THE MYTH OF THE NEUTRAL AMICUS: AMERICAN COURTS AND THEIR FRIENDS, 1790-1890

*Stuart Banner**

An *amicus curiae* ("friend of the court") is, in modern American practice, a non-party to a case who nevertheless has a strong enough interest in the case's outcome to file a brief. Common amici include the federal and state governments, ideological organizations like American Civil Liberties Union or the Washington Legal Foundation, commercial groups like the Chamber of Commerce or the AFL-CIO—in short, anyone with a stake in influencing the content of judge-made law. The name *amicus curiae* is generally acknowledged as something of a misnomer, in that very few amici intend primarily to help the *court*. Virtually every amicus hopes instead to advance its own interest by helping one party or the other win the case. This mismatch between name and function is embodied, for example, in court rules that typically require amici to identify the party to the case on whose behalf they wish to argue.

The misnomer is conventionally understood to be a vestige of a time when amici actually did render disinterested advice, for the purpose of helping the court rather than one of the parties. The original role of an amicus, on this view, was that of a neutral bystander, someone without a stake in the outcome of a case, who offered information to the court gratuitously, just to help the court avoid error. The *function* of an amicus has changed, the story goes, but the name has not. This understanding of the amicus's history traces back to a 1963 *Yale Law Journal* article by the political scientist Samuel Krislov, who located the supposed "shift from neutrality to advocacy" in the nineteenth century. Krislov's conclusion has been repeated many times since.[1]

---

* Professor of Law, UCLA. For helpful comments on earlier drafts I'd like to thank Lee Epstein, Joseph Gratz, Dan Klerman, Rick Sander, Eugene Volokh, and Steve Yeazell.

1. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72

In recent years, many courts have even relied on this supposed history to refuse to permit interested non-parties to file amicus briefs, on the theory that only the disinterested are eligible to become amici. As one federal district judge reasoned in 1999, it would be improper to allow a non-party to participate as an amicus where the non-party "has a specific pecuniary interest in the defendant's perspective," or where the non-party "makes no attempt to present itself as a neutral party."[2]

To put the history of the amicus this way, however, only raises further questions, questions that to my knowledge have not been raised previously. Who exactly were these neutral amici in the early nineteenth-century United States? Why were they offering disinterested help to judges? Was there really a time when gratuitous public-spirited legal advice was more plentiful than it is today?

We might approach these questions with some skepticism about the conventional story of a transformation from neutral to partisan amici, because the story fits so perfectly into a common but unrealistically nostalgic version of the history of American legal practice.[3] If one believes that the law was once a noble profession, staffed by officers of the court rather than mere advocates, and if one thinks of American lawyers as having gradually

---

YALE L.J. 694 (1963); Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782 (1990); Lucius J. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 J. POL. 53 (1967); Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2000); Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV 1243 (1992). The idea that amici were once supposed to be neutral is so ingrained that it can be found even in stray comments in papers on unrelated subjects, such as Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 883 (2001); and Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 308 (2000). Among the many cases reciting the same story are Community Assoc. for Restoration of the Env't v. DeRuyter Bros. Dairy, 54 F. Supp. 2d 974 (E.D. Wash. 1999); Overton Power Dist. No. 5 v. Watkins, 829 F. Supp. 1523 (D. Nev. 1993); United States v. Michigan, 940 F.2d 143 (6th Cir. 1991); Time Oil Co. v. Cigna Prop. & Cas. Ins. Co., 1990 U.S. Dist. LEXIS 15146 (W.D. Wash. 1990); Mines v. Olin Corp., 524 N.E.2d 1203 (Ill. App. 1988); Taylor v. Roberts, 475 So. 2d 150 (Miss. 1985); Ferguson v. Brick, 649 S.W.2d 397 (Ark. 1983); and Pime v. Loyola Univ. of Chicago, 1981 U.S. Dist. Lexis 13382 (N.D. Ill. 1981).

2. Sciotto v. Marple Newtown Sch. Dist., 70 F. Supp. 2d 553, 555 (E.D. Pa. 1999); *see also* Goldberg v. City of Philadelphia, 1994 U.S. Dist. LEXIS 9392 (E.D. Pa. 1994); United States v. Andrews, 1993 U.S. Dist. LEXIS 860 (N.D. Ill. 1993); American Satellite Co. v. United States, 22 Cl. Ct. 547 (1991); United States v. Gotti, 755 F. Supp. 1157 (E.D.N.Y. 1991); Tiara Corp. v. Ullenberg Corp., 1987 U.S. Dist. LEXIS 8102 (N.D. Ill. 1987); Leigh v. Engle, 535 F. Supp. 418 (N.D. Ill. 1982).

3. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

degenerated into paid mouthpieces for their clients, then one can readily believe that the institution of the amicus curiae has undergone the same decline. But if one considers the American lawyers of today no more or less venal than ever, the assumed change in the function of the amicus curiae becomes a puzzle.

There is a second reason for revisiting the issue. Krislov wrote in the early 1960s, before the existence of computerized legal research, so he had no easy way of counting cases. He drew his conclusion from a very small sample, a sample that nevertheless included cases clearly at odds with the point he was trying to prove. Today, with the benefit of an enormous word-searchable database of court opinions, we can do better.

In this paper I accordingly investigate the role of the amicus curiae in early American practice. The paper concludes that:

(1) There was never a time in American practice when an amicus was only allowed to offer neutral advice. Some amici were partisan even in the early nineteenth century.

(2) Neutral amici were slightly more common than partisan amici through the 1820s. Beginning in the 1830s, however, partisan amici seeking to advance the interests of their clients became much more common than neutral amici, and remained so through 1890, the study's endpoint.

(3) Before the 1870s most neutral amici did not file written submissions. Neutral amici were almost always lawyers who happened to be present in court, watching the oral argument of a case in which they were not involved, and their advice was given orally and spontaneously.

