257]

Amar points to at least three interpretive influences that are relevant to voices briefs. In Chapter Three ("Hearing the People") of *America's Unwritten Constitution*, Amar recognizes the role of culture and evolving practice in considering "the constitutional status of textually unnamed or underspecified rights."[258] He refers to a lived experience of liberty, recognizing that "judges should pay and do pay close attention to how various rights are embodied in citizens' daily rhythms and embedded in powerful customs."[259] He closes the chapter by suggesting that "what should ideally emerge is a genuine dialogue among judges, legislators, and ordinary citizens."[260]

Chapters Seven and Eleven also support a role for the lived experience of the People. Chapter Seven recognizes feminism's legitimacy in constitutional interpretation,[261] and Chapter Eleven recognizes a role for judicial conscience and humanity.[262] Amar writes: "The success of our national constitutional project

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253. *Supra* Bobbitt, note 252 at 12-13; BRIAN L. PORTO, THE CRAFT OF LEGAL REASONING 80-81 (1998).

254. In *Obergefell,* for example, voices briefs in support of marriage equality were offered to show the costs of inequality to LGBT citizens, their families, and especially their children. Brief for Kristin M. Perry, et. al., *supra* note 85; Brief of Ninety-Two Plaintiffs, *supra* note 92; Brief of the County of Cuyahoga, Ohio, *supra* note 90; Brief of PFLAG, Inc., *supra* note 45; Brief of Family Equality Council et. al., *supra* note 90; Brief of Marriage Equality USA, *supra* note 90.

255. "The take-home lesson of our story thus far is that sound constitutional interpretation involves a dialogue between America's written Constitution and America's unwritten Constitution. The latter, at a minimum, encompasses various principles implicit in the written document as a whole and/or present in the historical background, forming part of the context against which we must construe the entire text. . . . Rather we have been exploring a variety of unwritten sources that intertwine with the written text—sources such as . . . preconstitutional and postconstitutional practices and precedents; principles and purposes implicit in various patches of constitutional text; and . . . structural deductions from the constitutional system viewed holistically." AMAR, *supra* note 236, at 19-20.

256. *Id.* at xiii.

257. *Id.* at 5.

258. *Id.* at 97.

259. *Id.* at 97.

260. *Id.* at 138.

261. *Id.* at 277-305.

262. *Id.* at 417-48.

requires that certain things must always exist, and exist in abundance, in America. *Virtue*, *honor*, and *conscience* rank high among these essential elements."[263]

All this proof-texting should not be taken to mean that either Bobbitt or Amar would support resolving a constitutional issue by storytelling. Bobbitt has not addressed the role of narrative, and Amar is still, when all is said and done, a "text-centric" originalist.[264] The point here is that, in both Bobbitt's and Amar's constitutional worlds, there is room for considering the lived experience of the People. Voices briefs provide glimpses of that lived experience.

VII. LOOKING AHEAD

The use of voices briefs has increased dramatically in recent years, and we have no reason to suspect that, absent Court intervention, that trend will abate. As vehicles for expression, especially by marginalized groups, the briefs serve important purposes. Their role in persuasion may even be necessary to respond to the preexisting biases that afflict us all, including judges. Just one more pair of questions remains: What legitimate concerns do voices briefs raise, and how might we preserve their role while minimizing undeniable concerns?

A. Concerns

Despite the value of voices briefs generally, legitimate concerns do exist. Voices briefs add to the number of amicus filings before the Court, which continue to increase in the most controversial cases each term.[265] But while a large number of amicus filings may engage judicial resources and complicate case management, nothing unique to voices briefs distinguishes them on this basis.[266] In fact, it is considerably easier to read and digest a voices brief than to read and digest a brief making traditional legal arguments. Thus, any response to the increase in amicus filings should not single out voices briefs.[267]

Three legitimate concerns do exist, however. The first is the question of reliability. Evidentiary rules establish a process for testing the reliability of adjudicative facts, but the rules of evidence do not help on appeal. As earlier sections have shown, the value of non-party stories does not depend as much on careful evidentiary accuracy as does the value of trial court evidence. Nonetheless, it is disturbing to imagine an appellate process that might include a set of fictional

263. *Id.* at 419.

264. James Ryerson, *'America's Constitution': A Liberal Originalist*, N.Y. TIMES (Nov. 6, 2005), http://www.nytimes.com/2005/11/06/books/review/americas-constitution-a-liberal-originalist.html (reviewing AMAR, *supra* note 236).

