

NOTES

SHOULD THE SUPREME COURT STOP INVITING AMICI CURIAE TO DEFEND ABANDONED LOWER COURT DECISIONS?

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Forty-three times since 1954—approximately twice every three Terms—the Supreme Court has heard a case in which no party argued one side of the issue before the Court, generally because the party who prevailed in the lower court refused to defend its victory below. When faced with this unusual, nonadversary posture, the Court has tapped an attorney to brief and argue the case as an amicus curiae in support of the orphaned argument. This practice raises a number of questions: First, at the most basic descriptive level, why has it been necessary? If the respondents themselves did not wish to defend their victories below, then whom were the appointed amici representing? Second, did these uncontested cases run afoul of Article III’s limitation of federal jurisdiction to “cases” and “controversies,” or the American tradition of adversarial litigation? And third, even if the invitations were constitutionally permissible, was it prudent for the Court to spend its scarce certiorari grants on them rather than waiting for more traditional cases to present the same issues?

This Note explores some answers to those questions. It identifies four broad categories into which these cases fall, based on the reasons the appointment of an amicus was deemed necessary, and evaluates each against the principal goals of the adversary system. Often the Court’s role as a neutral adjudicator of disputes is aided by the assistance of an amicus curiae who can represent the lower court’s position on an issue of independent interest to the courts, such as subject matter jurisdiction. But there are some questions that the Court is not empowered to answer unless they are contested, such as issues and arguments that the parties

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As this Note went to press, an amicus curiae was appointed in *Tapia v. United States*, No. 10-5400—the forty-fourth such appointment. *Tapia* is not included in the analysis.

are entitled to waive—and sometimes have actively chosen to waive—or those that have become moot on appeal. To the extent appointing an amicus enables the Court to resolve legal questions that are not squarely presented by a live controversy, the practice itself should be abandoned, lest the Court appear to be reaching out to address issues that do not arise organically. Even where a live controversy does remain, it may be imprudent to choose less-than-fully-adversarial cases as vehicles to set national precedent. The Note concludes by proposing three criteria to determine the propriety of inviting an amicus to argue an unrepresented position, and finds that under those criteria, fifteen of the forty-three appointments were probably ill-advised.

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INTRODUCTION

On April 15, 2008, the Supreme Court heard oral argument in *Greenlaw v. United States* and *Irizarry v. United States*. In the first case, petitioner Michael Greenlaw had appealed his criminal conviction to the Eighth Circuit and challenged the length of his sentence.¹ That court affirmed his conviction, but then went on to order that his sentence be *increased*, even though the government had declined to file a cross-appeal seeking that increase.² During oral argument, Justice Ginsburg, who would go on to write the Court's opinion reversing the Eighth Circuit's opinion, questioned why the American tradition of adversarial litigation should permit a court to do something on behalf of a party who did not ask for it:

It seems to me that our system rests on a principle of party presentation as many systems do not. In many systems, the court does shape the controversy and can intrude issues on its own. But in our adversarial system, we rely on counsel to do that kind of thing. So, my problem with [the court of appeals' sua sponte action] . . . is what business does the court have to put an issue in the case that counsel chose not to raise?³

Yet this question was addressed to counsel who himself represented no party in the case. The government agreed with Greenlaw that the Eighth Circuit had exceeded its authority, so it had suggested the Court send the case back. The Court declined. Instead, it invited Jay T. Jorgensen, a former law clerk to Chief Justice William Rehnquist and Justice Samuel Alito, "to brief and argue this case, as *amicus curiae*, in support of the judgment below."⁴ And in the other case argued that same day, *Irizarry*, the government again sided with a criminal defendant challenging his sentence, this time conceding that a district court had committed procedural error in issuing the sentence.⁵ So a second attorney, former Justice Clarence Thomas clerk Peter B. Rutledge, received a similar invitation to defend a decision that neither party supported.⁶

While it was coincidental that these two cases were argued the same day, this type of appointment has not been uncommon in the Court's recent history. Since 1954, the Court has tapped an attorney to support an undefended judgment below, or to take a specific position as an amicus, forty-three times—

1. See *United States v. Carter*, 481 F.3d 601, 604 (8th Cir. 2007), *rev'd sub nom. Greenlaw v. United States*, 554 U.S. 237 (2008).

2. See *Greenlaw*, 554 U.S. at 240.

3. Transcript of Oral Argument at 34, *Greenlaw*, 554 U.S. 237 (No. 07-330).

4. *Greenlaw v. United States*, 552 U.S. 1135 (2008) (mem.); see also Tony Mauro, *Supreme Court Justices Turn to Ex-Clerks for Unusual Role*, LEGAL TIMES, Apr. 14, 2008, <http://www.law.com/jsp/article.jsp?id=1207904904951>.

5. See *Irizarry v. United States*, 553 U.S. 708, 712-13 (2008); Brief for the United States, *Irizarry*, 553 U.S. 708 (No. 06-7517) (agreeing with the petitioner that there was procedural error, but arguing that the error was harmless so the judgment should be affirmed).

6. *Irizarry v. United States*, 552 U.S. 1135 (2008) (mem.); see also Mauro, *supra* note 4.

slightly more than twice every three Terms on average. Invited amici have included prominent academics, such as Harvard Law School Dean Erwin N. Griswold⁷ and University of Utah Professor Paul G. Cassell,⁸ a former U.S. Senator, Thomas H. Kuchel of California;⁹ future U.S. Attorney General Benjamin R. Civiletti¹⁰ and former Solicitor General Charles Fried;¹¹ future civic leaders such as Joel I. Klein,¹² recently Chancellor of the New York City schools; attorneys who would go on to become leading appellate litigators, including Stewart A. Baker,¹³ David W. DeBruin,¹⁴ Thomas G. Hungar,¹⁵ Michael K. Kellogg,¹⁶ Maureen E. Mahoney,¹⁷ Stephen M. Shapiro,¹⁸ and Thomas C. Walsh;¹⁹ renowned civil rights attorneys, including Mark D. Rosenbaum²⁰ and William T. Coleman, Jr.²¹ (who also had served previously as Secretary of Transportation); and attorneys who have since joined the federal bench, including Judge Rhesa H. Barksdale of the Fifth Circuit,²² Judge Barrington D. Parker, Jr. of the Second Circuit,²³ Judge Jeffrey S. Sutton of the Sixth Circuit,²⁴ and Chief Justice John G. Roberts, Jr.²⁵ Of the forty-three amici, just over half had served previously as law clerks to Justices of the Supreme Court.²⁶

7. See *Granville-Smith v. Granville-Smith*, 348 U.S. 885 (1954) (mem.).

8. See *Dickerson v. United States*, 528 U.S. 1045 (1999) (mem.).

9. See *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 404 U.S. 813 (1971) (mem.).

10. See *Kokoszka v. Belford*, 415 U.S. 956 (1974) (mem.).

11. See *Alabama v. Shelton*, 534 U.S. 987 (2001) (mem.).

12. See *O'Connor v. Ortega*, 475 U.S. 1006 (1986) (mem.).

13. See *Becker v. Montgomery*, 531 U.S. 1110 (2001) (mem.).

14. See *Clay v. United States*, 536 U.S. 974 (2002) (mem.).

15. See *Ogbomon v. United States*, 519 U.S. 805 (1996) (mem.), *cert. dismissed as improvidently granted*, 519 U.S. 1073 (1997).

16. See *Gutierrez de Martinez v. Lamagno*, 513 U.S. 1010 (1994) (mem.).

17. See *Mackey v. Lanier Collection Agency & Serv.*, 484 U.S. 809 (1987) (mem.).

18. See *Keeton v. Hustler Magazine, Inc.*, 464 U.S. 958 (1983) (mem.).

19. See *Bousley v. United States*, 522 U.S. 990 (1997) (mem.).

20. See *Kolender v. Lawson*, 459 U.S. 964 (1982) (mem.).

21. See *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982) (mem.).

22. See *Thigpen v. Roberts*, 464 U.S. 1006 (1983) (mem.).

23. See *New York v. Harris*, 492 U.S. 934 (1989) (mem.).

24. See *Hohn v. United States*, 522 U.S. 944 (1997) (mem.).

25. See *United States v. Halper*, 488 U.S. 906 (1988) (mem.).

26. In addition to Jorgensen and Rutledge, these include Cassell (Burger), Fried (Harlan), Klein (Powell), Baker (Stevens), DeBruin (Stevens), Hungar (Kennedy), Kellogg (Rehnquist), Mahoney (Rehnquist), Barksdale (White), Sutton (Powell and Scalia), and Roberts (Rehnquist). The remainder were invited as amici in: *Bond v. United States*, 131 S. Ct. 589 (2010) (mem.) (Stephen R. McAllister (White and Thomas)); *Pepper v. United States*, 131 S. Ct. 32 (2010) (mem.) (Adam G. Ciongoli (Alito)); *Kucana v. Holder*, 130 S. Ct. 30 (2009) (mem.) (Amanda C. Leiter (Stevens)); *Reed Elsevier, Inc. v. Muchnick*, 129 S. Ct. 1693 (2009) (mem.) (Deborah Jones Merritt (O'Connor and then-Judge Ginsburg)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 917 (2001) (mem.) (Richard G. Taranto

There is no question that the representation provided by such highly qualified counsel was superb. But whom were they representing? Why was it necessary to invite them in the first place? More critically, did these uncontested cases run afoul of Article III's limitation of federal jurisdiction to "cases" and "controversies," or the American tradition of adversarial litigation? And, even if the invitations were constitutionally permissible, was it sensible for the Court to make them, rather than waiting for a more typical case to present the same issue? To date, no study has been made of the history, causes, constitutionality, and prudence of inviting an amicus when the respondent²⁷ fails to defend the judgment below.²⁸ The Court itself has discussed the practice directly only to state conclusively that "it is this Court, a part of the Judicial Branch, that must decide whether to exercise its discretion to review the judgment below, and it is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument in support of that judgment."²⁹

This Note challenges that assertion. The Supreme Court is subject to the constraints of Article III and the American adversary system of adjudication no less than any other federal court. In many cases, the Court's role as a neutral arbiter of last resort sits comfortably with, and is even aided by, the assistance of an *amicus curiae* in support of the judgment below, such as when the lower

(O'Connor)); *Forney v. Apfel*, 522 U.S. 1088 (1998) (mem.) (Allen R. Snyder (Harlan and Rehnquist)); *Ornelas v. United States*, 516 U.S. 1008 (1995) (mem.) (Peter D. Isakoff (Stevens)); *United States v. Fausto*, 480 U.S. 904 (1987) (mem.) (John M. Nannes (Rehnquist)); *Verlinden B.V. v. Cent. Bank of Nigeria*, 459 U.S. 964 (1982) (mem.) (Stephen N. Shulman (Harlan)); and *Cheng Fan Kwok v. INS*, 390 U.S. 918 (1968) (mem.) (William H. Dempsey, Jr. (Warren)).

27. A few cases in which amici were invited were direct appeals from the district court under the Supreme Court's now nearly abolished mandatory appellate jurisdiction. *See, e.g.*, 16B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4002 (2d ed. 1996). The responding parties in such cases are appellees, not respondents. For purposes of simplicity, however, the term "respondent" is used throughout this Note to refer generically to responding parties in the Supreme Court. Where a particular case is discussed that arose on direct appeal, the responding party will properly be called an "appellee." Additionally, in a single case, discussed in note 146 and accompanying text, an amicus was appointed to support the *petitioner's* initial position that was subsequently abandoned.

28. The existing literature contains discussions of only specific instances in which an amicus was invited. *See, e.g.*, Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287 (2000) (discussing *Dickerson* only); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 466-67 (2009) (discussing *Bob Jones University v. United States* and *Irizarry v. United States*). Treatises offer similarly sparse discussion. *See* EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 753-54 (9th ed. 2007) (describing the practice briefly and citing a few of the invitation cases); 13 WRIGHT ET AL., *supra* note 27, § 3530, at 702 n.42 (3d ed. 2008) (collecting fourteen cases). Even where the Court has itself highlighted the practice, it has only cited a few of the cases in which it has been employed. *See, e.g.*, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring).

29. *United States v. Providence Journal Co.*, 485 U.S. 693, 703-04 (1988) (citing *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982) (mem.); *United States v. Fausto*, 480 U.S. 904 (1987) (mem.)).

court's undefended decision concerned its own subject matter jurisdiction—an issue in which courts have an independent interest apart from the litigants, such that the parties cannot “waive” the issue even if they wish to. But in some cases, the invitation of an amicus enables the Court to reach the merits of a legal question that the parties could—and did—choose not to present. Because the Court should have no independent interest in such questions, its decision to construct a way for them to be heard should give us pause. The invitation of amici thus arises at the outer boundary of justiciable “cases” and “controversies” before the Court. Whether, and when, an invitation crosses that line is an important question, because when the Court reaches out to make pronouncements of law and set nationwide precedent on questions that are not properly before it, it undermines the perceived neutrality and legitimacy upon which its authority depends. Therefore, this Note attempts to theorize this practice, to (1) understand whether appointed amici have allowed the Court to exceed those limits in the past, and (2) develop a set of criteria for when it would, and would not, be prudent to employ invited amici in the future. In so doing, I seek also to provide a comprehensive history and description of this peculiar practice. While this Note limits its focus to amicus appointments at the Supreme Court, its reasoning should apply equally to such appointments in the courts of appeals, where the practice is used as well.

This examination proceeds in four Parts. In Part I, I review the origins of the invited-amicus practice in 1954, and I analyze the frequency of its use since then. In Part II, I assemble a detailed taxonomy of amicus invitations, which highlights the various glitches in the traditional adversary system that have given rise to the amici's appointments. Then, in Part III, I evaluate how well the practice fits with the primary goals of the adversary system and with Article III's constraints on federal jurisdiction. I conclude that the practice is justified in many instances, but more troubling in others where it facilitates judicial agenda setting. Finally, in Part IV, I propose a set of criteria based on the evaluation in the previous Part for determining whether an amicus invitation is warranted. Applying those criteria to the forty-three past invitations, I conclude that twenty-eight were justified, but fifteen might not have been appropriate under the circumstances.

I. BACKGROUND AND ORIGINS

A. *Pre-1954*

Prior to 1954, the Court had never invited an amicus to appear on behalf of an undefended lower court judgment. This was not, however, for want of respondents failing to defend a judgment below. Rather, the Supreme Court simply heard one-party appeals with some frequency. *Marbury v. Madison*, for ex-

ample, was presented only by counsel for Marbury after Secretary Madison resisted the entire proceeding.³⁰ Later in the nineteenth century, the Court heard forty-five cases between 1870 and 1880 in which “[n]o opposing counsel” appeared, including the significant constitutional voting rights decision in *Minor v. Happersett*.³¹ The Court decided the major Second Amendment case *United States v. Miller* in 1939 even though only the government filed a brief or appeared at argument.³² And just one year before the first appointment of an amicus, the Court heard two one-party appeals.³³

Additionally, the Court had at least once invited an amicus to “enabl[e] the Court to satisfy itself that it has fully considered all that can be said,” even though the issues before the Court were disputed by the parties themselves.³⁴ In the important executive power case *Myers v. United States*, the plaintiff challenged his dismissal as a postmaster by President Wilson under a statute requiring that postmaster removals be approved by the Senate. In defense, the government contended that the statute was an unconstitutional encroachment upon the President’s power. The Court of Claims rejected the government’s constitutional argument, but ruled against Myers on the basis that his claim was barred by laches.³⁵ Myers took an appeal to the Supreme Court, where he argued against the lower’s court laches finding but in favor of the statute. The government agreed that laches should not apply, but renewed its argument that the statute was unconstitutional and suggested the judgment be affirmed on that ground. To support Myers in defending the statute’s constitutionality, the Court invited Pennsylvania Senator George W. Pepper to appear as an amicus.³⁶ While Senator Pepper’s role was neither to argue an unrepresented position nor to defend an abandoned decision below, and thus *Myers* is excluded from the set of cases examined by this Note, *Myers* foreshadowed some of the issues that animate the modern practice of inviting amici: the Court’s concern with ensuring a full airing of all issues, and the government’s unwillingness to accept

30. See 5 U.S. (1 Cranch) 137, 139, 154 (1803).

31. 88 U.S. 162, 164 (1875). The case’s landmark holding that the Fourteenth Amendment did not guarantee women the right to vote galvanized the suffrage movement to lobby for what would become the Nineteenth Amendment. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 974 (2002).

32. See 307 U.S. 174, 175 (1939); see also *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008) (“The defendants made no appearance in [*Miller*], neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court’s consideration of the Second Amendment).”).

33. See *United States v. Gilbert Assocs.*, 345 U.S. 361, 361 (1953); *Local Union No. 10, United Ass’n of Journeymen Plumbers v. Graham*, 345 U.S. 192, 196 (1953).

34. *Myers v. United States*, 272 U.S. 52, 177 (1926).

35. See *Myers v. United States*, 58 Ct. Cl. 199 (1923); see also *Myers*, 272 U.S. at 107.

36. See *Myers*, 272 U.S. at 56, 176.

lower court victories obtained on bases it deems to be incorrect or unjust. Part II will explore these recurring themes further.

B. *The First Invitation: Granville-Smith v. Granville-Smith*

The first amicus to be invited by the Court to defend an abandoned lower court judgment was Erwin Griswold, Dean of Harvard Law School, who argued in support of the Third Circuit's opinion in *Granville-Smith v. Granville-Smith*.³⁷ The case arose out of a divorce proceeding in the U.S. Virgin Islands. Petitioner Elizabeth Granville-Smith sued her husband for divorce under the Virgin Islands divorce statute in federal district court. The respondent, who lived in New York, "entered an appearance" through Virgin Islands counsel, "waived personal service, denied petitioner's allegations, and filed a 'Waiver and Consent' to 'hearing of this cause as if by default' and to 'such findings of fact and conclusions of law and decree as to the Court may seem just and reasonable.'"³⁸ In effect, the couple sought a consensual divorce at a time when the law did not provide for no-fault dissolution of marriage, in a jurisdiction with a more liberal attitude toward divorce.³⁹

While the Virgin Islands divorce statute provided that being present in the Virgin Islands for six weeks continuously prior to filing for divorce would constitute "prima facie evidence of domicile,"⁴⁰ the district court challenged Mrs. Granville-Smith for additional evidence of her domicile, particularly her intent to remain in the Virgin Islands. Since she could offer none, the court dismissed her complaint for want of jurisdiction.⁴¹ The Third Circuit affirmed,⁴² citing *Alton v. Alton*, a recent case that had held the domicile portion of the Virgin Islands divorce statute to be unconstitutional and unauthorized by the Virgin

37. See 349 U.S. 1, 2, 4 (1955).

38. *Id.* at 3.