(4) The change in the middle decades of the nineteenth century, to amici that were much more likely to be representing the interests of a client than offering disinterested advice, was most likely caused by the shift from an oral to a written practice, not by any loss of neutrality on the part of lawyers.

These conclusions are at odds with the conventional understanding of the history of the amicus curiae.

I. THE CASES

I conducted a Lexis search of all state and federal cases decided between 1790 and 1890 containing the words "amicus" or "amici" or the phrase "friend of the court," and then weeded out

the cases in which an amicus did not actually appear.[4] Joseph Gratz, technical editor at *Constitutional Commentary*, then conducted a similar Westlaw search, which picked up some additional relevant cases.[5] The result was 308 reported cases with amicus participation. All 308 cases are listed in the appendix. (In all but a few, the person designated as the amicus was a *lawyer*. Today it is the lawyer's *client* who is designated as the amicus, but that shift in terminology did not occur until the twentieth century.) For each case, I tried to figure out, from the account in the reports, the amicus's motive in appearing. This proved impossible in 56 of the cases, leaving 252 in which I had a sense of why the amicus was participating.

The resulting group of 252 cases has some strengths and some weaknesses as a basis from which to infer the motives of amici generally. These are worth discussing before examining the data.

Because the Lexis and Westlaw databases now include all or nearly all reported American cases, dating back to the beginning of published case reports in each state, we know that the sample is extremely small relative to the total number of reported cases. Lexis includes 692 cases decided in January 1850 alone, for instance, and that is just one of the 1,212 months covered by the sample. It is possible that amici participated in reported cases that are not included in the sample, either because their participation was not reported or because it was reported in a way that was not picked up by our searches. The sample is also heavily weighted toward the end of the century, but in that respect it is representative of the set of reported cases generally, in part because of improvements in case reporting, but mostly because the number of litigated cases rose along with the population.

The total number of *reported* cases, moreover, is very small relative to the total number of *decided* cases, a number that is unknown and most likely unknowable. Worse, the reported cases are a biased subset of the decided cases. They were reported because they were considered the most important—because they were decided by federal courts or by the highest state courts, because they required the development of legal

4. The cases weeded out were primarily those that included dicta about the proper role of an amicus but in which no amicus actually appeared. *See, e.g.*, McFaden v. The Exchange, 16 F. Cas. 85 (C.C.D. Pa. 1811); Commonwealth v. Smith, 9 Mass. 107 (1812).

5. The Westlaw search revealed some cases not available on Lexis, some cases for which the Westlaw text showed amicus participation but the Lexis text did not, and some cases I had overlooked.

principles of wide interest, because they involved high stakes, or because of some combination of these factors. This bias would make the reported cases a poor sample from which to infer the percentage of cases in which amici participated, because amici would almost certainly have been more likely to participate in a case destined to be reported than in an unreported case.

If one is interested in the *motives* of amici rather than the frequency of their appearance, however, the bias created by the reporting system would pose a problem only if the importance of a case disproportionately attracted amici of one variety or another. An important case was probably more likely than an ordinary case to draw an amicus seeking to advance the interest of a client, but it was probably also more likely than an ordinary case to draw an amicus wishing to offer disinterested information to the court. We have no reason to expect that one kind of amicus would have been more attracted to the important cases than the other.

The case reports are a more useful source of data than readers of today's case reports might expect, because nineteenth-century reports often included detailed accounts of oral proceedings in court, summaries of the arguments of counsel, and histories of the progress of the case in lower courts. It is often easier to tell why a lawyer is participating in a nineteenth-century case than it would be today. Over the course of the nineteenth century, however, this style of case reporting gradually began to change into the modern, less informative style, and that change introduces two biases into the data.

First, the likelihood that an oral remark would be reproduced in the reports declines over the century, so the shift in the data from oral to written amicus participation is in part an artifact of the change in reporting style. It is possible that oral amici were more likely to be disinterested than written amici; if so, part of the shift in the data from neutral to partisan amici is also an artifact of the change in reporting style.

Second, the modern style most likely concealed the interest of many amici in the later part of the century. There were probably many lawyers listed simply as "amici curiae" in reports toward the end of the century, who, earlier in the century, would have been described as representing a client or advancing the interest of someone other than the court. The percentage of cases I had to exclude from the sample because of reporting too terse to identify the amicus's motive rises quickly in the later decades,

from 4% for 1861-70, to 15% for 1871-80, to 38% for 1881-90. I do not know whether, by excluding these cases, I am affecting the percentage of neutral amici reported in the remaining cases.

For all these potential weaknesses as a sample, the group of 252 cases also has some strengths. It includes cases from all parts of the country, and from every decade of the century, so it avoids the regional or temporal bias that would result from choosing a more focused sample from a particular state or a particular time period. It includes cases from every type of court, from the United States Supreme Court down to state trial courts. (Summaries of state trial court proceedings were often included in the report of a higher court's decision.) And most important of all, it is the only set of its kind that could be obtained without an enormous and probably impractical amount of archival work.

The cases begin in 1790, the year of the first American case reported on Lexis or Westlaw to involve an amicus. They end in 1890, to encompass the entire period in which the transition from neutral to partisan amici is conventionally believed to have taken place.

II. CLASSIFICATION

As a first cut, I divided the cases into two groups, those in which the amicus was *neutral*, and those in which the amicus was *partisan*. I defined an amicus as "partisan" if he participated in the case in order to advance the interests of someone he represented, or, in cases where it was unclear whether he was representing someone, if he unambiguously appeared on the side of one party or the other. I defined an amicus as "neutral" if he was not representing anyone and he was not unambiguously for one side or the other. Neutral amici were present in 45 cases between 1790 and 1890, partisan amici in 207. As mentioned above, there were also 56 cases in which the report did not provide enough information to make the classification.