265. *See supra* notes 19-25 and accompanying text.

266. This observation is especially true since, most likely, a potential amicus filer precluded from filing a voices brief simply would seek to file a more traditional brief.

267. While concern about the number of amicus filings is not particular to voices briefs, some of the suggestions discussed in the following section might help reduce the number of amicus filings overall.

stories masquerading as real, especially in recent months when "fake news" and "alternative facts" have entered public discourse to an unprecedented degree.[268]

Rules of professional conduct offer only small comfort. Amicus briefs can be filed only by an attorney admitted to practice before the Court,[269] and rules of professional conduct prohibit lawyers from knowingly making false statements of fact to the Court.[270] But the rule prohibits only "knowing" false statements, so in theory, the lawyer's client might create fictional stories without the lawyer's knowledge. And some lawyers do violate professional rules, especially if they believe the odds of discovery to be slight.

Some risk does exist, then, but we must ask how great the risk might be. Realistically, it seems unlikely that a lawyer, an organization, or a group of individuals would simply fabricate an entire set of stories claiming, for instance, to have had an abortion when they did not.[271] The more realistic concern is that these storytellers may exaggerate or misstate their experience.

That risk is real, but it must be balanced against the realities of judicial decision making. As we have seen, judges are already inevitably influenced by a variety of background facts, many of which are completely untested and some of which are expressly fictional. Social science information—the kind of information that has been presented to the Court for over a century—may be no more reliable than the stories in a voices brief.[272] And judges rely expressly on a wide variety of extra-record sources whose accuracy is untested—including internet sites, magazines, experiments with video games, letters, and newspapers.[273] They also are influenced by their own experiences and those of family and friends, and by the books they have read (including fiction) and the movies, television shows, and documentaries they have seen.[274] These extra-record sources and influences largely are invisible to advocates and citizens and thus are immune from testing

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268. James Carson, *What Is Fake News? Its Origins and How It Grew in 2016*, TELEGRAPH (London) (Mar. 16, 2017), http://www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/ (discussing the history and current status of "fake news"). Despite our current heightened sensitivity to false reports, the stories in voices briefs should not be confused with false evidentiary reports, such as reports that Barack Obama was not born in the United States. Michael D'Antonio, *The Real Reason Trump Clings to Birtherism*, CNN (Sept. 16, 2016), http://www.cnn.com/2016/09/10/opinions/why-trump-clings-to-birtherism-dantonio/ (describing claims that Barack Obama was not born in the United States and is a Muslim). In voices briefs, each person describes only her own personal experience with the issue presented to the Court.

269. "An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5." Sup. Ct. R. 37(1).

270. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2017) (requiring candor toward the tribunal).

271. It is unlikely that a group of lawyers, judges, students, and law clerks would falsely claim to have had abortions. *See* Brief of MacAvoy et al., *supra* note 1. The Rules of Evidence have long recognized such estimates of likelihood. For example, Federal Rule of Evidence 804 establishes dying declarations as hearsay exceptions because, while not impossible, it is unlikely that a person who believes that her death is imminent would lie.

272. *See supra* Part II.

273. *See supra* notes 121-133 and accompanying text.

274. *See supra* notes 141-160 and accompanying text.

or refutation except by studies and stories that can broaden the Court's view of the issue.

And it is broadening that we are talking about here, after all. A personal story in a voices brief shares the experience of one person. It does not attempt to refute the individual experience of someone else. It seeks only to show the Court that there may be more to the matter than is apparent from the stories with which the Court is already familiar. Each story finds its own small place within a wide narrative sea already awash with many other stories. Each story is just one tiny facet of a large, complex, and inevitable set of narrative influences.

Those other narrative influences include stories that circulate widely in the culture, often with little factual basis.[275] For example, consider this recent, widely shared, anonymous Facebook meme: "It is wrong to tax a working person almost to the breaking point, then give it to a person who is able to work but refuses to." Two inaccurate cultural stories combine to produce that message: (1) the master story that the financial distress of working people is caused by exorbitant taxes (rather than by legislatures refusing to raise the minimum wage, employers manipulating working hours to avoid offering health care, or a myriad of other systemic and personal causes); and (2) the master story that tax dollars are distributed routinely to people who could get a job but instead choose a life of leisure on welfare.