39. As Dean Griswold had explained a few years prior, [I]n nearly all of these [problematic Nevada] divorce matters there is no contest. Either the defendant is not present and not served, or he appears but does not oppose the petition, and takes no appeal. The trial court hears the evidence of the plaintiff. That evidence is ordinarily sufficient to establish domicile in Nevada. The court thereupon makes a finding of domicile based upon this evidence, and the decree is in due course granted. The volume of divorce cases in the county courts of Nevada is rather great. The number of appeals taken to the Supreme Court of Nevada is very small.

Erwin Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 211-12 (1951); see also *id.* at 212 n.56 ("Divorces may be obtained on almost identical terms in a number of other states, including Idaho, Arkansas and Florida. Recently the Virgin Islands has become a fairly popular place for the more well-to-do divorce seekers.").

40. *Granville-Smith*, 349 U.S. at 2.

41. See *id.* at 3-4.

42. *Granville-Smith v. Granville-Smith*, 214 F.2d 820 (3d Cir. 1954) (en banc) (per curiam).

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Islands' Organic Act.⁴³ Because domicile was the necessary basis of divorce jurisdiction, the *Alton* court had reasoned, "six weeks' physical presence without more is not a reasonable way to prove it."⁴⁴

In the October Term 1953, the Court had granted certiorari in *Alton* and heard arguments in the case, but ultimately dismissed it as moot when a final divorce decree was entered in Connecticut, the parties' true home state.⁴⁵ *Granville-Smith* thus gave the Court the opportunity to resolve the question it had been forced to abandon in *Alton*. But unlike *Alton*, in which the respondent appeared at the Court, Mr. Granville-Smith joined his wife in asking the Court to reverse the decision below, because the result of that decision was that his wife's suit "against" him was dismissed rather than sustained—hardly the result he actually desired.⁴⁶ Moreover, because the petitioner was represented by the same attorney as the petitioner in *Alton*—future Justice Abe Fortas—and since the legal question was identical, the parties sought to submit the case on the *Alton* briefs without oral argument.⁴⁷

The Court accepted the *Alton* briefs, but refused to waive oral argument. When *Alton* was before the Court, Chief Justice Warren had told his colleagues: "This case is particularly troublesome to me and primarily because from the beginning it has not been an adversary proceeding. It has been a cooperative if not 'rigged' proceeding The importance and complexity of the case justify a full exposition before us which we have not had."⁴⁸ And after *Granville-Smith* arrived, Warren's law clerk suggested that "further argument" be required, particularly because "two Justices (Jackson and Douglas) took no part in the order dismissing *Alton* for mootness; if the reason was their not being present at the *Alton* argument, then hearing argument in the instant case will

43. See *Alton v. Alton*, 207 F.2d 667, 677 (3d Cir. 1953) (en banc) ("Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. . . . [I]f the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere."), *vacated as moot*, 347 U.S. 610 (1954).

44. *Alton*, 207 F.2d at 672.

45. See *Alton v. Alton*, 347 U.S. 610 (1954).

46. See Respondent's Statement, *Granville-Smith*, 349 U.S. 1 (No. 261) (on file with the Felix Frankfurter Papers, Harvard Law School) ("Respondent agrees that the question is novel and important and that it warrants review by this Court. Respondent appeared in both lower courts and did not raise any objection either to the jurisdiction of the court or to the granting of a decree.").

47. See *id.* ("Respondent is willing to submit his case for decision on the merits on the basis of the briefs and argument in *Alton vs Alton.*"); Letter from Abe Fortas, Att'y for Petitioner, to Harold B. Willey, Clerk, Supreme Court of the United States (Nov. 8, 1954) (on file with the Felix Frankfurter Papers, Harvard Law School); Telegram from Warren Young, Att'y for Respondent, to Clerk, U.S. Supreme Court (on file with the Felix Frankfurter Papers, Harvard Law School).

48. Memorandum from Chief Justice Earl Warren (1953) (on file with the Felix Frankfurter Papers, Harvard Law School).

permit a full Court to pass on the important issues involved here.”⁴⁹ The Chief Justice agreed and proposed a novel solution: “[The case] should be argued and if counsel for respondent is not willing to argue, perhaps a friend of the court could be appointed to do so.”⁵⁰

Justice Frankfurter, a former scholar of federal jurisdiction, strongly encouraged this approach. Writing to Chief Justice Warren about “the Virgin Islands divorce problem” that had been troubling the Court, Justice Frankfurter cited *Galloway v. Galloway*, “a recent case in the English Court of Appeals,” as “[a] good illustration of the duty of a court to have the benefit of informed argument, particularly in matters that touch closely the institution of the family.”⁵¹ In *Galloway*, the husband in a custody dispute had not been represented on appeal, “and in view of the difficulty and general importance of the question raised, [the court] thought it right to give the Queen’s Proctor the opportunity, of which he availed himself, of instructing counsel to appear for the assistance of the court.”⁵² Justice Frankfurter explained that “‘instructing counsel’ means that money had to be drawn from the Treasury in order that the public interest involved in this litigation could be properly represented and not left to the private arrangement of parties.”⁵³ That interest, he noted, “applies with even greater force” to *Granville-Smith*.⁵⁴

The Chief Justice brought his and Justice Frankfurter’s proposal to their colleagues,⁵⁵ and two days later the Court invited Dean Griswold to argue the case.⁵⁶ Griswold was a natural choice. Not only had he written an article in the *Harvard Law Review* a few years prior on the problems raised by nonuniform state divorce laws, but also he was a former student of Justice Frankfurter’s at Harvard and remained a close friend once Justice Frankfurter joined the Court.⁵⁷ In the end, the Court affirmed, in a five-to-three opinion written by

49. Memorandum on Granting Certiorari in *Granville-Smith v. Granville-Smith* (No. 261) at 3 (1954) (on file with the Earl Warren Papers, Library of Congress). At the time of the *Alton* argument in April 1954, Justice Jackson was hospitalized. See Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245, 264. It is not clear why Justice Douglas did not participate.

50. Memorandum from Chief Justice Earl Warren (1954) (on file with the Earl Warren Papers, Library of Congress).

51. Letter from Justice Felix Frankfurter to Chief Justice Earl Warren (Nov. 18, 1954) (on file with the Earl Warren Papers, Library of Congress).

52. *Galloway v. Galloway*, [1954] P. 312 at 322 (Eng.).

53. Letter from Justice Felix Frankfurter to Chief Justice Earl Warren, *supra* note 51.

54. *Id.*

55. See Notes of Justice William Douglas (Nov. 20, 1954) (on file with the William O. Douglas Papers, Library of Congress).

56. See *Granville-Smith v. Granville-Smith*, 348 U.S. 885 (1954) (mem.).

57. See Griswold, *supra* note 39; see also *Felix Frankfurter Dies; Retired Judge Was 82*, HARV. CRIMSON, Feb. 23, 1965, available at <http://www.thecrimson.com/article/1965/2/23/felix-frankfurter-dies-retired-judge-was>. So friendly were the two that in December 1954, while the case was pending, Griswold mentioned casually at the end of a letter addressed to “Felix,” “I am deep in the law of divorce. It is going to be a busy vacation.” Letter

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Justice Frankfurter, which agreed with the Third Circuit and Dean Griswold's position that the Virgin Islands lacked the authority to establish such liberal divorce jurisdiction for its courts.⁵⁸ The opinion acknowledged that

[i]n view of the lack of genuine adversary proceedings at any stage in this litigation, the outcome of which could have far-reaching consequences on domestic relations throughout the United States, the Court invited specially qualified counsel "to appear and present oral argument, as *amicus curiae*, in support of the judgment below."⁵⁹

A new practice was born.

C. *Post-1954*

The forty-two invitations since *Granville-Smith* have been scattered over the past fifty-six years, as Figure 1 indicates. The density of invitations is highest in the 1980s, when the Court extended an average of 1.5 invitations per Term. I hasten to add that the small number of cases in this sample, relative to the total number of cases on the Court's plenary docket during this time, precludes any claims about the significance of the distribution of cases involving invited amici. We may observe, however, that the steadier pace of cases in the 1980s follows the mid-1970s establishment of the Court's Legal Office, a small office of staff counsel who "advise the clerk, administrative staff, and the justices' clerks on procedural and jurisdictional matters."⁶⁰ Memos from that office concerning these cases demonstrate that the legal officers were aware of the option of inviting an amicus, and that as a result they regularly recommended exercising that option when the respondent was not present. In a 1988 memo on *United States v. Halper*, for example, the legal officer suggested, "for the Court's convenience, it may wish to invite a member of this Court's Bar to brief and argue the case as *amicus curiae* in support of the judgment below as it has done in several recent cases."⁶¹ But, even if this institutional memory ex-

from Erwin Griswold to Justice Felix Frankfurter (Dec. 20, 1954) (on file with the Felix Frankfurter Papers, Harvard Law School).

58. See *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955).

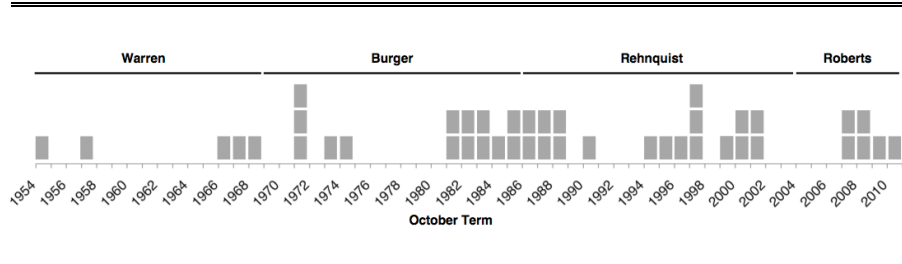
59. *Id.* at 4 (quoting *Granville-Smith v. Granville-Smith*, 348 U.S. 885 (1954) (mem.)).

60. David M. O'Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 672 (1985).

61. Memorandum from William McKinnie, Legal Officer, U.S. Supreme Court 5 (Oct. 4, 1988) (on file with the Harry Blackmun Papers, Library of Congress); see also, e.g., Memorandum from William McKinnie, Legal Officer, U.S. Supreme Court 6 n.1 (May 26, 1989) (on file with the Harry Blackmun Papers, Library of Congress) (recommending, as an alternative, appointing an amicus in *New York v. Harris*); Memorandum from Richard Schickele, Legal Officer, U.S. Supreme Court 4-5 (June 13, 1988) (on file with the Harry Blackmun Papers, Library of Congress) (recommending appointing an amicus in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*); cf. Letter from Francis J. Lorson, Chief Deputy Clerk, Supreme Court of the United States, to Chief Justice William Rehnquist (Sept. 14,

plains the increased frequency of invitations in the 1980s, it does not explain whether the drop-off in invitations in the 1990s was the result of changing attitudes toward the practice within the Court, or simply a lack of cases worthy of review that presented a procedural anomaly that might have prompted an invitation. The next Part examines those anomalies in detail.

FIGURE 1
Amicus Invitations by Term



II. A TAXONOMY OF INVITATIONS

Before we can assess whether the invitation of amici is justified, we must first understand what conditions have necessitated their appointment. Whether a case or controversy persists at the Supreme Court, and whether the goals of the adversary system are well served, depends on why the respondent does not defend the judgment below in each case. This Part classifies the forty-three invitation cases by the reason for the amicus's appointment, as determined by the opinion and briefs in each case, as well as from contemporary internal documents from the Court.⁶² The forty-three cases fall into four broad categories: (1) five cases in which the respondent confessed error and reversed its prior position on the merits, (2) fifteen cases in which the judgment below rested on grounds raised *sua sponte* by the lower court, which neither party supported, (3) two cases in which it was not the decision below that was unrepresented, but instead a specific position the Court wanted argued, and (4) twenty-one cases in which the respondent simply failed to enter a proper appearance before the Court. Figure 2 lists each case by these categories, and by subcategories dis-

1987) (on file with the Harry Blackmun Papers, Library of Congress) (recommending appointing an amicus in *Mackey v. Lanier Collections Agency & Service, Inc.*).

62. To better understand what drove the decision to appoint an amicus in each case, I consulted the relevant case files in the papers of Chief Justice Warren and Justices Douglas, Frankfurter, Marshall, and Blackmun, which contained certiorari-stage memoranda, notes from law clerks, memoranda from the Legal Office, and other internal communications discussing the reasons an amicus might be necessary. These files cover the twenty-six cases from *Granville-Smith* to *Toibb v. Radloff*, the last invited-amicus case prior to Justice Blackmun's retirement. The impetus for each of the remaining seventeen invitations is derived only from the opinion of the Court and the briefs.

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cussed below. I examine each category in detail, with a view to what motivated the respondents in each case and what discussion took place within the Court over how to respond. This Part is primarily descriptive; Part III will then evaluate the different concerns each category raises.

FIGURE 2
Amicus Invitations by Category and Term When Invitation Was Made

<p>(1) The Respondent Changes Its Position on the Question Presented</p> <ul style="list-style-type: none"> • <i>Bond</i> (2010) • <i>Pepper</i> (2009) • <i>Bousley</i> (1997) • <i>Gutierrez de Martinez</i> (1994) • <i>Bob Jones University</i> (1981) 	<p>(3) The Supreme Court Raises a Question Sua Sponte</p> <ul style="list-style-type: none"> • <i>Shelton</i> (2001) • <i>Hohn</i> (1997)
<p>(2) Neither Party Accepts the Lower Court's Sua Sponte Decision</p> <p>Subject matter jurisdiction</p> <ul style="list-style-type: none"> • <i>Kucana</i> (2008) • <i>Reed Elsevier</i> (2008) • <i>Greenlaw</i> (2007) • <i>Becker</i> (2000) • <i>Great-West Life Insurance Co.</i> (2000) • <i>Forney</i> (1997) • <i>Cheng Fan Kwok</i> (1967) • <i>Granville-Smith</i> (1954) <p>Nonjurisdictional grounds</p> <ul style="list-style-type: none"> • <i>Irizarry</i> (2007) • <i>Clay</i> (2001) • <i>Dickerson</i> (1999) • <i>Ogbomon</i> (1996) • <i>Ornelas</i> (1995) • <i>Toibb</i> (1990) • <i>Mathews</i> (1974) 	<p>(4) The Respondent Fails to Enter a Proper Appearance Before the Court</p> <p>. . . at all</p> <ul style="list-style-type: none"> • <i>Harris</i> (1988) • <i>Bonito Boats</i> (1987) • <i>Mackey</i> (1987) • <i>Verlinden</i> (1982) • <i>Brown</i> (1981) • <i>Kokoszka</i> (1973) • <i>12 200-Ft. Reels of Super 8mm Film</i> (1971) • <i>Flair Builders</i> (1971) • <i>Gomez</i> (1971) • <i>Daniel</i> (1968) • <i>Stidger</i> (1966) <p>. . . with proper counsel</p> <ul style="list-style-type: none"> • <i>Fausto</i> (1987) • <i>O'Connor</i> (1985) • <i>Thigpen</i> (1983) • <i>Keeton</i> (1983) • <i>Kolender</i> (1982) • <i>Cores</i> (1957) <p>. . . due to an anomaly applying for IFP status</p> <ul style="list-style-type: none"> • <i>Halper</i> (1988) • <i>Cox</i> (1986) • <i>Ritchie</i> (1985) • <i>Sharpe</i> (1984)

A. *The Respondent Changes Its Position on the Question Presented*

Perhaps the most dramatic reason the Court would be faced with a respondent who does not defend the judgment below is that the respondent, despite having secured a victory below, changes its mind on the question presented and affirmatively rejects its prior position. Not surprisingly, this does not happen often; most litigants do not change course and seek the reversal of a ruling in their favor. Only five amici have been invited in response to a change of position on the merits, and each time the United States was the respondent.

1. *Confessions of error by the Solicitor General*

To understand these five reversals, some brief background on the U.S. government's particular susceptibility to changes in position is helpful. The Solicitor General, who represents the government before the Supreme Court, occupies a peculiar institutional role that has led it to "confess error" to the Court in two to three cases per Term.⁶³ This candor results from three related institutional dynamics. First, as the most frequent litigant before the Court, the Solicitor General is singularly focused on its perceived integrity and on its long-term relationship with the Court.⁶⁴ Thus, when the Solicitor General realizes that the government erred in its views below, it prioritizes correcting the error over "winning" at the Court.⁶⁵ Second, the Solicitor General may not become aware of government positions it believes to be erroneous, in conflict with the positions of other parts of the government, or just disagreeable, until a private party has served its petition for certiorari. In the district courts, and when the government appears in the courts of appeals as an appellee, local U.S. Attorneys, individual components of the Department of Justice, and each federal department and agency litigate cases largely as they see fit.⁶⁶ In such cases, only

63. See David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080 (1994); see also 28 U.S.C. § 518(a) (2006).

64. See, e.g., Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187, 1203 (1988) ("[T]he relationship between the Solicitor General and the Court is not a one-case-stand, but a permanent, indissoluble marriage; as passionately as the Solicitor General may desire a particular result, he must also worry about whether the Court will still respect him when the case is over.").

65. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 9 (1987) ("[W]hen the government wins on grounds that strike the Solicitor General as unjust, he may 'confess error' and recommend that the Supreme Court overturn the flawed decision.").