There were a few cases in which the report *did* provide sufficient information to classify the amicus as neutral or partisan, but where the classification required me to exercise some judgment, because the categories are not airtight. I have described these judgments parenthetically in the list of cases in the appendix. The distinction between neutrality and partisanship was not difficult to make in the large majority of cases. The distinction would be much more difficult and subjective with cases from the late twentieth and early twenty-first centuries, when many amici

are ideological organizations that could reasonably be characterized either as partisan (in that they have a definite view about what the law ought to be) or as neutral (in that they are indifferent as to the particular parties before the court). Before 1890, however, there were no such institutional ideological amici with an interest in the long-run development of the law. When amici had an interest in a case, it was normally a case-specific interest in who would win.

I then subdivided the *neutral* cases into two groups, those in which the amicus offered his advice orally, and those in which he submitted his advice in writing. There were 34 cases of oral advice, and 11 cases of written advice.

I subdivided the *partisan* cases into five groups, according to the purpose of the amicus's appearance.

1) In some cases, the ostensible amicus was in fact the lawyer for the defendant or the appellee, who was arguing that the court lacked jurisdiction over his client for want of some formal requirement such as service or notice. Lawyers described themselves as amici in this context for fear that if they appeared in their true capacity they would be curing the very defect they claimed deprived the court of jurisdiction. If the defendant's lawyer was asserting, for example, that the case should be dismissed because the plaintiff has failed to give his client adequate notice, his appearance in court *as the defendant's lawyer* would undercut his argument that his client would suffer harm from lack of notice. This use of the amicus device may have originated as a subterfuge, but by the early nineteenth century it was an accepted procedural device for challenging the court's jurisdiction.[6] As the report of one 1823 Connecticut case explained, "the attorney of Judson, then, as amicus curiae, informed the court, that he, Judson, had had no notice of the entry or pendency of the action." When the court decided nevertheless to proceed with the case, Judson's lawyer then formally entered his appearance as

6. For suggestions that this was considered the proper way to raise formal objections to the court's jurisdiction, see Walker v. Taylor, 1 Stew. & P. 298 (Ala. 1832); Whitwell v. Barbier, 7 Cal. 54 (1857). There was some variation among the states in this regard. The practice of appearing as amicus to contest the court's jurisdiction was disapproved in Sexton v. Pennsylvania & New Jersey Steam-Boat Co., 7 N.J.L. 169 (1824), and Taft v. Northern Transp. Co., 56 N.H. 414 (1876). But New Jersey and New Hampshire appear to have been unusual. The sample includes cases in this category from eighteen states plus the federal courts. More than 40 percent of these cases, 31 of 75, come from Alabama. I don't know whether this practice was more common in Alabama or whether the Alabama case reports were simply more informative in this regard than those from other states.

Judson's lawyer.[7] There are 75 such cases in the sample, more than in any other category. In the table below, these cases are entered under the heading "Jurisdiction."

2) In some cases, the amicus was representing a client who had died after becoming a party to the case. The client technically ceased to be a party to the case upon his death, so his lawyer was, strictly speaking, no longer representing one of the litigants. These cases are entered under "Dead party." There are nine of them.

3) In some cases, the amicus was speaking on behalf of a party to the case who was technically unrepresented by counsel. Many of these amici were helping criminal defendants who otherwise lacked a lawyer. The rest were helping a variety of other kinds of litigants, but without representing them in a formal sense. These cases are entered under "Quasi-lawyer." There are 33.

4) In some cases, the amicus was representing a non-party to the case who had an interest in the case's outcome. (This is the dominant function of an amicus today, although today the term refers to the client rather than the lawyer.) These non-parties were often creditors of one of the litigants, or insurance companies who might have been liable to one of the litigants. These cases are entered under "Non-party." There are 52 cases in this category, second only to the category of lawyers appearing to challenge the court's jurisdiction.

5) Finally, there are some cases in which the reports unambiguously list the amicus as supporting one side or the other but provide no further information. These cases are entered under "Unclear." There are 38.

This classification scheme resulted in seven categories of cases—two under the general heading of "Neutral," and five under the general heading of "Partisan."

I then further divided the cases by decade. There are only twenty cases in the sample from the period 1790-1820, so I treated this period as a single unit rather than dividing it into decades. This division resulted in eight chronological classifications, the 1790-1820 period plus the following seven decades.

7. Judson v. Blanchard, 4 Conn. 557 (1823).

III. RESULTS

The results of this classification are summarized in the following table.

Amicus Participation in Reported
American Cases, 1790-1890

Years	Neutral		Partisan					Not known	Total	% neutral
	Oral	Written	Juris-diction	Dead party	Quasi-lawyer	Non-party	Unclear			
1790-1820	13	0	5	0	1	1	0	0	20	65%
1821-1830	7	2	4	1	2	2	0	2	20	50%
1831-1840	3	1	7	1	2	4	0	0	18	22%
1841-1850	4	0	13	2	1	1	1	1	23	18%
1851-1860	2	0	15	2	7	9	0	2	37	6%
1861-1870	3	0	9	1	4	4	2	1	24	13%
1871-1880	1	3	10	2	4	16	10	8	54	9%
1881-1890	1	5	12	0	12	15	25	42	112	9%
Total	34	11	75	9	33	52	38	56	308	18%

The most important set of figures is in the far right column, which presents, for each time period, the percentage of cases in which the amicus was neutral. (In calculating these percentages I did not include in the denominator the 56 cases in which the reports provide insufficient information as to whether the amicus was neutral or partisan.) There were more neutral amici than partisan amici in 1790-1820 (thirteen of twenty cases). In 1821-1830 the numbers of neutral and partisan amici were equal. In every decade from 1831-1840 through 1881-1890, however, there were many more partisan amici than neutral amici. After 1831-1840 the percentage of amici who were neutral never rose above 18% in any decade.

These percentages suggest that since 1790 there has never been a time in American practice in which the amicus curiae was exclusively neutral. The amicus was most neutral before the 1830s, but even then it was a device that seems to have been un-

derstood to be available regardless of whether the amicus was neutral or partisan.