The actual stories of individuals may be the only way to challenge these false cultural stories. Certainly, advocates would want to offer social science studies and statistics to disprove the stories, but, as Part IV has shown, statistics and social science studies can operate to increase, not decrease, the influence of preexisting cultural beliefs.[276] Anecdotal messages such as those in voices briefs may be the best way to loosen the grip of preexisting values commitments.[277] And after decades of voices briefs, to date we have no indication that the Justices are confused about the nature of the stories, nor would we expect them to be.[278]

Given (a) the relatively low risk of complete fabrication, (b) the need for a way to counter pre-existing bias, (c) the need for a way to counter inevitable extra-record sources, (d) the ability of opposing parties to offer competing narratives, (e) the tiny role of any individual story compared to many others, and (f) the sophistication of the judicial audience, the reliability risk is acceptable. Nonetheless, as the next section describes, some steps can be taken to reduce reliability concerns.

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275. For a discussion of the role of master stories in law, see Linda H. Edwards, *supra* note 161, at 49-53.

276. *See supra* notes 189-192and accompanying text.

277. *See supra* notes 193-197and accompanying text.

278. Even Justice Kennedy, *if* he was referring to the stories in *Carhart*, carefully qualified the reference: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice . . . ." Gonzales v. Carhart, 550 U.S. 124, 159 (2007). These are not the words of a Justice who is confused about whether voices briefs constitute evidentiary facts.

The second concern is the question of relevance. The stories related in voices briefs should not be offered simply to prompt a generalized emotional reaction for or against a topic or practice. Rather, the stories should relate to the particular issue the Court must decide. For example, in *Whole Woman's Health*, the Texas legislature had passed sweeping regulations purportedly aimed at protecting women's physical health by raising the medical standards applicable to abortion clinics.[279] The new standards had caused the closure of over half the clinics in the state. The issue for the Court was whether these regulations represented legitimate medical requirements rather than a masked effort to make abortion less available.[280] Pro-life voices briefs offered stories describing psychological injuries from abortion generally—stories completely unrelated to the medical practices at issue in the case.[281] These stories raise relevance concerns, for voices briefs should offer only stories that relate to the relevant legal issue. Thus, the following section proposes a way to tighten the connection between the proffered stories and the legal question at issue.

The third realistic concern is that non-party stories may actually be adjudicative facts in disguise. No Supreme Court filer should use the appellate process to smuggle new evidentiary facts into the record. For example, *Whole Woman's Health* put directly at issue the evidentiary question of whether and to what extent the conditions in Texas abortion facilities raised legitimate health concerns. Facts describing the conditions in those Texas clinics would seem to be evidentiary facts. Yet, pro-life appellate briefs offered stories from Texas women relating substandard abortion practices in Texas.[282] Those stories may overstep the line between adjudicative facts and legislative facts. As the next section suggests, the Court should increase scrutiny of any appellate brief that offers what may amount to untested evidentiary facts.

Finally, the Court's own procedural rules complicate all three of these concerns. Under the Court's rules, parties may and often do grant blanket consent to the filing of amicus briefs,[283] thus short-circuiting screening as part of the consent process. But even in the absence of blanket consent, the Court's rules all but preclude meaningful pre-filing screening. Rule 37(1) admonishes amicus filers not to file briefs that duplicate the arguments made by the parties, but Rule 37(3)(a) requires that amicus briefs be filed within seven days after the filing of the brief for the party supported. Thus, in theory, Rule 37 seems to contemplate

279. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

280. *Id.*

281. *See, e.g.*, Brief of Amicus Curiae Priests for Life in Support of Respondents at 8-11, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274).

282. Two briefs offered stories from Texas women who had abortions and from Texas abortion providers describing their experiences with the facilities. Amicus Curiae Brief of Former Abortion Providers et al. in Support of Respondents app. at A1-12, B1-5, C1-8, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274); Amicus Curiae Brief of 3,348 Women Injured by Abortion and the Justice Foundation in Support of Respondents for Affirmance, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274).

283. Sup. Ct. R. 37(3)(a).

that a conscientious amicus filer would (1) write a draft of the brief and reserve a spot with the printer despite not yet knowing whether the brief will be filed; (2) await the filing of the party's brief and quickly read it; (3) decide whether the proposed amicus arguments would be duplicative; (4) if not, seek consent from all parties (including from the party whose attention is, at that point, focused with laser-like precision on the newly filed opposing brief and on drafting its own response);[284] (5) receive consent from the parties; (6) have the brief printed;[285] and (7) file the brief. Steps two through seven would have to be accomplished within seven days. Even in less controversial cases, this timing is, practically speaking, impossible. In controversial cases—the very cases in which voices briefs are most likely to be filed—the large number of briefs seeking consent[286] within that short window would exacerbate an already impossible situation.