66. Cf. Role of the Solicitor General, 1 Op. O.L.C. 228, 230 (1977) ("[I]t has been thought to be desirable, generally, for the Government to adopt a single, coherent position with respect to legal questions that are presented to the Supreme Court. Because it is not uncommon for there to be conflicting views among the various offices and agencies within the executive branch, the Solicitor General, having the responsibility for presenting the views of the Government to the Court, must have power to reconcile differences among his clients, to

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when a case arrives at the Court will the Solicitor General have to determine the official position of the United States on a question in controversy, and occasionally that position will be opposite the position taken by the government in the case below.⁶⁷ By contrast, the Solicitor General must authorize any appeal that is taken *by* the government to a court of appeals, precisely to avoid the situation in which the government may secure a decision in its favor below that does not represent the uniform, official position of the United States.⁶⁸ And third, government policy may simply change over time, particularly as new administrations come into office.⁶⁹

In response to confessions of error, the Court may summarily reverse,⁷⁰ issue an order granting certiorari, vacating the judgment below, and remanding the case (GVR) “for further consideration in light of the position asserted by the Solicitor General in her brief for the United States”;⁷¹ simply deny certiorari;⁷² or grant and set the case for plenary review, as with most cases decided by the Court. It is this last option that poses a problem for the Court: who will defend the decision below if the government, which had advocated for that decision, has changed its mind? The Court has turned to invited amici five times.

accept the views of some and to reject others, and, in proper cases, to formulate views of his own.”).

67. Compare, for example, the government’s supplemental letter brief in the Third Circuit in *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009), *see infra* note 91, which was signed by the local U.S. Attorney’s Office in Philadelphia, with the government’s brief in response to the petition for certiorari, *see infra* note 92, which was signed by the Acting Solicitor General and attorneys from the main office of the Justice Department’s Criminal Division in Washington, D.C.

68. *See* 28 C.F.R. § 0.20(b) (2010).

69. In general, however, the Solicitor General has resisted swings in position as a new political party takes control of the government in order to maintain its reputation as a neutral, honest broker before the Court. *See, e.g., Schnapper, supra* note 64, at 1192 (“[One commentator notes] that the Solicitor General traditionally has not been, and ought not become, a ‘mouthpiece’ for the President or an ‘ideological cheerleader for the administration.’”). But not all Solicitors General have approached the position with such a spirit of nonpartisanship. President Reagan’s second Solicitor General, Charles Fried, stirred controversy by adopting positions reflecting where the administration sought to see the law move, as opposed to where it was. *See* Nancy Blodgett, *Solicitor General: Has Office Been Politicized?*, A.B.A. J., May 1, 1986, at 20.

70. *See, e.g., Leonard v. United States*, 378 U.S. 544, 544-45 (1964) (per curiam).

71. *See, e.g., Frankel v. United States*, 130 S. Ct. 72, 72 (2009) (mem.); Brief for the United States at 19, *Frankel*, 130 S. Ct. 72 (No. 08-10150), 2009 WL 3236337 (“[T]he denial of counsel on direct appeal is a sufficiently drastic and serious matter as to warrant additional proceedings. In the government’s view, the appropriate course would be to grant the petition, vacate the judgment below, and remand the case for further proceedings in the court of appeals.”).

72. *See, e.g., Gay v. United States*, 411 U.S. 974, 974-75 (1973) (Douglas, J., dissenting from denial of certiorari) (objecting to the denial despite the Solicitor General’s confession of error where one of the lower court judges should have recused himself due to a conflict of interest).

2. *Invitations of amici in response to changes of position by the Solicitor General*

In *Gutierrez de Martinez v. Lamagno*, for example, the Solicitor General confessed error and parted ways with the U.S. Attorney's office in Virginia that had handled the case below. At issue was whether courts could review discretionary certifications by the Justice Department that federal employees were acting within the scope of their office at the time they committed a tort, which would allow the government to substitute itself for the employee as a defendant.⁷³ The U.S. Attorney had made such a certification, substituted in the United States, and then moved to dismiss the suit on the basis of sovereign immunity "because the incident giving rise to the claim occurred abroad and the [Federal Tort Claims Act] excepts '[a]ny claim arising in a foreign country.'"⁷⁴ To save their suit, the plaintiffs asked the district court and the Fourth Circuit to review the certification, but both held it to be unreviewable.⁷⁵ On petition for certiorari, the Solicitor General noted a split among the circuits on the issue and rejected the U.S. Attorney's position, agreeing with the plaintiffs (and a majority of circuit courts) that they were entitled to judicial review of the Attorney General's certification decision.⁷⁶ Per the Solicitor General's suggestion, the Court "appoint[ed] counsel to defend the Fourth Circuit's decision and to ensure that [the] Court [would have] the benefit of an adversarial presentation."⁷⁷

The Solicitor General also adopted a more forgiving approach than had the government attorneys below in two other cases. In *Bousley v. United States*, after the Eighth Circuit found a federal defendant's collateral attack on his sentence procedurally defaulted, the Solicitor General expressed the opinion that the petitioner should nonetheless be given the opportunity to prove his actual innocence, and so it urged the court to GVR the case for that purpose.⁷⁸ When the Court granted plenary review instead, it appointed an amicus to defend the lower court's outright dismissal.⁷⁹ Similarly, in *Pepper v. United States*, the Solicitor General reversed the government's position on whether postsentencing rehabilitation could be considered by a district court as a factor upon subse-

73. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-20 (1995).

74. *Id.* at 420 (alteration in original) (citing 28 U.S.C. § 2680(k) (1994)).

75. See *id.* at 422-23.

76. Compare Brief for the United States at 7-8, *Gutierrez de Martinez v. Lamagno*, 513 U.S. 998 (1994) (No. 94-167), with Brief for the United States at 15-22, *Gutierrez de Martinez v. Lamagno*, 23 F.3d 402 (4th Cir. 1994) (No. 93-1573), 1994 WL 728562.

77. Brief for the United States, *supra* note 76, at 8 n.6; see *Gutierrez de Martinez v. Lamagno*, 513 U.S. 1010 (1994) (mem.) (inviting an amicus). The Court would have had the benefit of an adversarial presentation even without the amicus, however, since the individual federal employee obtained his own counsel to represent his interests at the Supreme Court. See *Gutierrez de Martinez*, 515 U.S. at 419.

78. See Brief for the United States at 11-12, *Bousley v. United States*, 521 U.S. 1152 (1997) (No. 96-8516).

79. See *Bousley v. Brooks*, 522 U.S. 990 (1997) (mem.).

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quent resentencing.⁸⁰ Again the Solicitor General recommended that the Court GVR for further consideration, but once more the Court granted review instead and appointed an amicus.⁸¹

In *Bob Jones University v. United States*, by contrast, the government's rejection of its prior position was driven by a change in administrations. Of all the invited-amicus cases, *Bob Jones* is perhaps the best known. *Bob Jones* held that nonprofit private schools that discriminate in admissions on the basis of race do not qualify as tax-exempt organizations, notwithstanding their religious beliefs.⁸² After its tax-exempt status was revoked, Bob Jones University had sued the government to challenge the IRS's then-existing policy that "a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in" the portions of the Internal Revenue Code defining tax-exempt organizations.⁸³ In the district court and before the Fourth Circuit, the IRS defended its interpretation of the Code.⁸⁴

Between the Fourth Circuit's ruling and the time the university filed its petition for certiorari, however, President Reagan was elected and inaugurated, and the administration began to rethink the IRS interpretation of the tax code. The Solicitor General responded to the petition while the administration's position was in flux. Its brief in opposition approved of the decision below, but noted that the IRS had been "impeded in its efforts to achieve even-handed enforcement" of the revenue ruling on account of substantial resistance by organizations claiming religious freedom, and so it suggested the Court grant the case to "dispel the uncertainty."⁸⁵ But by the time the government filed its brief on the merits, it had aligned itself with the university on the meaning of the Code, agreeing that it did not authorize the IRS to issue the revenue ruling.⁸⁶ Noting that the Solicitor General had confessed error, the university moved for

80. See Brief for the United States at 13-15, *Pepper v. United States*, 130 S. Ct. 3499 (2010) (No. 09-6822).

81. See *Pepper v. United States*, 131 S. Ct. 32 (2010) (mem.); Brief for the United States, *supra* note 80.

82. See 461 U.S. 574 (1983).

83. *Id.* at 579, 581-82 (alteration in original).

84. See *Bob Jones Univ. v. United States*, 639 F.2d 147, 149-51 (1980); *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 896 (1978).

85. See Memorandum on Granting Certiorari in *Bob Jones University v. United States* (No. 81-3) at 5-6 (Sept. 18, 1981) (on file with the Harry Blackmun Papers, Library of Congress).

86. See Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 2 (Feb. 26, 1982) (on file with the Harry Blackmun Papers, Library of Congress). In the brief, the Acting Solicitor General expressly disavowed this change of position, noting that the "brief sets forth the position of the United States," but that "[h]is views" on the statutory question were reflected in the brief in opposition. Schnapper, *supra* note 64, at 1187 n.3 (quoting Brief for the United States at 1, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3)).

summary reversal.⁸⁷ The Court declined to do so, instead inviting civil rights attorney and former Secretary of Transportation William T. Coleman, Jr. to defend the judgment below.⁸⁸ Coleman, whose side of the case was supported by a broad coalition of civil rights organizations,⁸⁹ carried the day; the position that neither party to the litigation advocated prevailed by an eight-to-one vote.⁹⁰

Finally, in *Bond v. United States*—the most recent case in which an amicus was invited—the government changed its position between the court of appeals and the Supreme Court as to whether a private party has standing to raise a Tenth Amendment challenge to a federal criminal statute under which she was convicted. In the Third Circuit, the government argued that Bond lacked standing to make such a claim.⁹¹ In response to Bond's petition for certiorari, however, the Solicitor General changed course and argued that "[a] criminal defendant has standing to defend herself by arguing that the statute under which she is being prosecuted was beyond Congress's Article I authority to enact."⁹² The Solicitor General advised the Court to GVR for reconsideration in light of its new position,⁹³ but the Court granted certiorari and tapped an amicus instead.⁹⁴

B. *Neither Party Accepts the Lower Court's Sua Sponte Decision*

The second category of cases arises from lower court judgments that rest on grounds raised sua sponte by the court. As in the previous category, amici were invited to defend judgments that respondents disavowed despite the fact that they prevailed below. Unlike the change-of-position cases, however, in these cases the respondent had never advocated the position adopted by the lower court; the court itself introduced the undisputed issue into the case. Although in these cases some actual dispute remained between the parties, in each case—unlike in *Bob Jones*—it mattered to the respondent *how* it prevailed be-

87. See Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 1 (Mar. 4, 1982).

88. *Bob Jones Univ. v. United States*, 456 U.S. 922, 922 (1982) (mem.).

89. See *Bob Jones Univ.*, 461 U.S. at 576-77 (listing amicus curiae briefs filed).

90. *Id.* at 605.

91. See Supplemental Letter Brief for the United States, *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009) (No. 08-2677). The government had not objected to the defendant's standing at first, but following oral argument the Third Circuit requested sua sponte that the parties brief the question. See *Bond*, 581 F.3d at 135-36 & n.5. The case is therefore similar in many respects to the next category of cases, in which the lower court raises an issue on its own. Unlike in those cases, however, here the parties took adverse positions when asked for their views by the court. It was only when the Solicitor General reversed the government's position that an amicus became necessary.

92. Brief for the United States at 6, *Bond v. United States*, 131 S. Ct. 455 (2010) (No. 09-1227).

93. *Id.* at 17.

94. See *Bond*, 131 S. Ct. 455 (granting certiorari); *Bond v. United States*, 131 S. Ct. 589 (2010) (mem.) (inviting amicus).

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low, not just *that* it prevailed, and the court-created issue in its favor was not actually to its liking. These amici curiae are thus quite literally “friends of the court”: they are friends of the *lower* court, who act as counsel to represent the court’s independent action in the case.

These cases are still considered confessions of error, even though the term is somewhat imprecise when actually it is the respondent, joined by the petitioner, accusing *someone else* (the lower court) of erring. Still, the high number of cases in this category in which the Solicitor General represents the respondent—ten of fifteen—suggests that the confession-of-error paradigm is the same. While a typical respondent may be just as happy to defend its victory below on the basis of an issue the court decided *sua sponte* in its favor, the Solicitor General’s greater concern with making correct arguments to the Court and ensuring a just result than with winning at any cost may prompt him to reveal the lower court’s error.⁹⁵ This Subpart examines the types of *sua sponte* grounds of decision that respondents have repudiated, thus leading the Court to invite an amicus to defend the judgment below.

1. *Subject matter jurisdiction*

Eight of the forty-three invitations, including three of the five most recent, were extended because the lower court raised the question of its own jurisdiction *sua sponte* and reached a conclusion that displeased both parties. In four of these cases, the lower court disposed of the petitioner’s case by finding it had no jurisdiction to entertain the appeal, and either the Solicitor General or a state attorney general confessed that the lower court had erred. In *Kucana v. Holder*, for example, the petitioner had sought review in the Seventh Circuit of a Board of Immigration Appeals order denying his motion to reopen removal proceedings.⁹⁶ The government joined the petitioner in arguing to the circuit court that it possessed jurisdiction to review the order under the Immigration and Naturalization Act (INA). While the court found that agreement “[s]urprising[],”⁹⁷ the Solicitor General later explained that the government thought a reading of the statute that conferred jurisdiction was more strongly supported by the statutory text, congressional intent, “the backdrop of the federal courts’ long history of reviewing denials of motions to reopen,” and “the general presumption in favor

95. See CAPLAN, *supra* note 65, at 9. This generalization is not always true of private respondents, of course, as *Granville-Smith* demonstrated: the husband did not want to “win” by having his wife’s suit dismissed for want of jurisdiction; he wanted an adjudication on the merits that would result in a divorce decree.

96. 130 S. Ct. 827 (2010).

97. *Kucana v. Mukasey*, 533 F.3d 534, 537 (7th Cir. 2008), *rev’d sub nom.* *Kucana v. Holder*, 130 S. Ct. 827 (2010).

of judicial review of agency actions”⁹⁸—notwithstanding the fact that nonreviewability would have been an easier path to “victory” for the government.

Despite the government’s concession of jurisdiction, the Seventh Circuit undertook an independent analysis of the jurisdiction conferred upon it by the INA and concluded that it lacked the power to review the Board’s order.⁹⁹ Responding to *Kucana*’s petition for certiorari, the Solicitor General adhered to the government’s position below and argued that the court’s jurisdictional ruling was erroneous.¹⁰⁰ So shortly after the Court granted certiorari, it invited an amicus to defend the Seventh Circuit’s view.¹⁰¹ Three other cases, two involving the Solicitor General and one a state attorney general, followed a similar model: a government representative rejected a victory on jurisdictional grounds raised by the lower court because it declined to “win” the case in a manner it deemed incorrect and unjust.¹⁰²

In *Granville-Smith* and two other cases, private respondents rejected sua sponte jurisdictional rulings in their favor because they desired judgments on the merits of their dispute. Specifically, in each case some concern external to their formal dispute was most important to them, and so what it meant to prevail on appeal had a much more specific meaning. The peculiar constraints on divorce in the 1950s that gave rise to the sham dispute in *Granville-Smith* have already been discussed; they explain why respondent’s notion of a “win” was

98. Brief for the Respondent Supporting Petitioner at 35, 36, *Kucana*, 130 S. Ct. 827 (No. 08-911).

99. *See Kucana*, 533 F.3d at 536-39.

100. *See* Brief for the Respondent in Opposition at 9-11, *Kucana v. Holder*, 129 S. Ct. 2075 (2009) (No. 08-911). The Solicitor General argued that review was unwarranted despite the error, however, because “review would be premature” and the “petitioner could not ultimately succeed on the merits of his challenge to the removal order” even if the court were to review it. *Id.* at 9.

101. *Kucana v. Holder*, 130 S. Ct. 30 (2009) (mem.).

102. *See* *Becker v. Montgomery*, 532 U.S. 757, 761-62 (2001); *Forney v. Apfel*, 524 U.S. 266, 268 (1998); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 207-08, 210 n.9 (1968). In *Becker*, for example, the Sixth Circuit had ruled it lacked jurisdiction to hear the appeal of a pro se plaintiff’s § 1983 claim because he failed to hand sign the notice of appeal. *See* 532 U.S. at 759-60. In response to *Becker*’s petition for certiorari, the Ohio Attorney General urged the Court to reverse, noting, “We cannot honestly claim any uncertain[t]y about petitioner *Becker*’s intention to pursue an appeal once he filed his timely, though unsigned, notice of appeal in the district court. We never objected to the lack of a signature on his notice of appeal, and fully expected the court of appeals to address his appellate arguments on the merits.” *Id.* at 762 (alteration in original) (quoting Brief in Response to Petition for Certiorari at 1, *Becker v. Montgomery*, 531 U.S. 1069 (2001) (No. 00-6374)).

In *Forney*, after the Ninth Circuit gave notice of its intent to address its own jurisdiction, counsel for the government argued against the court’s jurisdiction at oral argument, contravening its brief in the case. *See* Brief for the Respondent in Support of Reversal at 6 n.4, *Forney*, 524 U.S. 266 (No. 97-5737). In its brief on the merits, the Solicitor General noted that this momentary change in position had been changed back. *Id.* The case is better thought of as resulting from a sua sponte decision than a change of position because the government’s initial and ultimate positions were the same, and the brief reversal in between came about only after the court raised the jurisdictional question itself.

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actually a default judgment entered *against* him, not a dismissal of his wife's divorce action on jurisdictional grounds.¹⁰³

Attorney's fees were at stake in *Great-West Life & Annuity Insurance Co. v. Knudson*, a case that, by the time it reached the Supreme Court, concerned courts' power to provide certain equitable relief under ERISA.¹⁰⁴ In the district court, defendant Knudson had prevailed on the merits when the court found that the plaintiff insurance company was not entitled to the relief sought on the facts of the case.¹⁰⁵ The defendant was also awarded attorney's fees.¹⁰⁶ The Ninth Circuit affirmed, but on the alternate grounds that ERISA simply did not provide for the type of relief sought.¹⁰⁷ The insurance company sought certiorari, arguing that either the Ninth Circuit was wrong about the availability of relief—a question over which the courts of appeals were divided—or, if it was correct that courts lacked jurisdiction to provide such relief, they also lacked jurisdiction to award attorney's fees.¹⁰⁸ For fear of losing its fees, the respondent declined to defend the jurisdictional holding below, instead arguing that the district court had been correct in ruling for it on the merits.¹⁰⁹ Rather than accept the respondent's argument, the Court appointed an amicus.¹¹⁰

And in *Reed Elsevier, Inc. v. Muchnik*, the Second Circuit had sua sponte raised the question of whether the Copyright Act deprived federal courts of jurisdiction over particular claims, including those that were the subject of a class action settlement the district court had approved.¹¹¹ Objectors to the class settlement had appealed the approval to the Second Circuit, hoping to have the settlement reopened and restructured to benefit them.¹¹² But when the circuit court ruled that there was no jurisdiction to entertain a class action at all, no one was happy. The plaintiff class, objectors from the class, and defendants all wanted a settlement; they simply disagreed on the terms. Because no party defended the jurisdictional holding below, the Court invited an amicus to defend it.¹¹³

The last case in this category, *Greenlaw v. United States*, stands apart from the others because the lower court determined independently that it *did* have

103. See *supra* note 46 and accompanying text.

104. 534 U.S. 204 (2002).