Of the 22 cases involving neutral amici in the period 1790-1830, there were only two in which the amicus submitted written arguments. Most of these neutral amici were lawyers who happened to be in the courtroom when a case was being argued, and who made what appear to have been spontaneous oral suggestions to the court, typically in order to inform the court of precedents of which the court was unaware.

In 1800, for example, when the Attorney General of Pennsylvania asked the state's Supreme Court to try a particular case ahead of others that were waiting to be tried, Alexander Dallas happened to be in the courtroom. Dallas was Pennsylvania's commonwealth secretary, but he also had a sideline in compiling and publishing the opinions of Pennsylvania courts and the U.S. Supreme Court. Dallas mentioned to the court, as an amicus, that he knew of a recent and apparently unreported case in Pennsylvania's federal court, in which U.S. Supreme Court Justice William Patterson had ruled that the federal government was entitled to have its cases tried before cases involving other parties.[8]

Another example: In 1811, as the Massachusetts Supreme Court was empanelling the term's grand jury, it turned out that John Tucker, one of the grand jurors, was also the source of the complaint against one of the suspected criminals whose cases the grand jury would be considering. Joseph Story happened to be in the room, perhaps as a practicing lawyer, or perhaps because he was in the midst of saying farewell to the local legal community after having just been appointed to the U.S. Supreme Court. Story suggested, as an amicus, that Tucker would be unsuitable to serve on the grand jury, and recalled that he had read an account of the trial of Aaron Burr, in Virginia, in which the defense had successfully challenged grand jurors for this reason.[9]

8. Respublica v. Cobbett, 3 Yeates 93 (Pa. 1800).

9. *In re* Tucker, 8 Mass. 286 (1811). The timing of Story's involvement is uncertain. The case was decided in November 1811, but the report does not give the precise date. Story was nominated for the Supreme Court seat on November 15 and confirmed by the Senate on November 18. It is a measure of how much criminal procedure has changed that the Massachusetts Supreme Court rejected Story's suggestion. "Those who live in the vicinity of persons accused are probably better knowing than others to the general character of the parties, and the witnesses," the court reasoned, "and on this account are perhaps the more proper members of the grand jury, who will derive useful information from their knowledge."

The era was one in which legal argument was primarily carried on orally. The body of published American precedent and treatises was still very small. Written briefs were rare, even in the United States Supreme Court.[10] Precedent was stored more in the memories of lawyers than in written reports, so the reminiscences of lawyers were an important source of knowledge.[11] Lawyers kept current in the law, not just by reading freshly published reports as they do today, but also by attending court and watching the proceedings. For that reason, aspiring lawyers were advised that the best way to learn the law quickly was to go to court and listen, advice that is virtually never given today.[12] As a result, it was not unusual for early nineteenth-century cases to be litigated before audiences more knowledgeable about relevant precedents than the participants in the case. A lawyer listening to oral argument might remember a relevant previous case that lacked any published record, and he might mention it during the argument. Such a lawyer may have been a true friend of the court, but he was a friend who was doing virtually no work—no research, no writing, none of the labor that goes into modern-day litigation. He was merely chiming in with a suggestion.

The frequency of this sort of oral suggestion relative to other functions performed by amici plummeted in the middle decades of the nineteenth century. By the 1870s and 1880s, neutral amici were swamped by partisan amici, and even the neutral amici who submitted written briefs outnumbered the neutral amici who offered oral advice. It is probably not a coincidence that this change in the role of the amicus occurred just as legal argument was shifting from a primarily oral to a primarily written practice. As more American case reports and treatises began to be published, there would have been fewer occasions on which a lawyer hanging around the courtroom would have had knowledge of a relevant precedent not known by the court or the lawyers for the parties. As lawyers began to make their legal arguments primarily in written briefs rather than in open court,

10. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 203 (Oxford University Press, abridged ed., 1991). The Court required lawyers to file "a statement of the material points of the case" in 1795, and required printed briefs beginning in 1821, but in 1849 the Court had to announce that lawyers not filing briefs would not be heard at oral argument, a rule suggesting that the briefing requirement was being ignored. 14 U.S. xiv (1816) (for the 1795 rule); 19 U.S. v (1821); 48 U.S. v (1849).

11. *Cf.* Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J.L. & HUMAN. 229 (1998).

12. *See, e.g.*, 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 48-50 (L.H. Butterfield ed., Harvard University Press, 1961).

eavesdroppers to litigation would have become less likely to offer unsolicited suggestions. Lawyers knowledgeable about recent cases were less likely to be hanging around the courtroom and more likely to be in their offices. The percentage of amici who were neutral would have declined in the middle of the nineteenth century, without any decline in the altruism of American lawyers.

Amici in today's sense of the word—lawyers representing non-parties with an interest in the case—were a familiar feature of litigation as far back as the 1810s. They were as common as neutral amici in the 1830s, and much more common than neutral amici beginning in the 1850s.

The results reported here suggest that there *was* a change in the nature of the amicus curiae in the nineteenth century United States, but it was not the transformation from strict neutrality to partisanship that is conventionally thought to have taken place. It was a change from an early nineteenth-century mixture of neutrality and partisanship in roughly equal measure to a late nineteenth-century mixture dominated by partisanship. And it is a change that was most likely driven by the changing nature of litigation rather than by any change in the partisanship of lawyers themselves. One does not need to assume that lawyers degenerated from officers of the court to paid mouthpieces in order to explain the shift in the nature of the amicus.

APPENDIX

This appendix includes names and citations for all 308 cases, the 252 in the sample as well as the 56 for which there was insufficient information to classify the amicus as neutral or partisan. They are divided according to the headings in the table. Within each category they are in chronological order. Where I had to exercise some judgment in classifying the case, I have provided a brief parenthetical explanation following the citation.