Understandably, as a practical matter, this is not how amicus practice unfolds. Amicus filers decide to file well before they know what the parties or any other amici will argue. The rules simply do not permit filers to await the parties' briefs to decide whether they have something new to say. Some amicus filers subsequently work informally with the supported party, coordinating strategies. Others do not. If no blanket consent has been given, filers seek individual consent while their brief is being written. Parties generally consent without having time to review the amicus brief for which consent is sought. Printing is arranged and often accomplished nearly simultaneously with or shortly before the supported party's brief is filed. Thus, under the Supreme Court's own rules and customary Supreme Court practice, pre-filing screening by the opposing party—the party with an incentive to screen—is essentially impossible.[287]

The practical impossibility of evaluating a proposed brief applies to all amicus briefs, but the difficulties may be greater for voices briefs and briefs relying on social science information. Briefs making traditional legal arguments may be easier for the parties' lawyers to evaluate because they are already deeply immersed in the applicable law. If they were to review the brief before consenting, which generally they do not, they would at least be well versed in the legal arguments. Voices briefs and social science briefs, however, may rely on sources that are completely new to the parties and their lawyers—sources the lawyers have little ability to evaluate under intense time pressure. Thus, appellate procedure essentially precludes meaningful pre-filing screening either to enforce the non-

284. Consent sought before the filing of the party's brief would preclude the opposing party from insisting on compliance with the "no-duplication" rule.

285. Because it is a significant expense, printing is unlikely to precede the decision to file.

286. *See supra* notes 12-15 and accompanying text.

287. This Article's scope does not include the question of whether the Court's non-duplication standard is or can be effective, but the timing contemplated by Rule 37 is instructive on that question as well. Rule 37's timing precludes careful compliance with the non-duplication standard by even a conscientious amicus filer. The timing requires an amicus filer to await the filing of the party's brief in order to determine whether the amicus brief would duplicate the party's arguments. The amicus filer then has seven days in which to re-draft and file the amicus brief, all while seeking consent and allowing for three or four days for printing.

duplication standard or to test information for reliability, relevance, or legislative fact.

Supreme Court rules create another procedural unfairness. Currently, amicus filers supporting the respondent can rebut amicus briefs filed in support of the petitioner, thus relieving the respondent from the need to use precious pages to rebut an amicus brief. The petitioner, however, is the only participant capable of responding to an amicus brief supporting the respondent because the only filing opportunity remaining after pro-respondent amicus briefs are filed is the petitioner's (short)[288] reply brief.[289]

Whole Woman's Health again serves as an example. Women Injured by Abortion (WIA) had been an amicus filer in the Fifth Circuit and was expected to be an amicus filer in the Supreme Court as well. In the Fifth Circuit, WIA's amicus brief had related stories describing psychological injuries attributed to abortion, making the implicit argument that abortion injures women's mental health and therefore any regulations that limit abortion are valid protections of women's health.[290] Because the pro-choice argument was in the procedural position of the petitioner at the Supreme Court level, the only available way to rebut those anticipated arguments without sacrificing space in the Petitioner's Reply Brief was for a pro-choice amicus filer to cite to and rebut WIA's Fifth Circuit amicus brief.[291] Unanticipated pro-respondent amicus filings could not be rebutted in this manner, however, and would therefore require space in the petitioner's reply brief.

This section has recognized three legitimate concerns— reliability, relevance, and the potential misuse of adjudicative facts—all of which are somewhat exacerbated by the Court's procedural rules. But preserving a role for voices briefs is preferable to limiting their use in ways that ignore modern cognitive science and ancient rhetorical principles, that silence the voices of the governed, or that secretly smuggle in the adoption of a limiting jurisprudential view. The choice to preserve a role for voices briefs is bolstered by the possibility of adopting modest reforms that can reduce understandable concerns. The next section proposes such reforms.

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288. A word limit of 15,000 words applies to the petitioner's opening brief and the respondent's responsive brief. The petitioner's reply brief, however, must not exceed 6,000 words. Sup. Ct. R. 33(1)(g)(v)-(vii).

289. The petitioner's reply brief is to be filed thirty days after the respondent's brief, and thus, twenty-three days after the amicus briefs supporting the respondent. Sup. Ct. R. 25(3).