105. See *id.* at 208-09.

106. *Great-W. Life & Annuity Ins. Co. v. Knudson*, No. 98-56472, 2000 WL 145374, at *1 (9th Cir. Feb. 7, 2000), *aff'd*, 534 U.S. 204.

107. See *id.* The decision is inconclusive as to whether the noncognizability of the claim for relief is a jurisdictional defect or a decision on the merits. See *id.* at *1 n.5.

108. See Petition for a Writ of Certiorari, *Great-W. Life & Annuity Ins. Co. v. Knudson*, 531 U.S. 1124 (2001) (No. 99-1786).

109. See *Great-W. Life Ins.*, 534 U.S. at 226 n.1 (Ginsburg, J., dissenting); Brief in Opposition at 8-9, *Great-W. Life Ins.*, 531 U.S. 1124 (No. 99-1786).

110. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 917 (2001) (mem.).

111. See 130 S. Ct. 1237, 1242-43 (2010).

112. See *id.* at 1242.

113. *Reed Elsevier, Inc. v. Muchnick*, 129 S. Ct. 1693 (2009).

jurisdiction to act on an issue, and neither party agreed. As discussed in the Introduction, the Eighth Circuit in *Greenlaw* acted without invitation from the government to correct a sentencing error committed by the district court that had resulted in a lower-than-required sentence.¹¹⁴ The court found that “[b]ecause this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings and because we think it is judicially efficient for us to address the error,” it was within its discretion to do so.¹¹⁵ Implicit in this decision was a determination that the court had jurisdiction to act in the government’s favor even though the government had not filed its own appeal or cross-appeal in the court.

The Solicitor General disagreed. In response to *Greenlaw*’s petition for certiorari, the government argued that the Eighth Circuit had acted in excess of its jurisdiction. The Solicitor General’s priority was not obtaining a longer sentence for the defendant in this case, but instead preserving for “high-ranking officials within the Department of Justice the responsibility for determining whether the government, on behalf of the public, should pursue a sentencing appeal” and “the legitimacy of, and significant interests promoted by, the Solicitor General’s role in deciding which appeals and petitions for writs of certiorari the government will pursue.”¹¹⁶ Because lower courts were divided as to whether the absence of a cross-appeal deprived the court of jurisdiction to act against the appellant’s interests, the Court granted certiorari and invited an amicus to defend the Eighth Circuit’s broader view of its jurisdiction.¹¹⁷

2. *Nonjurisdictional grounds*

Another seven of the forty-three invitations followed respondents’ rejections of lower court decisions that disposed of their cases, or otherwise affected their cases, on grounds that were raised *sua sponte*. What distinguishes these cases from the prior set is that the grounds were nonjurisdictional. But like the respondents who benefited (nominally) from the *sua sponte* jurisdictional holdings, these respondents refused to defend the unrequested “victories” the lower courts had handed them. In six of the cases, the Solicitor General represented the respondent; in the seventh, he represented the petitioner. This Subpart ex-

114. See *United States v. Carter*, 481 F.3d 601, 607-08 (8th Cir. 2007), *rev’d sub nom. Greenlaw v. United States*, 554 U.S. 237 (2008); see also text accompanying notes 1-3.

115. *Carter*, 481 F.3d at 608 (citing FED. R. CRIM. P. 52(b), which says that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention”).

116. Brief for the United States at 42-43, *Greenlaw v. United States*, 552 U.S. 1087 (2008) (No. 07-330). The Solicitor General admonished: “That determination, which often involves diverse reasons unrelated to the merits of a decision, is not well suited to second-guessing by the courts.” *Id.* at 43 (citation and internal quotation marks omitted).

117. *Greenlaw v. United States*, 552 U.S. 1135 (2008) (mem.).

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amines three types of unrequested relief the courts of appeals had provided parties, and why they repudiated it.

a. *Asserting waived arguments*

First, courts in three cases have asserted arguments that the respondent could have raised to dispose of the petitioner's claim more quickly, but which the respondent waived instead. In one recent case, for example, a district court sua sponte dismissed a criminal defendant's collateral attack on his sentence as untimely under the (nonjurisdictional) limitations period provided by 28 U.S.C. § 2255, notwithstanding the government's argument that the court's interpretation of when the limitations period began was too early.¹¹⁸ As with the jurisdictional cases, the government appeared to be uninterested in supporting what it thought was an incorrect procedural barrier to review, even though it believed the petitioner's § 2255 motion to be meritless.¹¹⁹

A starker case arose from a lower court's sua sponte disposition of a case on the basis of a merits argument that the respondent had waived.¹²⁰ In *United States v. Dickerson*, the Fourth Circuit ruled on the defendant's claimed violations of his *Miranda* rights by holding that, under 18 U.S.C. § 3501, *Miranda*'s protections against self-incriminating statements did not apply to federal prosecutions.¹²¹ The government had not argued that position, however; indeed, in the thirty-one years since Congress had purported to override *Miranda* with § 3501, the Justice Department had not invoked the statute except for a few isolated instances during the Nixon Administration.¹²² Instead, the Department had presumed that *Miranda* still governed its conduct, largely because it be-

118. See *Clay v. United States*, 537 U.S. 522 (2003); Brief for the United States in Opposition at 4, *Clay v. United States*, 536 U.S. 957 (2002) (No. 01-1500).

119. Brief for the United States in Opposition, *supra* note 118, at 11-12. Similarly, in *Toibb v. Radloff*, the bankruptcy court acted sua sponte on a defense that had been waived by the respondent-trustee-in-bankruptcy: that the petitioner-debtor had failed to state a claim upon which relief could be granted. The debtor, an individual, had sought to convert his case under Chapter 7 of the Bankruptcy Code (liquidation) to a Chapter 11 case (reorganization) when he discovered that his estate contained more assets than he had realized. The bankruptcy court, and subsequent courts on appeal, had held that an individual debtor not engaged in business was ineligible to reorganize under Chapter 11. See 501 U.S. 157, 157, 160 (1991). As the case reached the Court, the United States Trustee had stepped in to replace the trustee, who had been dismissed. See *id.* at 160 n.4. Representing the Trustee, the Solicitor General suggested that the question was important and worthy of certiorari because the courts of appeals were divided, and noted its agreement with the petitioner that he was eligible to seek relief under Chapter 11 of the Bankruptcy Code. See Brief for the Respondent at 6, 8, *Toibb v. Radloff*, 498 U.S. 1060 (1991) (No. 90-368). The Solicitor General suggested that the Court "might wish to appoint counsel to defend the judgment below," *id.* at 9, which it did, *Toibb v. Radloff*, 498 U.S. 1065 (1991) (mem.).

120. See generally Chemerinsky, *supra* note 28.

121. See 166 F.3d 667, 692 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

122. See Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1033-35 (1998).

lieved § 3501 to be unconstitutional and because it preferred *Miranda*'s bright-line rules to the pre-*Miranda* totality-of-the-circumstances test for voluntariness of confessions.¹²³ So when Dickerson sought review in the Supreme Court, the government urged reversal of the position it had expressly disowned for decades.¹²⁴ Professor Paul Cassell, who in the Fourth Circuit had represented a public interest organization as an amicus urging the court to raise § 3501 on its own, was tapped to defend the decision before the Court.¹²⁵

b. *Imposing harsher punishments*

Second, in two cases district courts imposed sentences on criminal defendants in excess of both what the government had requested and thought permissible. The government confessed error in the court of appeals in *United States v. Irizarry* after the district court had failed to give the defendant proper notice that it was considering an upward deviation from the Sentencing Guidelines.¹²⁶ When the Eleventh Circuit affirmed nonetheless and the defendant petitioned for certiorari, the Solicitor General maintained the government's position that notice had been required, though it argued the error was harmless.¹²⁷ When the Court granted certiorari, it appointed an amicus to argue that no notice had been required for such a sentencing decision.¹²⁸ And in *Ogbomon v. United States*, both the petitioner and the government argued that the district court had lacked authority to order the petitioner deported as a condition of supervised release.¹²⁹

c. *Enforcing court-created rules*

Finally, in two more cases, a lower court enforced a rule of its own creation that neither party supported. In *Ornelas v. United States*, the government agreed with the petitioner that courts of appeals should apply de novo review to

123. See Brief for the United States at 26-29, 31-38, *Dickerson v. United States*, 528 U.S. 1045 (1999) (No. 99-5525); see also Miller, *supra* note 122, at 1036-37.

124. See Brief for the United States, *supra* note 123, at 50.

125. *Dickerson*, 528 U.S. 1045; see Brief of the Washington Legal Foundation and Safe Streets Coalition as Amici Curiae, *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750).

126. See Brief of Appellee at 18, *United States v. Irizarry*, 458 F.3d 1208 (11th Cir. 2006) (No. 05-11718-DD).

127. See *Irizarry*, 458 F.3d 1208, *aff'd*, 553 U.S. 708 (2008); Brief for the United States in Opposition at 10, 13, *Irizarry v. United States*, 552 U.S. 1086 (2008) (No. 06-7517).

128. *Irizarry v. United States*, 552 U.S. 1135 (2008) (mem.).

129. See Brief for the United States at 11, *Ogbomon v. United States*, 518 U.S. 1056 (1996) (No. 95-8736). After the petitioner's supervised release was revoked, the deportation condition imposed on that term of release was lifted as well, so the case became moot. See Suggestion of Mootness at 2, *Ogbomon v. United States*, 519 U.S. 1073 (1997) (No. 95-8736). The Court then dismissed the writ as improvidently granted. *Ogbomon*, 519 U.S. 1073.

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lower court determinations of whether warrantless stops and searches had been justified under the circumstances by the requisite levels of suspicion.¹³⁰ The Seventh Circuit had previously determined that it would review such Fourth Amendment determinations for clear error only,¹³¹ however, which is what it did in *Ornelas*.¹³² So the Court appointed an amicus to defend the Seventh Circuit's preferred standard of review.¹³³

And *Mathews v. Weber*—the only case in this set of nonjurisdictional *sua sponte* decisions below in which the government was not the respondent—questioned a district court's local rule that automatically referred challenges to Social Security benefits determinations, including the respondent's, to a magistrate judge.¹³⁴ The defendant, the Secretary of Health, Education, and Welfare, contended that such referrals were unauthorized by statute and possibly unconstitutional.¹³⁵ When the Secretary took an interlocutory appeal on this question to the Ninth Circuit, and ultimately the Supreme Court, the plaintiff-respondent took no position on the matter, because "he d[id]n't care who 'decides' his case"; either a magistrate or a district judge was fine with him.¹³⁶ To defend the district court rule, the Court invited an amicus to appear.¹³⁷

C. *The Supreme Court Raises a Question Sua Sponte*

The next category differs significantly from the others: it is not the judgment below that was unrepresented, but instead a specific position the Court wanted to hear argued. But, analytically, these cases are quite similar to the prior category, except that here the Supreme Court itself raised issues *sua sponte*. It is not uncommon for the Court to introduce new questions; most commonly, it does so by asking the parties to brief and argue an additional question to the one presented in the petition for certiorari, either when certiorari

130. See 517 U.S. 690, 695 n.4 (1996); Brief for the United States at 12, *Ornelas*, 517 U.S. 690 (No. 95-5257) ("The advantages that normally justify *de novo* appellate review are fully applicable here. First, the exposition of the Fourth Amendment standard of reasonableness depends on the process of case-by-case elaboration in the appellate courts. Second, the development of the law at the appellate level gives guidance to law enforcement officers and promotes consistent outcomes in the trial courts. Third, the considerations favoring *de novo* review have special force where, as here, a constitutional right is concerned.").

131. See *United States v. Spears*, 965 F.2d 262, 269 (7th Cir. 1992).

132. See *United States v. Ornelas-Ledesma*, 16 F.3d 714, 719 (7th Cir. 1994), *vacated sub nom.* *Ornelas v. United States*, 517 U.S. 690 (1996).

133. *Ornelas v. United States*, 516 U.S. 1008 (1995) (mem.).

134. See 423 U.S. 261, 263-65 (1976).

135. See *id.* at 265.

136. Memorandum from Chief Justice Warren Burger to the Conference (May 21, 1975) (on file with the Harry Blackmun Papers, Library of Congress) ("Respondent Weber who is proceeding *pro se* has no interest in this issue [Respondent] has advised the Clerk that he will not appear here.").

137. *Weinberger v. Weber*, 421 U.S. 985 (1975) (mem.).

is granted¹³⁸ or when ordering reargument in a case.¹³⁹ But the Court has asked an amicus to address a question in two cases.

First, in *Hohn v. United States*, the Court was uncertain as to its own jurisdiction to hear the petitioner's appeal, so it invited an amicus to argue against its jurisdiction.¹⁴⁰ Hohn had sought review of the circuit court's denial of a certificate of appealability in his § 2255 motion to vacate his sentence.¹⁴¹ The Solicitor General had confessed error and agreed that, based on the constitutional nature of Hohn's claim, the certificate should have issued.¹⁴² It suggested that the Court GVR in light of its confession.¹⁴³ But, the Court noted, "[w]e may not vacate and remand . . . unless we first have jurisdiction over the case," and it was not sure the denial of a certificate of appealability constituted a "case" for purposes of its jurisdiction over "[c]ases in the courts of appeals."¹⁴⁴ So, "since Hohn and the Government both argue[d] in favor of [the Court's] jurisdiction," it "appointed an *amicus curiae* to argue the contrary position."¹⁴⁵ The case thus closely resembles those described in Part II.B.1, involving an amicus arguing a represented side of a court-created debate over jurisdiction. It differs, however, in that the amicus did not represent the jurisdictional decision of the lower court, but rather played a "devil's advocate" role to assist the Court with its evaluation of its own jurisdiction.

Second, *Alabama v. Shelton* produced the sole instance in which an amicus was invited "to argue . . . in *opposition* to the judgment below," and "in support of [a particular] position" defined by the Court.¹⁴⁶ In the Alabama Supreme Court, the State had argued that the Sixth Amendment did not require counsel to be provided to a defendant who was given a suspended sentence only.¹⁴⁷ When the defendant prevailed, the State sought certiorari on the question, "In the light of the 'actual imprisonment' standard established in *Argersinger v. Hamlin*, and refined in *Scott v. Illinois*, does the imposition of a suspended or conditional sentence in a misdemeanor case invoke a defendant's Sixth

138. See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 549 U.S. 1105 (2007) (mem.) ("In addition to the questions presented by the petitions, the parties are requested to brief and argue the following questions . . ."); *Feltner v. Columbia Pictures Television, Inc.*, 521 U.S. 1151 (1997) (mem.); *Arizonans for Official English v. Arizona*, 517 U.S. 1102 (1996) (mem.).

139. See, e.g., *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (mem.) ("This case is restored to the calendar for re-argument. The parties are directed to file supplemental briefs addressing the following question . . ."); *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988) (per curiam); *New Jersey v. T.L.O.*, 468 U.S. 1214 (1984) (mem.).

140. See 522 U.S. 944, 944-45 (1997) (mem.).

141. See *Hohn v. United States*, 524 U.S. 236, 239-40 (1998).

142. See *id.* at 240.

143. See *id.*

144. *Id.* at 240-41 (quoting 28 U.S.C. § 1254 (1994)).

145. *Id.* at 241 (citation omitted).

146. 534 U.S. 987 (2001) (mem.) (emphasis added).

147. See *Alabama v. Shelton*, 535 U.S. 654, 657-61 (2002).

Amendment right to counsel?”¹⁴⁸ After certiorari was granted, however, Alabama backed down from its position in its briefs on the merits, “conced[ing] that the Sixth Amendment bars *activation* of a suspended sentence for an uncounseled conviction, but maintains that the Constitution does not prohibit *imposition* of such a sentence as a method of effectuating probationary punishment.”¹⁴⁹ So, “[t]o assure full airing of the question presented,” the Court

invited an *amicus curiae* . . . to argue in support of a third position, one Alabama has abandoned: Failure to appoint counsel to an indigent defendant “does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked.”¹⁵⁰

D. *The Respondent Fails to Enter a Proper Appearance Before the Court*

The final category of amicus invitations consists of twenty-one cases—just under half of the total number—in which the amicus took the place of an absentee respondent. Unlike the first two types of amicus appointments, these did not result from the respondent’s repudiation of the decision below. Rather, in each case it is likely that the respondent wished to preserve its victory. Instead, matters of stubbornness, cost, or principle stood in its way from entering a proper appearance with the Court. Specifically, as this Subpart describes, these failures to appear are prompted by (1) the respondent’s refusal to cooperate with the Court’s review of the judgment below, (2) the respondent’s failure to be represented by, or to accept the representation of, competent counsel before the Court, and (3) problems with the formality of applying for in forma pauperis (IFP) status to obtain appointed counsel. Particularly during the 1980s, the Court responded to these various hiccups in the adversarial system by inviting an amicus to participate.

1. . . . *at all*

Eleven times, the Court has invited an amicus when the respondent simply “decid[ed] . . . that he will not ‘play ball.’”¹⁵¹ In six of these cases, the respondent confessed that the cost of continuing to litigate the case was not worth-

148. Petition for a Writ of Certiorari at i, *Alabama v. Shelton*, 532 U.S. 1018 (2001) (No. 00-1214) (internal citations omitted).

149. *Shelton*, 535 U.S. at 661.