NEUTRAL—ORAL

Vasse v. Spicer, 2 U.S. 111 (Pa. 1790)
Respublica v. Cobbet, 3 Yeates 93 (Pa. 1800)
Hun v. Bowne, 1 Cai. R. 23 (N.Y. Sup. 1803)
Watson v. Depeyster & Co., 1 Cai. R. 66 (N.Y. Sup. 1803)
Lackey v. McDonald, 1 Cai. R. 116 (N.Y. Sup. 1803)
Spencer v. Webb, 1 Cai. R. 118 (N.Y. Sup. 1803)
Drew v. Canady, 1 Mass. 158 (1804)
Blanchard v. Wild, 1 Mass. 342 (1805)
Beasley v. Owen, 13 Va. 449 (1809)
In re Tucker, 8 Mass. 286 (1811)
Walsh v. Nourse, 5 Binn. 381 (Pa. 1813)
Beatty's Adm'rs v. Burnes' Adm'rs, 12 U.S. 98 (1814)
Mansfield v. Mansfield, 13 Mass. 412 (1816)
Boqua v. Ware, 6 N.J.L. 151 (1822)
Alcott v. Phelps, 1 Cow. 170 (N.Y. Sup. 1823)
Jackson v. Chapman, 3 Cow. 390 (N.Y. Sup. 1824)
James v. Commonwealth, 12 Serg. & Rawle 220 (Pa. 1825)
State v. Murat, 9 N.J.L. 3 (1827)
Banner v. McMurray, 12 N.C. 218 (1827)
People v. Ten Eyck, 2 Wend. 617 (1829)
Beeson v. Beeson, 1 Del. 466 (1834)
Bowman v. James, 6 La. 124 (1834)
Benjamin v. Boyce, 2 Del. 316 (1837)
Dockstader v. Sammons, 4 Hill 546 (N.Y. Sup. 1842)
Muire v. Smith, 41 Va. 458 (1843)
Wolfe v. Gardner, 4 Del. 338 (1845)
Brewington v. Lowe, 1 Ind. 21 (1848)
United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 686 (E.D. Pa. 1855)
Reynolds v. Harris, 8 Cal. 617 (1857)
Commonwealth v. Cooley, 83 Mass. 358 (1861)
Ex parte Northington, 37 Ala. 496 (1861)
Tate v. Powe, 64 N.C. 644 (1870)
Braden's Case, 10 Ct. Cl. 412 (1874)
Gardner v. People, 106 Ill. 76 (1883)

NEUTRAL—WRITTEN

Word v. Commonwealth, 30 Va. 743 (1827), Commonwealth v. Garth, 30 Va. 761 (1827) (a pair of cases raising the same issue, litigated together, and drawing the same amicus submission, so I have counted them as one)
Thompson v. Clay, 24 Ky. 413 (1829)
Miller v. Holstein, 16 La. 395 (1840)
Opinion of the Justices, 53 N.H. 640 (1873)
In re Assignment of Judges, 34 Ohio St. 431 (1878)
Todd v. The Bark Tulchen, 2 F. 600 (E.D. Pa. 1880)
In re Attorney General of New Mexico, 2 N.M. 49 (1881)
In re St. Louis Institute of Christian Science, 27 Mo. App. 633 (1887)
People v. Starks, 1 N.Y.S. 721 (1888)
In re Appropriations by General Assembly, 13 Colo. 316 (1889)
In re Speakership of the House of Representatives, 15 Colo. 520 (1890)

PARTISAN—JURISDICTION

Hollingsworth v. Duane, 12 F. Cas. 367 (C.C.D.Pa. 1801)
Dean v. Legg, 7 F. Cas. 304 (C.C.D.C. 1807)
Hunt v. Whitney, 4 Mass. 620 (1808)
Commonwealth v. Emery, 2 Binn. 257 (Pa. 1810)
Livingston v. Dorgenois, 11 U.S. 577 (1813)
Malcom v. Rogers, 1 Cow. 1 (N.Y. Sup. Ct. 1823)
Judson v. Blanchard, 4 Conn. 557 (1823)
State v. Tombeckbee Bank, 1 Stew. 347 (Ala. 1828)
Picquet v. Swan, 19 F. Cas. 609 (C.C.D. Mass. 1828)
Nabors v. The Governor, 3 Stew. & P. 15 (Ala. 1832)
Pearsoll & Stanton v. Middlebrook, 2 Stew. & P. 406 (Ala. 1832)
Rather v. State, 1 Port. 132 (Ala. 1834)
Lecat v. Salle, 1 Port. 287 (Ala. 1835)
Rider v. Nelson & Albemarle Union Factory, 34 Va. 154 (1836)
Richardson v. Cleaveland & Huggins, 5 Port. 251 (Ala. 1837)
Hendricks v. Johnson, 6 Port. 472 (Ala. 1838)
Lindner v. Aaron & Nelson, 6 Miss. 581 (1841)
Bierne & McMahon v. The Steam Boat Triumph, 2 Ala. 738 (1841)
Reynolds v. Bell, 3 Ala. 57 (1841)
Crocker v. Dunkin, 6 Blackf. 535 (Ind. 1843)
Ham v. Rogers, 6 Blackf. 559 (Ind. 1843)
Hopkins v. Gary, 7 Ala. 46 (1844)
Alonzo Childs & Co. v. Risk, 1 Morris 439 (Iowa Terr. 1845)
Kavanaugh v. Brown, 1 Tex. 481 (1846)
Sherry v. Denn, 8 Blackf. 542 (Ind. 1847)
Cartwright v. Chabert, 3 Tex. 261 (1848)
Dent v. Smith, 15 Ala. 286 (1849)
Glover v. Glover, 18 Ala. 367 (1850)
Pendleton v. Vanausdal, 2 Ind. 54 (1850)
Northern Indiana R. Co. v. Michigan Cent. R. Co., 3 Ind. 8 (1851)
State *ex rel.* Claunch v. Castleberry, 23 Ala. 85 (1853)
Sherrod's Executors v. Hampton, 25 Ala. 652 (1854)