290. Brief of Women Injured by Abortion, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (No. 14-50928).

291. Brief Amici Curiae Supporting Petitioners for National Advocates for Pregnant Women et al. at 27-30, *Whole Woman's Health*, 790 F.3d 563 (No. 14-50928).

B. Preserving and Managing a Role for Voices Briefs

Voices briefs should be tested by asking three questions: Are the stories reliable enough? Are they relevant enough? Are they too relevant because they are actually adjudicative facts?

1. Reliability

For reliability, legal process looks primarily for competence (the person speaking is competent to make the statements) and accuracy (the statements are likely to be accurate for their intended purposes). We seek only the degree of reliability appropriate for the use to which the facts will be put. Currently, voices briefs vary in their assurances of competence and accuracy. Some stories are told by the person who experienced the events, while others are related by third parties, including journalists and researchers with varying degrees of neutrality. Some relate conclusions for which the speaker is the most competent source, such as her own emotional reactions or the "who, what, when, and how" of particular events in her own life. Others offer expert conclusions the speaker seems unqualified to make, such as the appropriateness of certain medical decisions or matters of medical causation.

For assurance of accuracy, some amicus filers have provided stories in the form of sworn affidavits. Others have taken the stories from some other published source, ranging from sworn legislative testimony to social science studies, to newspaper articles, to website postings, to letters sought by a partisan organization. Some have provided the parties and the Court with access to the original versions of excerpted stories. For highly personal issues, some names are redacted in public filings. All have cited to the original versions of the stories or have explained the process by which the stories were gathered.

2. Relevance and Legislative Facts

Relevance on appeal requires the stories to be relevant *enough* (by relating to the appropriate legal standard or policy argument) and not *too relevant* (by being adjudicative facts masquerading as legislative facts). Most voices briefs expressly explain the relationship between the proffered stories and the legal and policy questions raised by the case, but voices briefs largely have not addressed the question of whether the proffered stories qualify as legislative facts. As the example from *Whole Woman's Health* demonstrates,[292] some briefs may have trespassed beyond permissible uses of facts on appeal. Responsible use of non-party stories on appeal should include an explanation of the basis for asserting that the stories are not evidentiary facts in disguise.

292. *Supra* note 282.

3. Suggested Improvements

Presently the Justices appear to manage amicus briefs by using their clerks to sort briefs in chambers.[293] A variety of additional strategies—some better than others—could improve reliability and relevance, either by replacing the sorting process or by improving it. For instance, the Court could toughen the consent process with the goal of prohibiting questionable briefs. This approach is problematic for several reasons. It would significantly increase the Court's workload, and depending on how stringently the Court approached requests for consent, the approach might smack of prior restraint, silencing an appellate argument before it can be made.[294] It also would risk sparking internal arguments regarding which sources and forms of argument some Justices would permit other Justices to hear.

Alternatively, the Court could impose post-filing sanctions when the Court believed that a brief had transgressed reliability and relevance standards. Legal sanctions might include striking the brief itself and/or assessing monetary fines against the filer, the lawyer, or both. Striking the brief, however, would increase the Court's workload. Simply ignoring the brief would be much easier than creating a process for decisions to strike that would result in significant disagreements on the Court. The sanction would be difficult to implement as well, since a triggering standard likely would be vague, at least in application.[295] Sanctions also might risk something akin to a chilling effect—discouraging speech offered as part of a judicial proceeding out of concern about legal sanctions.[296] Striking the brief might have a less depressive effect than a fine, but the public humiliation could still cause filers and their counsel to worry about judicial reaction to a brief that uses strategies outside the customary variety, especially in light of the vagueness of the standard. Further, almost inevitably, the reach of post-filing sanctions would be broader than the goal. Lawyers would surely want to build a hedge

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293. Interviews with seventy Supreme Court law clerks refer to such a sorting role. "Nearly all clerks (83%) skimmed or looked over every amicus brief filed," carefully reading only the briefs they found to be useful. "One clerk described his personal system of screening amicus briefs as 'separating the wheat from the chaff.'" Lynch, *supra* note 60, at 43. The late Justice Scalia confirmed that he did not read the amicus briefs as a general rule but rather asked his law clerks to read them and identify those of value. Andrew Wolfson, *Gay Marriage Court Briefs Both Wacky, Profound*, USA TODAY (Apr. 14, 2015), http://www.usatoday.com/story/news/nation/2015/04/14/gay-marriage-court-briefs-wacky-profound/25762729/.