150. *Id.* (quoting *Shelton*, 534 U.S. at 987); see also *id.* at 673 n.13 (“Not until its reply brief did the State convey that, as it comprehends *Argersinger* and *Scott*, there is no possibility that Shelton’s suspended sentence will be activated if he violates the terms of his probation. Before the Supreme Court of Alabama, the State’s position coincided with the position now argued by *amicus*.” (citations and internal quotation marks omitted)).

151. Memorandum from Robert T. Lasky, Law Clerk, U.S. Supreme Court, to Chief Justice Earl Warren 2 (Nov. 30, 1968) (on file with the Earl Warren Papers, Library of Congress).

while. In a dispute with the IRS over whether meals purchased while serving on an army base constituted deductible “travel expenses,” for example, only \$180 was at stake for the taxpayer-respondent.¹⁵² After representing himself throughout the litigation, the respondent in *Commissioner v. Stidger* sought appointment of counsel at the Court even though he was not indigent. The Clerk of the Court suggested instead that an amicus be appointed “to argue from the point of view of the taxpayer,” in order to “give the Court the benefit of the argument without setting a precedent of appointing lawyers for litigants who are not paupers.”¹⁵³

Similar claims were made by a defendant who threatened to go out of business if its victory below were revoked,¹⁵⁴ a bankruptcy trustee who complained that there were insufficient funds in the bankruptcy estate to continue litigating the case,¹⁵⁵ and three other respondents who simply did not want to spend more.¹⁵⁶ Following the model in *Stidger*, the Court invited an amicus in each

152. See *Comm’r v. Stidger*, 386 U.S. 287 (1967); Memorandum from Phillip E. Johnson, Law Clerk, U.S. Supreme Court, to Chief Justice Earl Warren 1 (Oct. 19, 1966) (on file with the Earl Warren Papers, Library of Congress).

153. Memorandum from Phillip E. Johnson to Chief Justice Earl Warren, *supra* note 152, at 1-2 (referencing suggestion of Clerk of the Court John F. Davis).

154. See *Daniel v. Paul*, 395 U.S. 298, 300 n.2 (1969); Memorandum from Robert T. Lasky to Chief Justice Earl Warren, *supra* note 151, at 1 (noting that in response to the Court’s call for a response to the certiorari petition in the case, respondent’s counsel sent a letter “stating that his clients do not wish to expend any more money on this litigation,” and that if the court were to reverse the respondent would “simply cease operations”). This rationale is perhaps confusing, since nothing is unusual about a defendant corporation facing the risk of bankruptcy if it loses in litigation, and that specter would presumably provide greater incentive to litigate zealously in defense of the judgment in its favor below, not less.

155. See *Kokosza v. Belford*, 417 U.S. 642 (1974); Memorandum from James Ginty, Legal Officer, U.S. Supreme Court, to Harry Blackmun 1-2 (Feb. 13, 1974) (on file with the Harry Blackmun Papers, Library of Congress) (“Resp[ondent] trustee states that there are no assets in the bankruptcy estate with which to compensate him or with which to engage the services of an attorney to pursue this litigation. He requests that the Court consider resp[ondent]’s case on the basis of the decision and judgment below.”).

156. *Mackey*: *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); see Letter from Carl S. Pedigo, Jr., Att’y for Respondent, to Sandy Nelsen, Assistant Clerk, Supreme Court of the United States (Sept. 1, 1987) (on file with the Harry Blackmun Papers, Library of Congress) (“[D]ue to the financial burdens of this proceeding, Lanier has instructed me . . . to cease all work on this case.”). *Brown*: *Brown v. Hartlage*, 456 U.S. 45 (1982); see Letter from Victor L. Baltzell, Jr., Counsel for Respondent, to Alexander L. Stevas, Clerk, Supreme Court of the United States (July 13, 1981) (on file with the Harry Blackmun Papers, Library of Congress) (“I have been advised and instructed by my client to proceed no further in the preparation, printing and filing of a brief on the merits . . . Mr. Hartlage has advised me that he does not possess, at this time, the financial capabilities to proceed further with a written response.”). *Flair Builders*: *Int’l Union of Operating Eng’rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972); see Memorandum from Michael A. LaFond, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun 1 (Mar. 2, 1972) (on file with the Harry Blackmun Papers, Library of Congress) (“Respondent has refused to authorize the attorneys to file a brief on the merits or to participate in oral argument. Evidently

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case, rather than relax its criteria for formally appointing counsel. In two of these cases, the Court merely tapped the respondent's lower court counsel to serve as amicus.¹⁵⁷

Other respondents did not cite financial hardship; they just refused to show up. Perhaps the cost of litigation drove the decision, or perhaps those respondents were under the misguided impression that they could quit while they were ahead and thus insulate their lower court victories from review; we can only speculate. But for whatever reason, in five cases the respondent either ceased responding to communications from the Court,¹⁵⁸ refused to allow its attorney to file briefs,¹⁵⁹ or had been absent from the case even prior to its arrival at the

respondent does not want to incur the expense—the attorneys assert that the financial condition of respondent would not justify filing a motion for leave to proceed IFP.”).

157. The two cases were *Daniel* and *Flair Builders*. See Memorandum from Michael A. LaFond to Justice Harry Blackman, *supra* note 156, at 1 (“The attorneys assert that they are willing to prepare a brief and to participate in oral argument at their own expense.”); Memorandum from Robert T. Lasky, Law Clerk, U.S. Supreme Court, to Chief Justice Earl Warren 12 n.3 (Mar. 19, 1969) (on file with the Earl Warren Papers, Library of Congress). Compare *Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 440 F.2d 557, 557 (7th Cir. 1971) (“J. Robert Murphy . . . for defendant-appellee”), with *Flair Builders*, 406 U.S. at 487 (1972) (“J. Robert Murphy, . . . as amicus curiae, in support of the judgment below”).

158. See *New York v. Harris*, 495 U.S. 14 (1990); Memorandum from Joseph F. Spaniol, Jr., Clerk of the Court, U.S. Supreme Court, to Justice Thurgood Marshall (Aug. 8, 1989) (on file with the Harry Blackmun Papers, Library of Congress) (noting that respondent, who had proceeded pro se in his state criminal proceedings, had not responded to multiple communications from the Court). Harris's motion to proceed IFP had been granted, but then he did not respond to the Court's request that he name counsel to appoint for him. See *New York v. Harris*, 490 U.S. 1105 (June 12, 1989) (mem.); Letter from Joseph F. Spaniol, Jr., Clerk of the Court, U.S. Supreme Court, to Bernard Harris, Respondent (July 12, 1989) (on file with the Harry Blackmun Papers, Library of Congress). The claimant in a forfeiture action by the government also ceased responding to requests from the Court during the direct appeal of his successful First Amendment defense in the district court. See *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); Memorandum from Robert E. Gooding, Jr., Law Clerk, U.S. Supreme Court (Feb. 22, 1971) (on file with the Harry Blackmun Papers, Library of Congress) (reporting that after appellee submitted a unilateral stipulation of facts and a copy of his motion to dismiss before the lower court, “no answer was received” by the Court to multiple requests for proper responsive filings).

159. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); Memorandum from Richard Schickele, Legal Officer, U.S. Supreme Court 3 (June 13, 1988) (on file with the Harry Blackmun Papers, Library of Congress) (noting that respondent's new counsel had “advised that our client . . . will not participate further in this proceeding” and instead “submits the issues in this case to the judgment of the court”); Memorandum from Richard Schickele, Legal Officer, U.S. Supreme Court 2-3 (May 9, 1988) (on file with the Harry Blackmun Papers, Library of Congress) (explaining that after the Court had called for a response to the petition for certiorari, counsel “informed his client of its obligation to file a response, [but] the client had not authorized him to file a response and had discharged his law firm”). Counsel was similarly instructed in *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). See Memorandum from Alexander L. Stevas, Clerk, Supreme Court of the United States, to Chief Justice Warren Burger (Oct. 8, 1982) (on file with the Thurgood Marshall Papers, Library of Congress) (“Counsel for the respondent has informed me that he has been instructed by his client not to proceed further in this case and hence no brief will be

Court.¹⁶⁰ And again, the Court responded by appointing an amicus to defend the judgment below rather than coerce the respondent to appear.

2. . . . *with proper counsel*

Six amici were invited when respondents did appear at the Court, but without proper counsel or any counsel at all. In one case, an amicus supplemented the brief of a respondent who was represented by counsel who did not belong to the Supreme Court bar.¹⁶¹ The Court appointed the remaining five amici when the respondent in the case was unrepresented. One case simply involved an unrepresented foreign criminal defendant, for whom counsel was not directly appointed.¹⁶² In the other four, the respondent was denied leave to argue pro se in

forthcoming for the respondent, unless the Court appoints an amicus curiae to file such brief.”).

160. *See* *Gomez v. Perez*, 409 U.S. 535 (1973) (per curiam). The appellant challenged the constitutionality of a Texas law providing that fathers have no legal obligation to support their illegitimate children. *Id.* at 536. In the Texas courts, the father appeared early on to file a general denial only, but he “did not appear [at] trial, either personally or by attorney.” *G—— v. P——*, 466 S.W.2d 41, 41 (Tex. Civ. App. 1971). When appellant appealed to the Supreme Court, the Court called for the view of the Attorney General of Texas, apparently in lieu of pursuing a response from the father. *See* Memorandum for the State of Texas as Amicus Curiae I, *Gomez v. Perez*, 408 U.S. 920 (1972) (No. 71-575). On the merits, however, the Court invited a private amicus to defend the judgment below. *Gomez v. Perez*, 408 U.S. 942 (1972) (mem.).

161. *See* *Thigpen v. Roberts*, 464 U.S. 1006, 1006 (1983) (mem.) (“It appearing that respondent is not represented by a member of the Bar of this Court, it is ordered that Rhesa H. Barksdale, Esquire, of Jackson, Miss., is invited to present oral argument as *amicus curiae* in support of the judgment below.”). Barksdale, a former clerk to Justice White who practiced in Mississippi, where the respondent habeas petitioner was imprisoned, was invited to deliver oral argument one month after the Court received the respondent’s brief on the merits. He opted to submit a brief of his own, which at sixty-five pages provided the Court with a much more detailed argument for affirmance than the respondent’s ten-page brief. *Compare* Brief of Amicus Curiae Supporting Oral Argument to Be Presented on Invitation from the Court in Support of the Judgment Below in Support of Affirmance, *Thigpen v. Roberts*, 468 U.S. 27 (1984) (No. 82-1330), *with* Brief for Respondent, *Thigpen*, 468 U.S. 27 (No. 82-1330). Indeed, though the historical record is silent on this point, given the poor quality of the respondent’s brief and the timing of inviting the amicus after that brief had been received, it seems plausible that the Court was actually motivated to appoint an amicus in this case in order to secure more effective representation of counsel at the Court. In a small hint that the respondent’s brief did not impress the Court, the bench memo in the case written to Justice Blackmun by his law clerk provides only minimal discussion of the brief as compared to the discussion of Barksdale’s brief. *See* Memorandum from Anna L. Durand, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun 5-6 (April 20, 1984) (on file with the Harry Blackmun Papers, Library of Congress).

162. *See* *United States v. Cores*, 356 U.S. 405 (1958). The Court discussed the “[r]epresentation of appellee” on November 22, 1957, two weeks before the amicus was appointed, but available materials do not explain what was at issue. *See* Docket Sheet, *Cores*, 356 U.S. 405 (No. 455) (on file with the William O. Douglas Papers, Library of Congress).

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the Court but refused to accept or was ineligible for appointed counsel.¹⁶³ One respondent, for example, “suffer[ed] from some emotional difficulties”¹⁶⁴ and had filed multiple letters and briefs that were “nothing more than an incoherent jumble of arguments,”¹⁶⁵ which prompted the Court to vociferously deny his request that “co-counsel” be appointed but that he be allowed two minutes of oral argument “to present important facts that may otherwise be buried by over-generalizations.”¹⁶⁶ The respondent’s prospective attorney agreed to defend the judgment below, but only as an amicus, not as respondent’s representative.¹⁶⁷ Another respondent was “commit[ted] to a principle of the right of self-representation before this Court.”¹⁶⁸ And in a third case, flamboyant *Hustler Magazine* publisher Larry Flynt fired the magazine’s attorney five days before oral argument in *Keeton v. Hustler Magazine, Inc.* and offered to “argue on his own behalf,” in what was understood to be an effort to turn the argument into a “stunt” for “publicity.”¹⁶⁹ The Court declined, and instead invited the author of an amicus brief supporting respondent to argue the case.¹⁷⁰

163. See *United States v. Fausto*, 480 U.S. 904 (1987) (mem.) (granting respondent’s motion to file a brief pro se, denying his motion to argue pro se, and inviting an amicus to brief and argue the case); *O’Connor v. Ortega*, 474 U.S. 1048 (1986) (mem.) (denying both leave to proceed IFP and appointment of counsel); *Keeton v. Hustler Magazine, Inc.*, 464 U.S. 958 (1983) (mem.) (denying the “motion of Larry Flynt for leave to present oral argument pro se” and inviting an attorney who had filed an amicus brief on behalf of a business association “to present oral argument as *amicus curiae* in support of the judgment below”); *Kolender v. Lawson*, 459 U.S. 964 (1982) (mem.) (denying leave to present oral argument pro se and appointing the counsel of record from appellee’s brief to argue as amicus); Memorandum from Chief Justice Warren Burger to the Conference (Oct. 27, 1982) (on file with the Harry Blackmun Papers, Library of Congress) (discussing the offer from “respondent’s former counsel” in *Kolender* “to assist the Court ‘in the consideration of this appeal in any way the Court may find helpful and appropriate’”).

164. Letter from Beth Heifetz, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun 2 (Jan. 8, 1986) (on file with the Harry Blackmun Papers, Library of Congress).

165. Letter from James Fanto, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun (Oct. 4, 1986) (on file with the Harry Blackmun Papers, Library of Congress); see Letter from Magno J. Ortega to Supreme Court and Attorney General staff (Sept. 30, 1986) (on file with the Harry Blackmun Papers, Library of Congress).

166. Letter from Magno J. Ortega to Clerk of the Supreme Court (Jan. 12, 1986) (on file with the Harry Blackmun Papers, Library of Congress); see, e.g., Memorandum from Richard Schickele, Legal Officer, U.S. Supreme Court 3 (Jan. 6, 1986) (on file with the Harry Blackmun Papers, Library of Congress); Memorandum from Chief Justice Warren Burger to the Conference 2 (Jan. 28, 1986) (on file with the Harry Blackmun Papers, Library of Congress) (“I seriously doubt that I would sit to hear a *pro se* oral argument from this respondent.”).

167. See Memorandum from Chief Justice Warren Burger to the Conference, *supra* note 166, at 2 (“Under the circumstances, I cannot fault Mr. Klein for ‘firing’ his client.”).

168. Letter from Mark D. Rosenbaum, Former Counsel to Appellee in *Kolender v. Lawson*, to Alexander L. Stevas, Clerk, U.S. Supreme Court (Oct. 21, 1982) (on file with the Thurgood Marshall Papers, Library of Congress).

169. Letter from Norman Roy Grutman, Counsel for Petitioner, to Alexander L. Stevas, Clerk, Supreme Court of the United States 2 (Nov. 3, 1983) (on file with the Harry Blackmun Papers, Library of Congress); see also Letter from Larry C. Flynt to Justice Harry

3. . . . *due to an anomaly with applying for IFP status*

Finally, in four cases, the Court refused to appoint counsel for indigent criminal defendants because they failed to file a signed affidavit explaining their financial situations.¹⁷¹ In two of these cases, the respondents were fugitives who, having prevailed below, had been released pending the government's appeal and then skipped bail or disappeared, and in a third the respondent had completed his sentence and could not be located.¹⁷² While their counsel were eager to defend the judgments below on their clients' behalf, the Court would not formally appoint them to do so—a circumstance that led one law clerk to exclaim, "Boy, this situation really puts counsel in a bind!"¹⁷³ Instead, the Court opted to invite them to appear as amici.

The appellee in the fourth case, a defendant who had been convicted of making false claims against the government, was seemingly eligible for IFP status but refused to sign the affidavit because it "says a false statement might mean perjury" and "[a]ppellee explains that his conviction arose from not un-

Blackmun (Nov. 3, 1983) (on file with the Harry Blackmun Papers, Library of Congress); Memorandum from Alexander L. Stevas, Clerk, Supreme Court of the United States, to the Chief Justice (Nov. 3, 1983) (on file with the Harry Blackmun Papers, Library of Congress) (noting that a corporation cannot argue pro se and suggesting that counsel for an already-filed amicus brief be invited to argue). Petitioner and the Court's fear of allowing Flynt to argue was not unfounded; while attending oral argument even after his motion to argue had been denied, "Flynt began a profane outburst" and "was immediately removed from the courtroom and arrested." Memorandum from Alfred Wong, Marshal of the Court 2 (Nov. 8, 1983) (on file with the Harry Blackmun Papers, Library of Congress).

170. *Keeton v. Hustler Magazine, Inc.*, 464 U.S. 958 (1983) (mem.).

171. *See* SUP. CT. R. 39 (formerly Rule 46.1).

172. *Cox: Vermont v. Cox*, 481 U.S. 1012 (1987) (mem.) (denying respondent's motion to proceed further IFP and inviting his attorney to brief and argue the case as amicus); *see* Memorandum from William McKinnie, Legal Officer, U.S. Supreme Court 1 (Apr. 14, 1987) (on file with the Harry Blackmun Papers, Library of Congress) (discussing respondent's counsel's request that the affidavit be waived due to his inability to locate the respondent). *Ritchie: Pennsylvania v. Ritchie*, 478 U.S. 1019 (1986) (mem.) (denying respondent's motion to proceed further IFP and inviting his attorney to brief and argue the case as amicus); *see* Memorandum from David Niddrie, Legal Officer, U.S. Supreme Court (June 24, 1986) (on file with the Harry Blackmun Papers, Library of Congress) (explaining that "[r]esp[ondent]'s attorney is unable to contact resp[ondent]" and seeks leave to proceed IFP without the required affidavit, and recommending "that the Court grant counsel's request for *ifp* status on condition that the . . . costs will be taxed against resp[ondent] if he is located and found to have sufficient assets"). *Sharpe: United States v. Sharpe*, 469 U.S. 809 (1984) (mem.) (denying respondent's motion to proceed further IFP and for appointment of counsel, and inviting his attorney to brief and argue the case as amicus); *see* Memorandum from David Niddrie, Legal Officer, U.S. Supreme Court (Sept. 20, 1984) (on file with the Harry Blackmun Papers, Library of Congress) [hereinafter Niddrie *Sharpe* Memorandum].