Owen v. Jordan, 27 Ala. 608 (1855)
Church v. Drummond, 7 Ind. 13 (1855)
Campbell v. Swasey, 12 Ind. 57 (1859)
Hust v. Conn, 12 Ind. 225 (1859)
Holtzclaw v. Ware, 34 Ala. 307 (1859)
Day v. Washburn, 64 U.S. 309 (1859)
Buchanan v. Beard, 13 Ind. 406 (1859)
New Albany & Salem R.R. Co. v. Combs, 13 Ind. 420 (1859)
Andrews v. Beck, 23 Tex. 455 (1859)
Simmons v. Varnum, 36 Ala. 92 (1860)
Morehouse v. Potter, 15 Ind. 477 (1860)
Knight v. Low, 15 Ind. 374 (1860)
Barney v. Barney, 14 Iowa 189 (1862)
Wiswell v. Starr, 50 Me. 381 (1862)
Booth v. Ableman, 16 Wis. 460 (1863), 18 Wis. 495 (1864)
Forrester v. Forrester, 39 Ala. 320 (1864)
Ex parte Stickney, 40 Ala. 160 (1866)
Marco v. Low, 55 Me. 549 (1867)
Gallegos v. Pino, 1 N.M. 410 (1867)
Morris v. Hall, 41 Ala. 510 (1868)
Alabama & Tennessee R.R. Co. v. Burns, McKibbin & Co., 43 Ala. 169 (1869)
Waddill v. John, 48 Ala. 232 (1872), 57 Ala. 93 (1876)
Ex parte Bell, 48 Ala. 285 (1872)
Ex parte Collins, 49 Ala. 69 (1873)
Davidson v. Washburn, 56 Ala. 596 (1876)
King v. Harbor Board, 57 Ala. 135 (1876)
Kramer v. Holster, 55 Miss. 243 (1877)
Ex parte McCoy, 64 Ala. 201 (1879)
St. Louis & San Francisco Ry. Co. v. McReynolds, 24 Kan. 368 (1880)
Brown v. Terre Haute & Indianapolis R.R. Co., 72 Mo. 567 (1880)
Nabers' Adm'r v. Meredith, 67 Ala. 333 (1880)
Republic Life Ins. Co. v. Beaty, 71 Ga. 160 (1883)
Burnett v. McCluey, 78 Mo. 676 (1883)
State v. Jefferson Iron Co., 60 Tex. 312 (1883)
Pollock v. Simpson, 67 Iowa 519 (1885)
Jones v. City of Jefferson, 66 Tex. 576 (1886)
Ex parte Henderson, 84 Ala. 36 (1887)
Proctor v. Pettitt, 25 Neb. 96 (1888)
Western Railway of Alabama v. Sistrunk, 85 Ala. 352 (1888)
Dean v. Gerlach, 34 Ill. App. 233 (1889)
Insurance Co. of North America v. McLimans & Coyle, 28 Neb. 653 (1890)
In re Assignment of Zwang, 39 Mo. App. 356 (1890)
Alexander Bros. v. Jones, 90 Ala. 474 (1890)

PARTISAN—DEAD PARTY

Walker v. King, 2 Aik. 204 (Vt. 1827)
Read v. Hatch, 36 Mass. 47 (1837)
Massey v. Steele's Adm'r, 11 Ala. 340 (1847)
Russ v. Dow, 32 Me. 590 (1850)

Armstrong v. Nixon, 16 Tex. 610 (1856)
Guyer v. Wookey, 18 Ill. 536 (1857)
Winship v. Conner, 42 N.H. 341 (1861)
Blaisdell v. Harris, 52 N.H. 191 (1872)
Tapley v. Martin, 116 Mass. 275 (1874); Martin v. Tapley, 119 Mass. 116 (1875); Tapley v. Goodsell, 122 Mass. 176 (1877) (installments of the same case)

PARTISAN—QUASI-LAWYER

United States v. Hare, 26 F. Cas. 148 (C.C.D.Md. 1818)
Chambers v. Astor, 1 Mo. 327 (1823)
State v. Jim, 12 N.C. 508 (1828)
State v. Britt, 14 N.C. 122 (1831)
The David Pratt, 7 F. Cas. 22 (D. Me. 1839)
Goddard v. Coffin, 10 F. Cas. 505 (C.C.D. Me. 1849)
State v. Bradley, 6 La. Ann. 554 (1851)
Rankin v. Sherwood, 33 Me. 509 (1851)
Ex parte Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (fugitive slave case, where Pennsylvania has imprisoned marshals for catching slave, and amicus is really arguing for Pennsylvania in opposition to marshals' habeas corpus petition)
State v. Patten, 10 La. Ann. 299 (1855)
Scott v. Clark, 1 Iowa 70 (1855)
Collett v. Frazier, 56 N.C. 398 (1857)
Darlington v. Warner, 14 Ind. 368 (1860)
Miles v. Bradford, 22 Md. 170 (1864) (lawyers really representing Governor of Maryland, who refuses to recognize court's authority)
Mississippi v. Johnson, 71 U.S. 475 (1866) (Attorney General really representing Andrew Johnson)
Metzger v. Waddell, 1 N.M. 400 (1867)
State v. Izard, 48 S.C.L. 209 (1867)
In re Devaux, 54 Ga. 673 (1875) (amicus really representing opponents of application of Freemasons for a corporate charter, in procedural context where there is no party in the case to oppose the Freemasons)
In re Corbin, 8 S.C. 390 (1877)
In re Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878) (amicus really representing anti-Chinese sentiment in community, in opposition to Chinese person's application for naturalization, in procedural context where there is no party in the case to oppose the application)
Ex parte Steinman, 95 Pa. 220 (1880) (when lawyer appeals after being disbarred for publishing an editorial criticizing the court, amici really representing the bar in opposing appeal)
Lelia Robinson's Case, 131 Mass. 376 (1881) (amici really representing Boston bar, in opposing what the court characterizes as the first application by a woman for admission as an attorney in the history of the state)
State v. Williams, 34 La. Ann. 87 (1882)
Ex parte Levy, 43 Ark. 42 (1884) (in opposing an appeal from the county court's denial of an application for a liquor license, amicus is really representing the government)
Cowan v. Cowan, 139 Mass. 377 (1885)
Territory v. Murray, 7 Mont. 251 (1887)