294. While the content of the brief could be disseminated to a broader audience in other ways, it likely could not be communicated directly to the Justices themselves, and it is to the Justices that the amicus filers wish to speak.

295. Professor Garcia has suggested using a standard similar to that created by Rule 11. Garcia, *supra* note 78, at 349-52. Among other things, Rule 11 allows sanctions for knowingly signing litigation documents (1) when presented for an improper purpose, such as to harass, cause delay, or increase litigation costs; (2) when the arguments are frivolous; or (3) when the facts lack evidentiary support. *Id.* That standard has the virtue of familiarity in a trial court setting, but it has not been applied in an appellate context. Developing precedent explaining the standard in the appellate setting would impose significant new work on the Court.

296. "Chilling effect" is used here in its sense as an "emotive argument" rather than as a "substantive component of first amendment adjudication." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 685 (1978).

around the Torah in order to avoid the public humiliation and possible financial consequence accompanying sanctions. Thus, sanctions would be either ineffectual because seldom applied or too effectual, thus risking a depressive effect on advocacy.

Three other less severe options exist, however, all functioning as supplements to the Court's current sorting practice. In ascending order of change, the Court could (1) publicize informal best practices for amicus briefs, especially on matters of reliability and relevance; (2) amend the rules to require amicus briefs to explain their reliability and relevance; or (3) amend the appellate timeline to create a designated window to allow parties to reply to amicus briefs.

Promulgating a set of informal best practices is the easiest and the least reactive. The Court could endorse a set of best practices and couple it with a message indicating that briefs consistent with these practices likely would be considered more persuasive than briefs not in compliance. This approach avoids concerns of prior restraint or speech-chilling, and it does not require amendments to the rules. Nor does it increase the Court's current workload. It might result in some immediate improvement in the quality of briefs, but it could also serve as the first step of a gradual, measured approach to reform. After endorsing a set of best practices, the Court could continue its internal sorting process and monitor amicus briefing. The list of best practices could provide standards by which briefs could be evaluated, either by the parties in the consent process, by parties or other amicus filers in responsive briefs, or informally by the Court in its own deliberations. Best practices, at least for voices briefs, might include the following:

- *Citing to the original sources.* In the case of stories originally gathered by an organization, the brief should explain fully the gathering process and the instruments used.
- *Providing electronic access to original sources.* The brief could provide the Court and the parties with electronic links as the primary form of access, with CD-ROM or flash drive transfer available on request.[297]
- *Including names where possible.* If the stories must be anonymous, an appendix should include a sworn affidavit explaining

297. The Supreme Court's style manual for its own opinions weighs in on the matter of online materials. The manual:

> strongly discourages citation of otherwise-unpublished online materials . . . because of their corruptibility by hackers, natural disaster, technological obsolescence, and similar factors and because of their transient nature. While the Court's opinions will be relied on as authority for decades, even centuries, many of the materials posted on Internet Web sites are deleted within days, weeks, or months after their inclusion. Entire online sites come and go with alarming frequency, and sites regularly adopt entirely new Internet addresses (URLs).

OFFICE OF THE REPORTER OF DECISIONS, SUPREME COURT OF THE UNITED STATES, THE SUPREME COURT'S STYLE GUIDE § 0.2 (Jack Metzler ed., 2016).

the need for anonymity and the manner of assurance of accuracy.

- *Providing the public with hyperlink access to the original versions of the stories.* These more public versions of the stories could be redacted to preserve anonymity.
- *Committing to maintain the hyperlink on a website for a set period of time*, perhaps ten years, in order to minimize link rot.[298]
- *Providing the stories in the words of the individual herself*, where possible, rather than in language crafted by a lawyer, the amicus filer, or another third party.
- *Including in the brief a section explaining the stories' relevance* to the legal standard or policy argument at issue.
- *Including in the brief a section explaining why the proffered stories are legitimately considered legislative facts* rather than adjudicative facts.

Second, moving beyond an informal list of best practices, the Court could require amicus briefs to include a formal section explaining (a) the degree of reliability of their non-legal information; (b) the information's relevance to the legal issue; and (c) the information's legitimate status as legislative fact. Simply drafting such a section would focus the brief-writer's attention on these concerns and likely would result in some improvement. It also would focus attention in chambers on whether the assertions in that section of the brief were accurate. This approach would require a rule amendment and might thus require more effort than the Court would like to invest at this point. But after a few years of working with a set of best practices, this approach could offer a potentially productive second step.