173. Note from L.N. to Justice Harry Blackmun (Apr. 15, 1987), *handwritten on* Memorandum from William McKinnie, *supra* note 172, at 4.

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derstanding the instructions on a similar statement.”¹⁷⁴ Again, rather than compromise in its requirements for proceeding with IFP status, the Court opted to appoint an amicus instead.¹⁷⁵

III. DID THE COURT ERR IN INVITING AMICI?

Now that we understand what has prompted the Court to invite amici, we can assess whether these invitations should have been extended at all. In this Part, I evaluate the invitations from two perspectives. First, I examine these cases against the background principles and objectives of the American system of adversarial litigation. And second, I assess whether these cases were nonjusticiable based on their lack of adversity, or whether the Court should have otherwise exercised prudential restraint.

A. *Consistency with the Goals of the Adversary System*

It is clear that the desire for an adversary presentation on the question before the Court has been the primary motivation for appointing an amicus. In his suggestion that an amicus be appointed in *Granville-Smith*, for example, Justice Frankfurter alluded to “the duty of a court to have the benefit of informed argument.”¹⁷⁶ Others within the Court have noted, in weighing how to proceed with particular cases, being “somewhat troubled” by the idea of a one-sided appeal, which “does not further the underlying adversary nature of our judicial system”;¹⁷⁷ that “the absence of adversary proceedings below is somewhat disturbing”;¹⁷⁸ and that the “resp[ondent]’s position . . . deserves good representation.”¹⁷⁹ The idea that the judgment below might go undefended has unders-

174. Memorandum from William McKinnie, Legal Officer, U.S. Supreme Court 3 (Oct. 7, 1988) (on file with the Harry Blackmun Papers, Library of Congress); see *United States v. Halper*, 490 U.S. 435, 437 (1989).

175. *United States v. Halper*, 488 U.S. 906 (1988) (mem.). The appellee proceeded pro se below, so unlike the other respondents in this category, he did not have prior counsel who could be appointed as an amicus. See Brief of Amicus Curiae in Support of the Judgment Below at 5 n.4, *Halper*, 490 U.S. 435 (No. 87-1383).

176. Letter from Justice Felix Frankfurter to Chief Justice Earl Warren, *supra* note 51.

177. Note from James J. Knically, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun (Oct. 19, 1973), *handwritten on* Memorandum from Arthur F. Ferguson, Law Clerk, U.S. Supreme Court 4 (Oct. 15, 1973) (on file with the Harry Blackmun Papers, Library of Congress) (concerning *Kokoszka v. Belford*, No. 73-5265).

178. Memorandum from Michael Conley, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun (Jan. 11, 1991) (on file with the Harry Blackmun Papers, Library of Congress) (concerning *Toibb v. Radloff*, No. 90-368).

179. Note from James Fanto, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun (Feb. 5, 1987), *handwritten on* Memorandum from Richard Schickele, Legal Officer, U.S. Supreme Court 6 (Feb. 3, 1987) (on file with the Harry Blackmun Papers, Library of Congress) (concerning *United States v. Fausto*, No. 86-595).

tandably been jarring for the Court given that, as Justice Ginsburg observed in *Greenlaw*,

[i]n our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.¹⁸⁰

But there is reason to doubt that creating adversity through the artifice of appointing an amicus resolves these concerns. Bilateral presentation is a means to further the goals of our system of adjudication, not an end unto itself. So the practice of inviting amici must be evaluated against the substance of those goals, not simply its resemblance to the form of adversary proceedings. As Stephan Landsman has described,

The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a forensic setting, is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.¹⁸¹

In that definition I find four distinct objectives: accuracy, acceptability, neutrality, and the resolution of actual disputes. As this Part demonstrates, inviting an amicus serves only the first of these goals well.

Moreover, the principles underlying the adversary system do not just express an ideal, but they also reflect the system's constitutional footing. Article III limits the judicial power to specific categories of "cases" and "controversies," and indicia of adversity play a significant role in the justiciability doctrines derived from Article III.¹⁸² The Court has noted that "the words 'cases' and 'controversies' . . . limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and they also "define the role assigned

180. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008); *see also* *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. . . . Failure to enforce [the party-presentation] requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution.").

181. Stephan Landsman, *The Decline of the Adversary System*, 29 *BUFF. L. REV.* 487, 490 (1980).

182. U.S. CONST. art. III, § 2; *see, e.g.*, *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that *concrete adverseness* which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." (emphasis added)). There has long been debate over whether the Constitution compels the justiciability doctrines or whether they are merely prudential. *See, e.g.*, ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.1, at 44-45 (5th ed. 2007); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 *GEO. WASH. L. REV.* 562 (2009). This Note does not seek to stake a position in that debate, focusing instead on how the doctrines apply to invited-amicus cases, regardless of their origins.

to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”¹⁸³ That is, the case or controversy requirement is both an acknowledgment of courts’ institutional competence to resolve concrete disputes between adverse litigants, and a limitation on the unelected branch’s power to decide a legal question, “or expound[] the law in the course of doing so,” absent the need to do so as part of resolving a concrete dispute.¹⁸⁴ So when amici are appointed because there is no live dispute between the parties, justiciability concerns arise as well.

This Subpart looks generally across the categories of invited-amicus cases to see how well they fit with the first three goals of the adversary system: accuracy, acceptability, and neutrality. The Subpart that follows focuses more closely on the justiciability and dispute resolution challenges that each category of cases presents.

1. Accuracy

Adversary presentation is thought to foster accuracy because it “contributes to a properly grounded decision, a decision that takes account of all the facts and relevant rules.”¹⁸⁵ And, Lon Fuller and John Randall suggested, “[o]nly when [a judge] has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.”¹⁸⁶ On this dimension, inviting an amicus helps further the purpose of the adversary system: where the full persuasive force of an unrepresented decision below could not be captured by the cold text of the lower court opinion standing on its own, an amicus’s defense to the parties’ attacks on that opinion should help ensure that all relevant issues have been aired. The invited amicus thus represents an improvement over the pre-1954 model of hearing one-sided appeals, which left courts, including the *Marbury* Court, “searching anxiously for the principles on which a contrary opinion [to the petitioner’s] may be supported” and dependent on whatever “the imagination of the court could suggest.”¹⁸⁷ Indeed, the Court has acknowledged the benefit of having an amicus “to assist our deliberations.”¹⁸⁸ And even where the amicus makes “ingenious” arguments that are “ultimately unpersuasive,” the Court can be more certain about its decision to reverse the un-

183. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

184. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

185. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873 n.25 (2002) (internal quotation marks omitted) (quoting Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 39, 43 (H. Berman ed., 1971)).

186. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

187. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 159 (1803).

188. *Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000).

defended decision below.¹⁸⁹ The invited amicus genuinely serves as a friend of the Court in this respect.

It is true that accuracy could be compromised if the invited amicus, having no client and no pecuniary reward for prevailing (or for taking the time to accept the Court's assignment at all), becomes lazy and fails to represent the decision below as zealously as the more invested petitioner and respondent oppose it. But there is no evidence to suggest that invited amici present their cases less vigorously than any other litigant before the Court. To the contrary, there is every reason to think the opposite is true. The privilege of arguing a case at the Court is not one that most lawyers, particularly former clerks, take lightly.¹⁹⁰ And given that the appointment has been one stepping stone to prominent careers in appellate litigation and elsewhere in government service and legal practice, the incentive to perform as strongly as possible is high.¹⁹¹

If anything, amici may obscure accuracy by arguing *too* effectively for their positions, compelling the Court to wrestle with "novel" and "clever and complex" arguments in support of judgments that have been abandoned because they really were incorrect.¹⁹² Indeed, a skilled amicus might be so persuasive as to lead the Court to adopt an inaccurate position. This risk is not merely fanciful. In *United States v. Halper*, talented advocate and now-Chief Justice John G. Roberts, Jr. served as amicus in support of the judgment below after the pro se respondent refused to execute the IFP affidavit needed for appointment of counsel. He convinced the Court to accept the lower court's view that a large civil remedy sought by the government for conduct that had already earned the defendant a criminal sentence could constitute "punishment" for purposes of the Double Jeopardy Clause.¹⁹³ Eight years later in *Hudson v. United States*, the Court abandoned its holding in *Halper*, which it deemed "ill considered" and "unworkable."¹⁹⁴ To caution that "[h]ard cases make bad

189. *Kucana v. Holder*, 130 S. Ct. 827, 841 (2010) (Alito, J., concurring in the judgment).

190. *See, e.g.*, Letter from Rhesa H. Barksdale, Invited Amicus in *Thigpen v. Roberts* (No. 82-1330), to Chief Justice Warren Burger (Aug. 3, 1984) (on file with the Harry Blackmun Papers, Library of Congress) ("The Court's invitation provided me with a once in a lifetime opportunity, cherished by all lawyers, and for which I will be forever grateful. The oral argument was the highlight of my experiences as a lawyer; and the opportunity to provide such *pro bono* assistance, and serve as good stewards of the privilege granted us to practice law, was very rewarding to my Firm and me.").

191. *See, e.g.*, Mauro, *supra* note 4 (characterizing an invitation to appear as amicus as "a little-known and rarely available pathway that has launched the Supreme Court appellate careers of several former high court clerks" including "John Roberts Jr., now chief justice, and Maureen Mahoney, who heads the appellate and constitutional practice at Latham & Watkins").

192. *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 250 (2008) ("This novel construction of § 3742, presented for the first time in the brief *amicus* filed in this Court, is clever and complex, but ultimately unpersuasive." (footnote omitted)).

193. 490 U.S. 435, 448-49 (1989).

194. 522 U.S. 93, 101-02 (1997).

law,” the Chief Justice has since cited the *Halper-Hudson* episode as an example of the Court “yielding to the desire to correct the extreme case, rather than adhering to the legal principle.”¹⁹⁵ His effective job as an amicus no doubt helped the *Halper* Court to make that mistake.¹⁹⁶ But the risk that the side with the weaker argument prevails is present any time a case lacks “some measure of equality in the litigants’ capacities to produce their proofs and arguments,” so this general threat to accuracy can hardly be an indictment of the specific practice of appointing amici, even extraordinary ones.¹⁹⁷

2. *Acceptability*

Beyond the one virtue of promoting accuracy, however, the practice runs counter to the remaining aims of adversarial litigation. It is theorized that the adversary system fosters its second goal, acceptability, by providing parties with procedural justice: control over their own cases and a fair opportunity to be heard.¹⁹⁸ Whether a party wins or loses, she is more likely to accept the outcome when her autonomy has been respected and her arguments fully considered. Society, in turn, is more likely to accept the justice system as the proper venue for resolving legal disputes, because such resolution will come only after each side has had a fair shot to present its case. Every category of the invited-amicus cases, however, deprives one party of control. As a result, the acceptability principle is ill-served by the practice.

First, in cases such as *Bob Jones University*,¹⁹⁹ *Reed Elsevier*,²⁰⁰ *Dickerson*,²⁰¹ and *Hohn*,²⁰² the Court infringes upon party autonomy by considering a question over which the litigants do not, or never did, disagree. In general, “[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation.”²⁰³ Yet by deciding an issue uncontested by the parties—as the Court did in each of these four cases and those like them, and as the lower courts did in the first instance in the sua sponte cases like *Reed Elsevier* and *Dickerson*—a court substitutes its judgment as to what issues should be in play for the parties’. That represents an expansion of the judicial role from passive

195. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2272-73 (2009) (Roberts, C.J., dissenting).

196. See Lyle Denniston, *Digging Up a Discredited Precedent*, SCOTUSBLOG (June 9, 2009), <http://www.scotusblog.com/2009/06/digging-up-a-discredited-precedent>.

197. Rubenstein, *supra* note 185, at 1867-68.

198. See Landsman, *supra* note 181, at 526.

199. See *supra* text accompanying notes 82-90.

200. See *supra* text accompanying notes 111-13.

201. See *supra* text accompanying notes 120-25.

202. See *supra* text accompanying notes 140-45.

203. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512 (1989).

arbiter to more active inquisitor, and in constraining the parties' freedom to shape their own case, it undermines their sense of procedural justice.²⁰⁴

To be clear, this claim is descriptive, not normative. As I discuss in depth below,²⁰⁵ there are instances in which courts are obligated to introduce issues into a case even against the wishes of the parties, such as the court's own subject matter jurisdiction. The court is *not* intended to be a passive arbiter with respect to such questions, but rather it does have an interest of its own.²⁰⁶ In those cases, the party-control norm must give way to other values. So I do not suggest that either the Supreme Court in *Hohn* or the Second Circuit in *Reed Elsevier* was wrong to question their jurisdiction *sua sponte*. Rather, I simply note the harm to autonomy that results, even if that harm may be justified.

Party control is valuable not just because autonomy is a dignitary virtue unto itself, but also because parties often make strategic decisions in litigating cases. In test cases, for example, plaintiffs elect to bring specific claims (or defendants raise specific defenses) in order to see if they are valid and will set helpful precedent for future cases, even though by omitting other claims (or defenses) they run the risk of defeat. Similarly, in *Dickerson*, extralitigation concerns motivated the government to defend against a *Miranda* challenge without challenging *Miranda*'s continued validity itself: first, the government's belief that the *Miranda*-override statute was actually unconstitutional, and second, that it was not in the public interest for non-Mirandized confessions to be used in prosecutions even if doing so were possible. Injecting the override statute into the case, as the Fourth Circuit did, impeded the government's autonomy and its discretion as a prosecutor.²⁰⁷

Appointing an amicus to defend an unwanted issue in the Supreme Court, even when it was created in the case by a lower court, deepens the injury. Rather than eliminating the issue from the case, the practice endorses that issue by giving it a voice of its own, and potentially by escalating it to nationwide im-

204. Cf. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 738 (1983) ("The element of party control of proceedings apparent in English procedure from the earliest times was also attractive to the intensely individualistic polity of the eighteenth and nineteenth centuries. The English and American judicial process made increasing allowances for each party to run his lawsuit as he saw fit, to voice his claims, and to select his evidence. The judicial decision was directly tied to the presentations of the parties. Clearly, these facts of procedure were particularly suited to an age preoccupied with the establishment of individual political and economic rights." (footnote omitted)).

205. See *infra* Part III.B.2.

206. See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) ("[T]he court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion.").

207. See Chemerinsky, *supra* note 28, at 292-301 (noting particular separation of powers concerns that arise when the government's autonomy is undermined in its role as a prosecutor).

pact. In *Bob Jones University*, for example, neither party to the litigation desired the result the Court reached. Yet once the Court ruled, both the university and the Reagan Administration were responsible for having elicited a declaration that “racial discrimination in education is contrary to public policy,” whatever “may be the rationale for such private schools’ policies, and however sincere the rationale may be.”²⁰⁸ Surely neither side felt much procedural justice in that result.

On the other hand, once the Court has resolved to create an issue itself, employing an amicus is more autonomy preserving than simply deciding the issue in chambers. As Amanda Frost notes, “[t]urning to an amicus is a perfectly acceptable solution to a breakdown in the adversarial process, as it maintains the dialectical, partisan exchange essential to adversarial theory,” particularly because “the parties may respond to arguments by amici, and thus provide the judge with an adversarial exchange on the new issues raised.”²⁰⁹ So while refraining from sua sponte decisionmaking most respects litigant autonomy, inviting an amicus is a beneficial alternative where that restraint is not exercised because it gives the parties something concrete to oppose. Whether the appointment imposes a *justified* harm on autonomy overall, then, turns entirely on whether the judicially created issue is one in which the court does have some interest of its own. Part III.B.2 addresses this issue in greater detail.

Second, the failure-to-appear category of cases deprives the respondent of control as well, but the loss is to the amicus himself rather than the Court: the amicus plays the role of defending the respondent’s interests, but without any professional or ethical responsibility to do so. While litigating counsel are generally their clients’ agents and subject to their clients’ control—in theory, if not always in practice—an amicus owes no duty of loyalty or confidentiality to the respondent, nor is the respondent empowered at all to provide direction on strategic choices or to be informed about the status of the case.²¹⁰ Indeed, in two cases in which the respondent was denied leave to argue pro se, the amici appointed to argue the respondent’s side were already counsel of record for third-party amici and owed a duty to their own clients, not the respondent.²¹¹ And in a third, the amicus accepted the Court’s assignment, but on the express condition that he serve as an amicus and *not* receive instruction from the respon-

208. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

209. Frost, *supra* note 28, at 467, 506.

210. Cf. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2010) (scope of representation and allocation of authority between client and lawyer); *id.* R. 1.4 (communication); *id.* R. 1.6 (confidentiality of information); *id.* R. 1.7-18 (conflicts of interest and other duties of loyalty).

211. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 771 (1984) (Stephen M. Shapiro argued as amicus and filed an amicus brief for the Motor Vehicle Manufacturers Association); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 482 (1983) (Stephen N. Shulman argued as amicus and filed an amicus brief for the Republic of Guinea).

dent.²¹² It is unlikely that any of these respondents felt particularly validated by their hearing in the Court or were as accepting of the result.