People v. Gibbs, 70 Mich. 425 (1888)
Cox v. Gress, 51 Ark. 224 (1889)
United States v. Late Corp. of Church of Jesus Christ, 6 Utah 9 (1889)
State v. Brown, 41 La. Ann. 345 (1889)
Stephens v. Hall, 10 N.Y.S. 753 (1890)
In re Losasso, 15 Colo. 163 (1890)
Ex parte Bergman, 3 Wyo. 396 (1890)

PARTISAN—NON-PARTY

The Emulous, 8 F. Cas. 697 (C.C.D.Mass. 1813)
Green v. Biddle, 21 U.S. 1 (1823)
Green v. Willis, 1 Wend. 78 (N.Y. Sup. Ct. 1828)
Harrison v. Nixon, 34 U.S. 483 (1835)
In re Bank of Niagara, 6 Paige Ch. 213 (N.Y.Ch. 1836)
Stearns v. Stearns, 10 Vt. 540 (1838)
Planters' & Merchants' Bank of Mobile v. Andrews, 8 Port. 404 (Ala. 1839)
Townsend and Brothers v. Davis, 1 Ga. 495 (1846)
Lane v. Leet, 2 Ind. 535 (1851)
Miller v. Keith, 26 Miss. 166 (1853)
The Byron, 4 F. Cas. 956 (S.D. Fla. 1854)
Ex parte Yeager, 52 Va. 655 (1854)
Ex parte Knowles, 5 Cal. 300 (1855)
Mussina v. Alling, 11 La. Ann. 568 (1856)
Ex parte Russell, 29 Ala. 717 (1857)
Cockrell v. McGraw, 33 Ala. 526 (1859)
United States v. Carillo, 25 F. Cas. 310 (1859)
Ex parte Fleming, 69 U.S. 759 (1864)
Romeyn v. Caplis, 17 Mich. 449 (1868)
Ex parte Schenck, 63 N.C. 601 (1869)
New London Northern R.R. Co. v. Boston & Albany R.R. Co., 102 Mass. 386 (1869)
State *ex rel.* Bd. of Sch. Directors v. Mayor, 23 La. Ann. 358 (1871)
May v. Courtnay, Tennant & Co., 47 Ala. 185 (1872)
The Confiscation Cases, 6 F. Cas. 270 (C.C.D. La. 1872)
Branch v. Mechanics' Bank, 50 Ga. 413 (1873)
Gordon v. Green, 113 Mass. 259 (1873)
Ex parte Greeley, 10 F. Cas. 1069 (C.C.D. Mass. 1873)
Murdock v. City of Memphis, 87 U.S. 590 (1874)
Acosta v. The Halcyon, 1 F. Cas. 58 (S.D. Fla. 1877)
People *ex rel.* Attorney-General v. Security Life Ins. Co., 71 N.Y. 222 (1877)
Malone v. The Pedro, 16 F. Cas. 556 (S.D. Fla. 1878)
Hawes v. Contra Costa Water Co., 11 F. Cas. 862 (C.C.S.D. Cal. 1878)
Hammond v. Lesseps, 31 La. Ann. 337 (1879)
State v. Wilson, 70 Tenn. 204 (1879)
Moseby v. Burrow, 52 Tex. 396 (1880)
Burke v. Flood, 1 F. 541 (C.C.D. Cal. 1880)
Jones v. United States, 48 Wis. 385 (1880)
Kimball v. Penhallow, 60 N.H. 448 (1881)
Regents of the University of Michigan v. Rose, 45 Mich. 284 (1881)

City of Cambridge v. City of Boston, 130 Mass. 357 (1881)
New Orleans Taxpayers' Ass'n v. City of New Orleans, 33 La. Ann. 567 (1881)
Surget v. Chase, 33 La. Ann. 833 (1881)
State *ex rel.* Hudd v. Timme, 54 Wis. 318 (1882)
Slidell v. Grandjean, 111 U.S. 412 (1883)
Butterworth v. United States, 112 U.S. 50 (1884)
Rosenthal v. His Creditors, 2 McGl. 382 (La. App. 1884)
Rice, Stix & Co., 45 Ark. 34 (1885)
City & County of San Francisco v. Liverpool & London &Globe Ins. Co., 74 Cal. 113 (1887)
United States *ex rel.* Dunlap v. Black, 128 U.S. 40 (1888)
Ex parte Lloyd, 78 Cal. 421 (1889)
Parker v. North British &Mercantile Ins. Co., 42 La. Ann. 428 (1890)
County Ct. v. Boreman, 34 W. Va. 87 (1890)