Third, instead of tightening the consent process, the Court could amend the rules to allow the parties (and only the parties) time to file a short reply to amicus briefs (one brief per party, not one brief per amicus brief). The reply could respond particularly to matters of reliability and relevance. This approach would have the advantage of placing most of the enforcement responsibility on the parties rather than on the Court and of assisting the in-chambers sorting process. While the reply brief would add some work in chambers, it would be relatively easy to read and digest. Work in chambers need not await the filing of the reply, so there would be little to no delay.

Amending the appellate timeline could bring another benefit. The newly amended rule could slightly increase the time allowed for filing amicus briefs.

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298. *Id.* "Link rot" is the tendency of websites to be abandoned or removed, so the information becomes unavailable. *See Stopping Link Rot: Aiming to End a Virtual Epidemic*, NAT'L PUB. RADIO (Apr. 26, 2014), http://www.npr.org/sections/alltechconsidered/2014/04/26/307041846/stopping-link-rot-aiming-to-end-a-virtual-epidemic.

The goal would be to permit meaningful attention to the Court's no-duplication standard. Proposed amicus filers could be required to provide their proposed brief to the parties as part of the consent process. They might even be required to include a statement of what their brief would add to the briefs of the parties. The simple requirement of articulating and applying the non-duplication standard might improve compliance by amicus filers, even if parties continue to grant consent freely. To accomplish that goal, filing deadlines would need to change. Amicus filers would need additional time to examine the supported party's brief, to finalize their own brief, and to seek consent to file.

If the rules are amended in one of these forms, the implicit procedural disadvantage to petitioners discussed above[299] could be resolved as well. Allowing the parties to file simultaneous short replies to all amicus arguments as a last step in the briefing process would allow the petitioner to respond without using space in its reply brief, thus placing the parties on more even procedural footing.

These three approaches balance a number of important goals. They would maintain the parties' control over their own litigation while recognizing the legitimate interests of non-parties. They would maintain a level playing field and preserve the rights of others to craft their own appellate arguments without the depressive effect of pre-filing hurdles or post-filing sanctions. They would conserve judicial resources and avoid needlessly increasing litigation costs. Most important, they would preserve a legitimate role for voices briefs while improving the briefs' reliability and relevance.

CONCLUSION

On deeply personal constitutional issues, voices briefs are increasingly common, accounting for more than ten percent of the amicus briefs in *Obergefell v. Hodges*[300] and over twenty percent of the amicus briefs in *Whole Woman's Health*.[301] These briefs tell non-party stories on appeal without the benefit of any evidentiary testing, a potentially troubling practice. Because they were rare in earlier years, they have been the subject of little comment and no analysis to date. Given their dramatically increased use in the last three years, however, the time has come to examine the practice and begin to draw some conclusions.

This Article has begun that analysis. We have seen that voices briefs do not run afoul of any legal requirements, and they fulfill most of the recognized roles long served by other kinds of amicus briefs. In fact, surprisingly, they are far less different from traditional policy briefs than one might initially assume. They are

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299. *Supra* notes 288-291 and accompanying text.

300. A total of 144 amicus briefs were filed in *Obergefell*, *see supra* note 25, and 16 of them were voices briefs, *see supra* note 13.

301. A total of 80 amicus briefs were filed in *Whole Woman's Health*, *see Whole Woman's Health v. Hellerstedt*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole/, and 17 of them were voices briefs, *see supra* note 15.

at least as reliable as some other sources on which the Court increasingly relies. And because voices briefs are publicly submitted, unlike many of the web-based sources the Court now consults, the parties can respond to them rather than being blind-sided by them.

On a theoretical level, voices briefs are consistent with the overall policies behind procedural rules and forms of legal reasoning; with major schools of jurisprudence; and with major philosophies of constitutional interpretation. Further, in light of modern cognitive studies, they may be the only form of persuasion that can address the problem of preexisting bias. In fact, when an argument threatens an important preexisting value held by a judge, the stories in voices briefs may be one of the only ways to encourage that judge to engage in a rigorous traditional legal analysis. Voices briefs permit an appropriate amount of democratic involvement in cases that will govern the lives of parties and nonparties alike. Finally, even if a voices brief stands little chance of affecting the Court's decision on the merits, it can and should affect the Court's tone and attitude toward the losing side.

Voices briefs are not worry-free, however. They raise concerns about reliability, relevance, and the role of legislative facts on appeal. To address all of these concerns, the Article identifies three possible strategies. These strategies comprise a spectrum of judicial responses ranging from a gradual informal response to a more significant formal response. All of them, however, aim to preserve a role for voices briefs in constitutional deliberation.