Perhaps we should not be too concerned with the autonomy of respondents who exercise that autonomy by electing not to participate in the Court according to its rules. The eleven respondents who failed to show at all, whether due to stubbornness or financial concerns, decided that defending the decision below was not worthwhile to them and the loss of control over their case at the Court was no more than a consequence of that decision. Indeed, we might think they should have been grateful their side of the case was argued at all; in the courts of appeals, an appellee who fails to file a brief is typically sanctioned by being denied the opportunity to be heard at oral argument.²¹³

But what of respondent criminal defendants who could not be located to sign IFP affidavits, or respondents who sought to proceed pro se—had they waived their right to have their own interests represented too? There are good reasons to think that they had. Two of the IFP cases involved fugitives whose attorneys could not obtain notarized IFP affidavits because they could not locate their clients.²¹⁴ On the one hand, the Court's insistence upon completed affidavits before appointing the defendants' attorneys to serve as their counsel seems an excess of formalism, which prioritizes the Court's internal rules over a criminal defendant's right to counsel. But on the other hand, the defendants caused their own inability to sign by absconding, and the Court has held that "after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction," he is "disentitle[d] . . . [from] call[ing] upon the resources of the Court for determination of his claims."²¹⁵ So the respondents would have weak standing to complain about their autonomy in the litigation of their appeal. Regardless, there is little reason to worry that autonomy was infringed; in both cases, as well as the other IFP case in which the respondent had not proceeded pro se, the respondent's former counsel was selected to serve as the amicus and presumably litigated the case no differently than he had when formally representing his client.²¹⁶

212. See Letter from Joel I. Klein to Francis J. Lorson, Chief Deputy Clerk, U.S. Supreme Court (Jan. 21, 1986) (on file with the Harry Blackmun Papers, Library of Congress) ("I made clear that I would consult but that I would not be [respondent's] counsel in this case [*O'Connor v. Ortega*]."); see also *supra* note 163 and accompanying text (describing cases in which respondent clients had directed counsel to cease further litigation).

213. See FED. R. APP. P. 31(c); see, e.g., *In re Talbert*, 344 F.3d 555, 557 (6th Cir. 2003).

214. See *supra* note 172 and accompanying text (discussing *Pennsylvania v. Ritchie* and *United States v. Sharpe*).

215. *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam). In *Molinaro*, the petitioner was a fugitive, so his direct appeal was dismissed. In these cases, the respondent is a fugitive, so while not disentitled to have his case heard, the same logic would suggest he is not entitled to the appointment of counsel of his choice.

216. See *Vermont v. Cox*, 481 U.S. 1012 (1987) (mem.); *Pennsylvania v. Ritchie*, 478 U.S. 1019 (1986) (mem.); *United States v. Sharpe*, 469 U.S. 809 (1984) (mem.); see also

Where the respondents sought to argue pro se or lacked proper counsel, the intrusions on their autonomy were similarly minimal. Each had filed a brief, either pro se or through the counsel of his choice, and in one case, *Kolender v. Lawson*, the respondent's former counsel was appointed to argue as amicus.²¹⁷ Participating at oral argument themselves would no doubt have given these respondents more control over their case and a greater sense of the procedural justice that the adversary system endeavors to produce. But no right to self-representation exists on appeal, even for criminal defendants (which none of these respondents were),²¹⁸ and three of the four pro se respondents chose to place matters of principle above authorizing counsel to represent them.²¹⁹ So while appointing amici does nothing to advance the acceptability goal of the adversary system, the practice may be justified by countervailing considerations and the parties' prior autonomous actions that resulted in the amicus invitations.

3. *Neutrality*

The adversary system effects its third goal, neutrality, by "enjoin[ing] [the decisionmaker] from becoming too active a participant in the proceedings."²²⁰ In a nonadversarial context, when "the deciding tribunal is compelled to take into its own hands the preparations that must precede the public hearing," it "cannot truly be said to come to the hearing uncommitted, for it has itself appointed the channels along which the public inquiry is to run."²²¹ The consequence of a court "becom[ing] an active inquirer" is a failure "to convince society at large that the court system is trustworthy" by virtue of "appear[ing] to be an advocate rather than a neutral arbiter."²²² On the surface, appointing an amicus appears to avoid some of these pitfalls: it allows the Court to assume a

Letter from Mark J. Kadish, Counsel for Respondent, to Alexander Stevas, Clerk, U.S. Supreme Court (May 11, 1984) (on file with the Harry Blackmun Papers, Library of Congress) ("[M]y professional and ethical obligations require that I confer with my client on proceedings before the Court, and if the Court takes action in this matter, I am foreclosed from consulting with my client at the present time."); Niddrie *Sharpe* Memorandum, *supra* note 172, at 2 ("[Counsel for Sharpe] may have an ethical duty to proceed—even without his clients.").

217. See *supra* note 163.

218. See *Martinez v. Court of Appeal*, 528 U.S. 152, 154 (2000).

219. *O'Connor*: Memorandum from Chief Justice Warren Burger to the Conference (Jan. 28, 1986) (on file with the Harry Blackmun Papers, Library of Congress) (noting that respondent's many demands regarding his involvement in the preparation of the briefs and delivery of oral argument had left his prospective counsel unwilling to represent him directly). *Keeton*: Letter from Larry C. Flynt to Justice Harry Blackmun, *supra* note 169 (invoking "the grand American tradition [of] allowing me to retain the counsel of my choice—namely me"). *Kolender*: Letter from Mark D. Rosenbaum to Alexander L. Stevas, *supra* note 168 (noting the "principle of the right of self-representation before this Court").

220. Landsman, *supra* note 181, at 491.

221. Fuller & Randall, *supra* note 186, at 1161.

222. Landsman, *supra* note 181, at 491.

more passive role, by considering the briefed arguments on both sides of the question presented and testing their strength at oral argument, rather than compelling the Court to be more active in making the unrepresented side's arguments to itself.²²³ But that neutral posture comes only after the decision to invite an amicus has been made. It is the decision to extend the invitation in the first place where the risk of nonneutrality is greatest, particularly in the two categories of cases in which the respondent rejects the decision below.

Consider the handling of confessions of error by the Solicitor General. According to one calculation, "Solicitors General have confessed error in the Supreme Court approximately 250 times in the past 100 years."²²⁴ As noted earlier, the Court has responded in various cases by denying certiorari; granting, vacating, and remanding for consideration of the confession of error; and appointing an amicus.²²⁵ Between 1977 and 2006, the Court GVR'd a case in light of the Solicitor General's confession of error fifty-six times.²²⁶ Meanwhile, the Court decided to appoint an amicus in sixteen cases in which the Solicitor General confessed error, notwithstanding the government's express requests in some of them that the Court GVR,²²⁷ that certiorari be denied on the grounds that the error below was harmless,²²⁸ or that the decision below be reversed outright.²²⁹

Which route the Court elects to take can reflect an interventionist decision that is fraught with prejudice of the merits of the case. Denying certiorari might say, "We don't care about this issue, even though the government acknowledges an injustice."²³⁰ Appointing an amicus, by contrast, signals an in-

223. *See id.* at 491 n.15 ("As a general matter it has been said that the more active the judge becomes the greater is the risk that he will abandon a neutral posture in the litigation.").

224. Rosenzweig, *supra* note 63, at 2080.

225. *See supra* Part II.A.

226. Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 734 fig.2 (2009).

227. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 240 (1998) ("The Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature. It asked us to vacate the judgment and remand so the Court of Appeals could reconsider in light of this concession."); Brief for the United States, *supra* note 80, at 13-15 (concerning *Pepper v. United States*, 07-330); Brief for the United States, *supra* note 116, at 48 (concerning *Greenlaw v. United States*, No. 07-330); Brief for the United States, *supra* note 78, at 12 (concerning *Bousley v. United States*, No. 96-8516).

228. *See, e.g.*, Brief for the Respondent in Opposition at 19, *Kucana v. Holder*, 129 S. Ct. 2075 (2009) (No. 08-911); Brief for the United States in Opposition at 16, *Irizarry v. United States*, 552 U.S. 1086 (2008) (No. 06-7517); Brief for the United States in Opposition at 13, *Clay v. United States*, 536 U.S. 957 (2002) (No. 01-1500).

229. *See, e.g.*, Forney v. Apfel, 524 U.S. 266, 268 (1998) ("The Solicitor General suggested that we reverse the Ninth Circuit and remand the case so that it could hear Forney's appeal.").

230. To be sure, most denials of certiorari do not express any view on the merits of the question presented, but rather simply the view that the question presented is not one that the Court need resolve at that time, or that the case is a poor vehicle for examining the question.

tent to reach the merits because the Court has some doubts about the legal question, even though the parties do not. But to GVR is the most neutral approach: it is an exercise of self-restraint until the lower court has had the opportunity to reconsider its rule in light of party agreement on an issue. This is not to say that the “Court should mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error,” a behavior Chief Justice Rehnquist decried;²³¹ to the contrary, as Justices²³² and commentators²³³ alike have observed, there are instances when plenary review may be appropriate, such as when the confession of error appears to be made strategically in order to insulate an issue from the Court’s review. Rather, I note simply that those criticisms of the GVR practice appeal to other countervailing concerns (e.g., manipulation by the Solicitor General), which may at times need to be prioritized above neutrality. But the point remains that, by singling out cases for which to construct an adversary form, the Court acts with less neutrality than when it passes on the cases that *already* adverse parties bring to it.

A fair objection to this criticism is that, by design, the neutrality objective is *never* prioritized at the certiorari stage of litigation before the Supreme Court: the Court’s docket is discretionary and, as announced in its own rules, it chooses from among the thousands of petitions it receives those few cases deemed to raise “important” enough questions of federal law.²³⁴ The decision to grant or deny a petition is never neutral with respect to the merits,²³⁵ and unlike a district court’s acceptance of every case that is filed, it need not be.²³⁶ So, even if the decision to invite an amicus, rather than GVR in light of a con-

Even denials following government confessions of error might not express agreement with the decision below; rather, they may result from the view that the confessed error was harmless in that case, and so the Court will wait for a future case in which the issue is presented and *dispositive* to evaluate the government’s concern.

231. *Mariscal v. United States*, 449 U.S. 405, 406 (1981) (Rehnquist, J., dissenting); *see also id.* at 407 (“I harbor serious doubt that our adversary system of justice is well served by this Court’s practice of routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own.”).

232. *See, e.g., Lawrence v. Chater*, 516 U.S. 163, 178-92 (1996) (Scalia, J., dissenting) (arguing GVR practice is inappropriate in response to federal agency’s new interpretation of statute); *Alvarado v. United States*, 497 U.S. 543, 545-46 (1990) (Rehnquist, C.J., dissenting) (arguing GVR practice is inappropriate where the government concedes error in reasoning but deems it harmless); *see also Wellons v. Hall*, 130 S. Ct. 727, 732-33 (2010) (Scalia, J., dissenting); *Webster v. Cooper*, 130 S. Ct. 456, 456-57 (2009) (Scalia, J., dissenting); *Youngblood v. West Virginia*, 547 U.S. 867, 870-75 (2006) (Scalia, J., dissenting); *Dep’t of Interior v. South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting).

233. *See, e.g., Bruhl, supra* note 226, at 753-54; *Rosenzweig, supra* note 63, at 2095-101, 2111-14.

234. SUP. CT. R. 10.

235. *See, e.g., Margaret Meriwether Cordray & Richard Cordray, Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313 (2009).

236. *But see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

fession of error or deny certiorari, does betray some amount of prejudgment on the merits, that would hardly be unique to appointed-amicus cases.

With the exception of the failure-to-appear category of cases, however, inviting an amicus is meaningfully different and a more severe departure from the neutrality principle than the general certiorari process. While the discretionary docket allows the Court to choose which questions to take up, it is limited to those questions over which parties actively disagree. In cases in which the parties agree on the question presented—most commonly because the lower court raised a dispositive issue sua sponte—appointing an amicus allows the Court to decide an issue without the usual constraint that it be contested. Absent that constraint, there is risk that the Court will reach out for those issues it wishes to decide even though it need not. Thus, as with the harm imposed by sua sponte decisionmaking on litigants' autonomy, whether the impact of appointing an amicus on the neutrality principle is justified depends on whether the Court has an interest in the issue raised. The next Subpart addresses this question.

Finally, the Court typically limits its own discretion by granting review only when an issue has already been examined multiple times by the lower courts, and typically only when those courts have reached conflicting conclusions. That criterion produces a heightened form of neutrality: the Court usually becomes involved in controlling national precedent not only when the parties are adverse, but also when the courts of appeals are in conflict with one another. Because parties' agreement on an issue and disagreement with the decision below might lead the courts of appeals on the opposite side to reconsider, particularly when one party is the government, exercising the option to GVR is most consistent with the Court's generally neutral commitment to withholding review until an issue has fully percolated through the courts of appeals. Moreover, if the courts of appeals that had previously adopted a position opposite the one later embraced by the Solicitor General are led to reconsider, the Court might avoid needing to grant review at all.

B. *Consistency with the Case or Controversy Requirement*

The fourth goal of the adversary system is the resolution of actual disputes, a goal that is rooted in Article III's limits on federal jurisdiction to actual "cases" and "controversies." Within the Court, it has not always been obvious that invited-amicus cases should be justiciable at all. *Vermont v. Cox*, a failure-to-appear case in which an amicus was appointed because the respondent was a criminal defendant who could not be located, was described by one law clerk as "dangl[ing] from Article III by a thread."²³⁷ At various times, proposals were

237. Memorandum from Emily Buss, Law Clerk, U.S. Supreme Court, to Justice Harry Blackmun (Nov. 21, 1987) (on file with the Harry Blackmun Papers, Library of Congress) (concerning *Vermont v. Cox*, No. 86-1108).

circulated to dismiss the case as moot²³⁸ and for lack of standing.²³⁹ Ultimately, after much internal straining, the writ of certiorari was dismissed as improvidently granted.²⁴⁰ *United States v. Sharpe*, another failure-to-appear case involving a missing respondent, by contrast, was decided by the Court, notwithstanding Justice Stevens's scathing criticism of the Court for "rendering advisory opinions at the request of the Executive."²⁴¹ And *Bob Jones University* produced great uncertainty within the Court as to whether the IRS's change of position had mooted the case.²⁴² This confusion is unsurprising, as cases involving repudiated judgments and absentee parties are not typical "cases" or "controversies" within the Constitution's conferral of jurisdiction on federal courts.²⁴³ This Subpart evaluates the fit between the practice of inviting amici and the case or controversy requirement, which relates to the dispute resolution principle of the adversary system.

The central concern of the doctrines of justiciability is to "assure that the federal courts will not intrude into areas committed to the other branches of government."²⁴⁴ This restriction on federal courts' jurisdiction is defended on multiple grounds, including fairness and institutional competence. Fairness concerns arise from the fact that while courts resolve questions of law one case at a time, their legal pronouncements carry the weight of precedent and bind future parties whose interests and needs are not before the court. Reserving the judicial forum for only those who have the most at stake is therefore thought to produce the most accurate and fair results.²⁴⁵ Similarly, courts' relative institu-

238. See Justice William Brennan, Draft Opinion in *Vermont v. Cox* (Nov. 17, 1987) (on file with the Harry Blackmun Papers, Library of Congress).

239. See Justice William Brennan, Draft Opinion in *Vermont v. Cox* (Nov. 13, 1987) (on file with the Harry Blackmun Papers, Library of Congress).

240. *Vermont v. Cox*, 484 U.S. 173 (1987) (per curiam); see also, e.g., Memorandum from Justice Harry Blackmun to the Conference (Nov. 23, 1987) (on file with the Harry Blackmun Papers, Library of Congress) ("It seems to me that we are spinning our wheels here in a case that, in its present posture, cannot be very important. . . . I hope we shall do all we can to get rid of the case now.").

241. *United States v. Sharpe*, 470 U.S. 675, 726 (1985) (Stevens, J., dissenting); see also *infra* notes 317-21 and accompanying text.

242. See, e.g., Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 2 n.2 (Jan. 21, 1982) (on file with the Harry Blackmun Papers, Library of Congress) (suggesting the case be vacated and remanded for consideration of mootness). *But see* Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 3 (Feb. 26, 1982) (on file with the Harry Blackmun Papers, Library of Congress) (suggesting the case was no longer moot).

243. U.S. CONST. art. III, § 2.

244. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

245. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310 (1979) ("[O]ne of the best explanations of the case or controversy requirement may be the desire of courts to ensure the accountability of representatives. . . . The case or controversy requirement guarantees that the individuals most affected by the challenged activity will have a role in the challenge. This guarantee should be seen as a minimal element of the legitimacy of a legal system which imposes legal burdens upon its members.").

tional strength is in adjudicating concrete disputes between adversaries; the political branches, on the other hand, are better positioned to consider society-wide questions of policy because of their superior access to information.²⁴⁶ Moreover, legislatures' political accountability gives legitimacy to their policy determinations. By contrast, when courts engage in agenda setting and policy-making, they may be viewed as acting politically and unaccountably, and thus their legitimacy may be tarnished.²⁴⁷ Consequently, courts typically accept the justiciability doctrines as restrictions on their power and engage in "judicial self-restraint" by answering only those questions sharply presented to them by litigant parties.²⁴⁸

Related separation of powers concerns animate the prohibition against advisory opinions—judicial rulings on legal questions presented outside the context of a live case.²⁴⁹ As far back as *Hayburn's Case* in 1792, the Court has opined that federal courts may not maintain jurisdiction over a matter for which their decision would not have an actual effect.²⁵⁰ Although the term as originally conceived applied to extrajudicial legal advice rendered by a court to the executive or legislature,²⁵¹ it has since been applied more broadly by courts refusing to rule "on questions rendered unnecessary by the balance of its decision, on questions not yet properly before it, on questions that cannot affect the relations of the parties, or on questions that have not been properly framed and illuminated by the record in a case calling for further proceedings."²⁵² As when the parties lack standing, cases that would produce opinions that are only advisory are deemed nonjusticiable because they would compel courts to act as legislatures, forced to make policy tradeoffs and predictions about hypothetical

246. Cf. CHEMERINSKY, *supra* note 182, § 2.1, at 46 ("Because federal courts have limited ability to conduct independent investigations, they must depend on the parties to fully present all relevant information to them. It is thought that adverse parties, with a stake in the outcome of the litigation, will perform this task best. Many of the justiciability doctrines exist to ensure concrete controversies and adverse litigants.").

247. See, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1384 (1997) ("[F]or the Court to display [a] political choice is costly. It is institutionally costly for the Court because (1) it makes the Court seem less like what we consider to be a Court (executing the commands of others) and more like a policy maker (choosing what policy to make), and (2) the social meaning of this subjectivity is negative for a court within our political tradition. All things being equal, a rule that reveals a political choice is a worse rule than a rule that does not. There is a pressure to select rules that don't reveal this political choice.").