PARTISAN—UNCLEAR

Bryan v. Sundberg, 5 Tex. 418 (1849)
People *ex rel.* Taylor v. Brennan, 39 Barb. 522 (N.Y. Sup. 1863)
Dunn v. Sargent, 101 Mass. 336 (1869)
Barr v. Armstrong, 56 Mo. 577 (1874)
Sparhawk v. Sparhawk, 116 Mass. 315 (1874)
State *ex rel.* Fichtenkamm v. Gambs, 68 Mo. 289 (1878)
Friedman v. Nelson, 53 Cal. 589 (1879)
Ex parte Laboyteaux, 65 Ind. 545 (1879)
Ex parte Frazer, 54 Cal. 94 (1880)
Weill v. Kenfield, 54 Cal. 111 (1880)
State *ex rel.* Carcass v. Judge of First Dist. Ct., 32 La. Ann. 719 (1880)
Moore v. New Orleans, 32 La. Ann. 726 (1880)
Anderson v. His Creditors, 32 La. Ann. 892 (1880)
State *ex rel.* Widow Harper v. Judges of the Ct. of Appeals, 33 La. Ann. 358 (1881)
Cathcart v. Comstock, 56 Wis. 590 (1883)
County of Bay v. Bullock, 51 Mich. 544 (1883)
Urton v. Wilson, 65 Cal. 11 (1884)
Timm v. Harrison, 109 Ill. 593 (1884)
Morgan's Louisiana & Texas R.R. &Steamship Co. v. Board of Health, 36 La. Ann. 666 (1884)
Graves v. Northern Pac. R.R. Co., 5 Mont. 556 (1885)
People *ex rel.* Leverson v. Thompson, 67 Cal. 627 (1885)
Smith v. Strother, 68 Cal. 194 (1885)
Ebert v. Beedy, 113 Ill. 316 (1885)
Morris v. Lalaurie, 38 La. Ann. 47 (1887)
Reed v. His Creditors, 39 La. Ann. 115 (1887)
Grupe v. Byers, 73 Cal. 271 (1887)
In re Estate of Mary Cunningham, 73 Cal. 558 (1887)
Ex parte Kohler, 74 Cal. 38 (1887)
People v. City & County of San Francisco, 75 Cal. 388 (1888)
Turlock Irrig. Dist. v. Williams, 76 Cal. 360 (1888)
Bloomer v. Todd, 3 Wash. Terr. 599 (1888)

In re Douglass, 41 La. Ann. 765 (1889)
Kennedy v. Board of Educ., 82 Cal. 483 (1890)
People v. Toal, 85 Cal. 333 (1890)
United Land Ass'n v. Knight, 85 Cal. 448 (1890)
Davies v. City of Los Angeles, 86 Cal. 37 (1890)
Vorwerk v. Nolte, 87 Cal. 236 (1890)
Board of Educ. v. Common Council of Detroit, 80 Mich. 548 (1890)

NOT KNOWN

De Armas' Case, 10 Mart. (o.s.) 158 (La. 1821)
Morton v. Sanders's Heirs, 25 Ky. 192 (1829)
Hallowell v. Williams, 4 Pa. 339 (1846)
Jenny v. O'Flynn, 5 Mich. 215 (1858)
Rosier v. Hale, 10 Iowa 470 (1860)
People v. Maynard, 15 Mich. 463 (1867)
In re Commissioners of the First Draining Dist., 27 La. Ann. 20 (1875)
Melvin v. Melvin, 72 N.C. 384 (1875)
Price v. St. Louis Mut. Life Ins. Co., 3 Mo. App. 262 (1877)
Lesassier & Binder v. Board of Liquidation, 30 La. Ann. 611 (1878)
State *ex rel.* Agusti v. Houston, 30 La. Ann. 1174 (1878)
In re Guenzler, 70 Mo. 39 (1879)
Succession of Hugh McCloskey, 32 La. Ann. 146 (1880)
State *ex rel.* Newman v. Judge Sixth District Court, 32 La. Ann. 207 (1880)
Life Ass'n of America v. Hall, 33 La. Ann. 49 (1881)
De Jarnatt v. Cooper, 59 Cal. 703 (1881)
People *ex rel.* Dean v. Board of County Comm'rs, 6 Colo. 202 (1882)
Kidder v. Stevens, 60 Cal. 414 (1882)
Chicot County v. Davies, 40 Ark. 200 (1882)
Davidson v. Houston, 35 La. Ann. 492 (1883)
Cary v. Richardson, 35 La. Ann. 505 (1883)
State *ex rel.* Perche v. Earhart, 35 La. Ann. 603 (1883)
People *ex rel.* Kellogg v. Fleming, 7 Colo. 230 (1883)
Friedler v. Chotard, 36 La. Ann. 276 (1884)
Cochran v. Cobb, 43 Ark. 180 (1884)
Bailey v. Board of Supervisors, 66 Cal. 10 (1884)
Eager, Ellerman & Co. v. City of New Orleans, 36 La. Ann. 933 (1884)
Lux v. Haggin, 69 Cal. 255 (1886)
McCloy & Trotter v. Arnett, 47 Ark. 445 (1886)
Thomason v. Ruggles, 69 Cal. 465 (1886)
Hutchinson v. Lemcke, 107 Ind. 121 (1886)
Pfeiffer v. Regents of the Univ. of California, 74 Cal. 156 (1887)
Verdugo de Sepulveda v. Baugh, 74 Cal. 468 (1887)
In re Lake, 40 La. Ann. 142 (1888)
Succession of Samuel Stewart, 41 La. Ann. 127 (1889)
Richmond v. Mississippi Mills, 52 Ark. 30 (1889)
Glidewell v. Martin, 51 Ark. 559 (1889)
Brooks v. Fischer, 79 Cal. 173 (1889)
Central Irrig. Dist. v. De Lappe, 79 Cal. 351 (1889)
Wadsworth v. Wadsworth, 81 Cal. 182 (1889)

Touzalin v. City of Omaha, 25 Neb. 817 (1889)
Griffith v. Smith, 27 Neb. 47 (1889)
People v. Hemme, 24 P. 313 (Cal. 1890)
Ex parte Reilly, 85 Cal. 632 (1890)
De Guyer v. Banning, 25 P. 252 (Cal. 1890)
Wilson v. Board of Trustees, 133 Ill. 443 (1890)
In re Nieman, 14 S.W. 25 (Tex. 1890)
In re Walker's Estate, 6 Utah 369 (1890)
Ex parte Ah You, 82 Cal. 339 (1890)
Spring Valley Water Works v. San Francisco, 82 Cal. 286 (1890)
Cheyney v. Smith, 3 Ariz. 143 (1890)
People *ex rel.* Longenecker v. Nelson, 133 Ill. 565 (1890)
In re Funding of County Indebtedness, 15 Colo. 421 (1890)
In re House Bill No. 10, 15 Colo. 600 (1890)
In re the Constitutionality of Senate Bill No. 69, 15 Colo. 601 (1890)
Ex parte Boswell, 86 Cal. 232 (1890)