Why? Because in addition to all the reasons listed above, voices briefs offer a chance for the Court and for all of us to engage in rhetorical listening—a feminist concept often ignored in theorizing about constitutional deliberation.[302] Rhetorical listening is the primary way we can reach beyond our own limiting frames and better understand both ourselves and each other. Voices briefs can be a vehicle for that much-needed understanding.

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302. *See supra* note 222 and accompanying text.

Telling Stories in the Supreme Court: Appendix A

Voices Briefs Filed to Date

Date	Case	Position	Filer
1986	Thornburgh v. Am. Coll. of Obstetricians & Gynecologists	Pro-Choice	National Abortion Rights Action League et al. 1985 WL 669630
1989	Webster v. Reproductive Health Servs.	Pro-Choice	Women Who Have Had Abortions and Friends of Amici Curiae 1989 WL 1115239
		Pro-Life	Feminists for Life of America et al. 1989 WL 1115184
2006	Gonzales v. Carhart	Pro-Life	Sandra Cano, the Former "Mary Doe" of Doe v. Bolton, and 180 Women Injured by Abortion 2006 WL 1436684
2012	Nat'l Fed'n of Indep. Bus. v. Sebelius	Anti-Obamacare (challenging act on pro-life grounds)	Project Liberty 2012 WL 664933
		Pro-Obamacare	Asian & Pacific Islander American Health Forum et al. 2012 WL 549231
			National Women's Law Center et al. 2012 WL 160240
2012	United States v. Windsor	Pro-Marriage Equality	Family Equality Council et al. 2013 WL 4737186

2012	Kiobel v. Royal Dutch Petroleum Co.	International law claims in U.S. courts	Eleven Jewish Former Residents of Iran Whose Family Members "Disappeared" 2012 WL 2165351
2015	Obergefell v. Hodges	Pro-Marriage Equality	Survivors of Sexual Orientation Change Therapies 2015 WL 1021452
			Kristin M. Perry et al. 2015 WL 1048444
			Ninety-Two Plaintiffs in Marriage Cases 2015 WL 1022702
			County of Cuyahoga, Ohio 2015 WL 981535
			PFLAG, Inc. 2015 WL 1004714
			Colage et al. same as below
			Family Equality Council et al. 2015 WL 1022686
			Marriage Equality USA 2015 WL 1022683
			Mattachine Society of Washington, D.C. 2015 WL 1048438
		Anti-Marriage Equality	Organizations That Promote Biological Parenting 2015 WL 1569761
			Same-Sex Attracted Men and Their Wives 2015 WL 1608211
			Religious Organizations, Public Speakers, and Scholars Concerned About Free Speech 2015 WL 1534343
			Parents and Friends of Ex-Gays & Gays 2015 WL 1501659
			Robert Oscar Lopez and B.M. Klein 2015 WL 1519053
			Heather Barwick and Katy

			Faust 2015 WL 1534345
			Dawn Stefanowicz and Denise Shick 2015 WL 1519047
2016	Little Sisters of the Poor Home for the Aged v. Burwell	Anti-Obamacare (challenging contraceptive coverage)	Residents and Families of Residents at Homes of the Little Sisters of the Poor 2016 WL 183800
2016	Whole Woman's Health v. Hellerstedt	Pro-Choice	Kate Banfield et al. 2015 WL 9610343
			National Advocates for Pregnant Women et al. (responses to pro-life voices briefs) 2016 WL 322592
			Physicians for Reproductive Health 2016 WL 74947
			Honorable Wendy Davis et al. 2016 WL 93992
			Janice Macavoy et al. 2016 WL 74949
			Advocates for Youth 2016 WL 67616
			Jane's Due Process, Inc. 2016 WL 67621
			Business Leaders 2016 WL 322595
			Planned Parenthood Federation of America et al. 2016 WL 74963
			National Latina Institute for Reproductive Health et al. 2016 WL 106619
			National Network of Abortion Funds et al. 2016 WL 74959
		Pro-Life	Live Action 2016 WL 537541

			3,348 Women Injured by Abortion et al. not in WL.
			African-American and Hispanic-American Organizations 2016 WL 520077
			Illinois Right to Life 2016 WL 491477
			Priests for Life 2016 WL 447644
			Former Abortion Providers et al. 2016 WL 355060