248. *Massachusetts v. EPA*, 549 U.S. 497, 548 (2007) (Roberts, C.J., dissenting).

249. See *Flast*, 392 U.S. at 96.

250. See 2 U.S. (2 Dall.) 409 (1792).

251. See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50-51 (6th ed. 2009) (reproducing correspondence between Secretary of State Thomas Jefferson and the Supreme Court); Felix Frankfurter, *A Note on Advisory Opinions*, 37 *HARV. L. REV.* 1002 (1924).

252. 13 *WRIGHT ET AL.*, *supra* note 27, § 3529.1 (3d ed. 2008) (footnotes omitted) (collecting cases).

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factual scenarios, which in turn would weaken and short-circuit the political process.²⁵³

On the surface, cases in which one side is represented by an invited amicus appear to fall squarely within the definition of an advisory opinion and beyond the bounds of justiciable cases or controversies: the amici argue positions that no adverse party accepts, in cases that will produce nationwide binding precedent, and which may not actually have an effect on the litigating parties. The Court, of course, is hardly so careless, and in fact the justiciability of the appointed-amicus cases turns out to be a much more nuanced question. This Subpart examines each of the four categories of cases in turn. It identifies a set of issues that the Court may decide, even when not contested by the parties, without breaching “judicial self-restraint”: those issues that courts are *obligated* to address because they concern the courts’ own authority, operating procedures, or independent interests with which they have been charged.

1. *The respondent changes its position on the question presented*

Parties capitulate in litigation all the time; they settle. Most frequently they do so long before trial, but settlement occurs on appeal as well, and sometimes even after arriving at the Supreme Court.²⁵⁴ There is no doubt that an approved settlement ends a case; courts are without power to continue to adjudicate the questions raised, no matter how important or urgent the court considers them to be, after a plaintiff withdraws its complaint. So it would be clearly unconstitutional for a court to appoint amici to pick up where the parties left off. Similarly, when a party receives all the relief it seeks even absent settlement, the case becomes moot and most often nonjusticiable.²⁵⁵ So why did the Court appoint amici five times after the government reversed the position its opponent was challenging?

In *Gutierrez de Martinez v. Lamagno*²⁵⁶ the answer was simple: though the Solicitor General reversed the local U.S. Attorney and conceded that Federal Tort Claims Act certifications were reviewable, the individual federal officer who was sued remained in the case and defended the judgment below, so there was no question of mootness. Indeed, because the officer remained an adver-

253. *See, e.g.*, Frankfurter, *supra* note 251, at 1005-07.

254. *See, e.g.*, *Pottawattamie Cnty. v. McGhee*, 130 S. Ct. 1047 (2010) (mem.) (dismissing writ of certiorari upon settlement).

255. *See, e.g.*, *Kremens v. Bartley*, 431 U.S. 119 (1977) (holding that the repeal of the statutes challenged as unconstitutional rendered the case moot). There are established exceptions to the mootness doctrine, however, for cases in which the defendant voluntarily ceases its challenged conduct but there is some “reasonable expectation” that the conduct will be resumed. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (maintaining jurisdiction because the “defendant [was] free to return to his old ways”).

256. *See supra* notes 73-77 and accompanying text.

sary respondent, the invited amicus was redundant, but certainly not disallowed.

Bousley v. United States and *Bob Jones University* are more problematic. In *Bousley*, the Solicitor General confessed that a federal defendant's collateral attack on his sentence should not have been procedurally defaulted to the extent the defendant sought to prove his actual innocence.²⁵⁷ Had the government actually believed Bousley to be innocent, it could have factually mooted the case by issuing him a pardon or joining in a motion to vacate his sentence. But the government did not believe Bousley's claim had merit, so it did not reject the judgment below, which denied Bousley's § 2255 motion. Instead, it was unsatisfied only because the court of appeals had found procedural default without determining whether Bousley could make a showing of adequate innocence, which it believed would excuse the default if made.

Despite the fact that the broader case was not moot, the question presented was uncontested. And because that question concerned the imposition of a procedural default—a defense intended to protect the government from piecemeal litigation of claims—which the government could *waive*, the Court had no independent interest in the question. In other words, the *question presented* was moot. Typically when a case becomes moot on appeal, the appellate court vacates the lower court judgment and remands with directions to dismiss the complaint as moot.²⁵⁸ This is done so that the appellant is not left with an erroneous decision on the books that he cannot challenge after mootness terminates the court's jurisdiction, thus allowing the issue to be relitigated by him or another party in a future case that is justiciable. Such an approach would have been appropriate in this case: Bousley would have gotten the relief he sought (the opportunity to show actual innocence), the government would be put in the position in which it would have been had it waived procedural default initially, and the Court would have avoided rendering an opinion on the merits of an undisputed question. It is unsurprising, then, that that is precisely what the Solicitor General proposed in its certiorari-stage brief: granting, vacating and remanding the case.²⁵⁹ The Court erred in appointing an amicus instead.

To be sure, the GVR alternative in such cases is not without its flaws. It undoes the reasoned opinion of a court of appeals not because the Supreme Court disagrees, but simply because the winning party—an independent branch of government—has changed its mind. As Judge Learned Hand once exclaimed, "It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General."²⁶⁰ Then-Justice

257. See *supra* notes 78-79 and accompanying text.

258. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

259. Brief for the United States, *supra* note 78, at 12.

260. Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 S.M.U. L. REV. 73, 79 (1995) (quoting Archibald Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 225 (1963)).

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Rehnquist expressed this view in *Mariscal v. United States*, a case in which the Court did GVR in light of the Solicitor General's confession of error.²⁶¹ Dissenting from that decision, he opined that

[I]t ill behooves this Court to defer to the Solicitor General's suggestion that a Court of Appeals may have been in error after another representative of the Executive Branch and the Justice Department has persuaded the Court of Appeals to reach the result which it did . . . without any independent examination of the merits on our own.²⁶²

There is a certain separation of powers appeal to this view. But it is ultimately unconvincing, because as a practical matter a decision by the Court affirming (after inviting an amicus) would have no effect: the government could continue to simply waive objections such as procedural defaults in similar future cases. The Court's opinion could thus be overridden by the Executive in practice—precisely the type of “advisory opinion” the Constitution precludes courts from issuing.²⁶³ If the Court is disinclined in such cases to upset the judgment of a lower court at the behest of the Solicitor General, its alternative to vacating and remanding should simply be to deny certiorari altogether and let the erroneous judgment stand. Because it is not a court of error, the Court does so in many cases it deems wrongly decided but not worthy of plenary review. Granting certiorari and employing amicus support for an adversary presentation, by contrast, keeps alive a moot issue under such circumstances.

The recent amicus invitation in *Pepper v. United States* was not improper, however, notwithstanding its seeming similarity to *Bousley*. As in *Bousley*, government prosecutors took a more aggressive stance before the Eighth Circuit, which the Solicitor General subsequently renounced.²⁶⁴ And, like it had in *Bousley*, the Solicitor General suggested in response to the petition for certiorari that the Court GVR the case in light of its new position rather than order full briefing and argument in the case. But, unlike in *Bousley*, the question presented in *Pepper* concerns an issue the government could *not* waive: what factors a court may consider in sentencing. Sentencing is a discretionary task that is charged to the courts, which are authorized to impose any sentence within the range set by Congress for the crime of conviction,²⁶⁵ subject to the requirements imposed on them by higher courts under their supervisory powers.²⁶⁶

261. See *Mariscal v. United States*, 449 U.S. 405, 406-07 (1981) (Rehnquist, J., dissenting).

262. *Id.*

263. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

264. See Brief for the United States, *supra* note 80, at 13-15.

265. See, e.g., 18 U.S.C. § 3553 (2006); FED. R. CRIM. P. 32; *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (“For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether restraint, such as probation, should be imposed instead of imprisonment or fine.”).

266. See e.g., *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

The Eighth Circuit in *Pepper* found that, under its precedent, district courts could not consider a defendant's postsentencing rehabilitation upon resentencing following vacatur of an initial sentence.²⁶⁷ That precedent was rooted in a judicial policy determination that it would be unfair to allow "a few lucky defendants, simply because of a legal error in their original sentencing, [to] receive a windfall in the form of a reduced sentence for good behavior in prison."²⁶⁸ Thus, the Eighth Circuit's policy constraining courts' sentencing discretion was not something the government could waive, and so, unlike in *Bousley*, it would not have mattered whether the local federal prosecutor had expressed the ultimate view of the Solicitor General from the beginning. As with the cases involving sua sponte decisions made by lower courts, the amicus in *Pepper* will represent the Eighth Circuit's independent interest in the question presented. A GVR would not have been inappropriate to give the Eighth Circuit an opportunity to reconsider its position, but appointing an amicus to represent the Eighth Circuit's view was not impermissible either. Given courts' power over sentencing, the independent interest expressed by the Eighth Circuit is one that it is entitled to have.

Similarly, the most recently invited amicus, in *Bond v. United States*, will argue an issue that was not mooted by the government's change in position.²⁶⁹ A party's standing to raise a claim is a jurisdictional question that a court is obligated to consider itself, whether or not the parties agree on the answer.²⁷⁰ Consequently, the Third Circuit's determination that it lacked jurisdiction to consider Bond's constitutional challenge (because she lacked standing to raise it) did not depend on the government taking that position; the Third Circuit could have reached the same result even if the government had adopted the view later expressed by the Solicitor General before the Court. As in *Pepper*, the amicus will represent the Third Circuit's position on an issue about which it is independently interested: its own jurisdiction to decide a class of constitutional questions. Inviting an amicus to argue against jurisdiction, in what might be a close case as to standing, supports, rather than undermines, the case or controversy requirement.

Finally, like *Bousley*, the Court should have refrained from deciding *Bob Jones University*. Initially, the government took steps "to reinstate the tax-exempt status of both [petitioners], to refund to them the social security and unemployment taxes in dispute, and to revoke the Revenue Rulings that were relied upon to deny [them] tax-exempt status under the Code," and suggested that the lower court decision be vacated and the case remanded for dismissal as

267. See *United States v. Pepper*, 570 F.3d 958, 965 (8th Cir. 2009) (citing *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007)), cert. granted, 130 S. Ct. 3449 (2010) (No. 09-6822).

268. *United States v. Sims*, 174 F.3d 911, 912 (8th Cir. 1999).

269. Oral argument had not yet taken place in *Bond v. United States* at the time this Note went to press.

270. See *infra* text accompanying notes 279-83.

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moot.²⁷¹ The university agreed.²⁷² Had no developments ensued, the case surely would have been moot; absent some indication that the government might change its position once again, the case would have ceased to be a live one. But instead, one month later, the D.C. Circuit entered an order in a related case brought by civil rights organizations, which enjoined the Secretary of the Treasury and the Commissioner of Internal Revenue from granting or restoring the tax-exempt status to any school that discriminates on the basis of race.²⁷³ Noting that the Secretary of Treasury would “honor this order,” the Solicitor General withdrew his suggestion of mootness.²⁷⁴ Still, the government agreed with the university on the merits, and it plainly intended to restore the university’s tax-exempt status as soon as it could lift the D.C. Circuit’s injunction. Within the Court, staff continued to “question whether a real controversy remains,” and the Legal Office suggested dismissing the writ of certiorari.²⁷⁵ The Court declined and heard the case with an amicus instead.²⁷⁶

Although the IRS’s inability to revise its tax regulations meant that the case was not factually moot, the Court was faced with a question on which the parties agreed. In reality, the university’s dispute was with the D.C. Circuit in its related case, not with the government, which took the university’s position. So by hearing the case, the Court exceeded its role, reaching out to resolve a question of statutory interpretation over which there was no conflict. That is, it rendered an advisory opinion of sorts. This overstepping is all the more problematic because the Court *affirmed* the judgment with which neither party agreed; it seized the opportunity to insert itself in the middle of a national political debate, rather than restraining itself and awaiting a future challenge to the IRS’s position. Such overreaching is precisely what the case or controversy requirement seeks to protect against.

The Court could have better managed the situation by vacating the decision below, so as to relieve the university of res judicata effects, and remanding with

271. Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 2 (Jan. 14, 1982) (on file with the Harry Blackmun Papers, Library of Congress); *see also* Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 2 n.2 (Jan. 21, 1982) (on file with the Harry Blackmun Papers, Library of Congress) (“[B]ecause the SG has moved to dismiss, the Court may have no alternative but to vacate and remand to the CA 4 for consideration of mootness.”).

272. *See* Memorandum from Joe Caldwell, *supra* note 271, at 2.

273. *See* Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 2-3 (Feb. 25, 1982) (on file with the Harry Blackmun Papers, Library of Congress); *see also* Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *rev’d sub nom.* Allen v. Wright, 468 U.S. 737 (1984).

274. Memorandum from Joe Caldwell, *supra* note 86, at 2; *see* Note from Kit Kinports to Justice Harry Blackmun (Mar. 17, 1982) (“I continue to believe that these cases should be [dismissed as improvidently granted.]”), *handwritten on* Memorandum from Joe Caldwell, Legal Officer, U.S. Supreme Court 2 (Mar. 17, 1982) (on file with the Harry Blackmun Papers, Library of Congress).

275. Memorandum from Joe Caldwell, *supra* note 87, at 2.

276. *See supra* note 88 and accompanying text.

directions to dismiss the case or to hold it pending resolution of the parallel D.C. Circuit case, which was on its way to the Court. Alternatively, the Court could have held the case itself. Bob Jones University, meanwhile, would have been entitled to intervene in the other case on the government's side, where it could have helped the government's (ultimately successful) effort to ward off the civil rights groups' challenge.²⁷⁷ Either of these approaches would have prevented the Court from making a binding judicial pronouncement on a question that was not disputed and thus would have protected the democratic process from premature judicial intervention.

2. *Neither party accepts the lower court's sua sponte decision*

As noted earlier, the propriety of appointing an amicus to defend the lower court's sua sponte decision turns on whether the lower court was justified in introducing an issue into the case that the parties did not raise. The lower court would be justified in creating the issue where it had an independent interest in that issue, so it need not have been a passive arbiter. In such cases, the requisite adversity was present at the Supreme Court: in effect, the petitioner was on one side, and the lower court was on the other. Although all invited-amicus cases have been styled as "petitioner v. respondent," these justified cases are more akin to mandamus actions against the lower court that challenge the substance of the court's asserted interest. While in most mandamus cases the beneficiary of the lower court's action—the mandamus petitioner's opponent in the underlying litigation—appears as the "real party in interest" to defend the lower court decision, the opponent is not required to do so for a dispute against the court to be maintained, and the court may send its own attorney to defend its interest.²⁷⁸ This is essentially the role the invited amicus plays: she represents the lower court's interest in the minority of cases where the beneficiary elects not to. But when the lower court has no independent interest in the issue it creates, there is nothing for the amicus to defend. In those cases, inviting an amicus is improper, and instead the lower court's overreaching should be either vacated or left alone as with other errors not worthy of certiorari. An example of each type of issue creation will clarify this point.

It is uncontroversial that a court can raise its lack of subject matter jurisdiction to hear a case sua sponte, even if the defendant missed this legal argument in its motion to dismiss.²⁷⁹ Indeed, rather than rule on the merits when the court literally lacks the power to do so—and thereby issue an advisory opinion—a court *should* create the antecedent issue that would let it resolve the case more

277. See *Allen*, 468 U.S. 737.

278. See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 298 (1972) (noting that both the district court and the real party in interest appeared to defend the lower court's actions).

279. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977).

directly on jurisdictional grounds.²⁸⁰ So in the eight invitation cases in which a lower court made a determination of its jurisdiction *sua sponte*,²⁸¹ the lower courts did not act inappropriately in engaging in issue creation (even if they were incorrect as to the *merits* of their jurisdictional holdings). Consequently, an adversary dispute existed between the petitioner (whose claim as the plaintiff or appellant was held to be outside the court's jurisdiction) and the jurisdiction-denying lower court. That the respondent sided with the petitioner was unusual, but it did not moot the question because jurisdiction was not the respondent's to concede. To the contrary, it was the lower court's own interest in policing its jurisdictional boundaries that was on appeal to the Court.²⁸² So, just as the court could designate its own attorney to defend its decision in a mandamus action, the Supreme Court could "appoint counsel" for the lower court when its jurisdictional holding was challenged on appeal instead. Indeed, Chief Justice Warren got it exactly right when he noted on his docket sheet for *Cheng Fan Kwok v. INS*, "Bill Dempsey appointed to represent the Third Circuit Court of Appeals."²⁸³

Courts should not, on the other hand, *sua sponte* raise issues the parties have waived. A court has no interest of its own, for example, in its personal jurisdiction over a defendant or whether a plaintiff brings a constitutional challenge to a statute in addition to a claim that the statute should be interpreted a certain way; if the defendant waived its jurisdictional objection by appearing or the plaintiff did not make a particular claim that it could have, it is not for the court to inject those issues into the case. Unlike instances in which the parties miss a flaw in subject matter jurisdiction, the court runs no risk of issuing an advisory opinion (based on "hypothetical jurisdiction") when it reaches the merits of a dispute that could have been dismissed sooner on personal jurisdiction grounds.

Similarly, the court would not render an advisory opinion by resolving the parties' dispute over the meaning of a statute, even where it would have gladly entertained a constitutional challenge to the statute. Unlike with subject matter jurisdiction, courts generally face no obligation to confirm that a statute is constitutional before they construe it. Quite the opposite: it is a "doctrine more deeply rooted than any other in the process of constitutional adjudication" that courts "ought not to pass on questions of constitutionality . . . unless such adju-

280. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion.").

281. *See supra* Part II.B.1.

282. *See, e.g., In re Smith & Wesson*, 757 F.2d 431, 435 (1st Cir. 1985) (issuing mandamus to compel the district court to take jurisdiction of a case it had dismissed for want of jurisdiction).

283. Docket Sheet, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968) (No. 638) (on file with the Earl Warren Papers, Library of Congress).

dication is unavoidable.”²⁸⁴ Courts engage in such “constitutional avoidance” even when parties raise constitutional arguments themselves; thus, it would be an extreme form of overreaching to raise the statute’s constitutionality *sua sponte* where the dispute could be resolved more narrowly on the parties’ own terms, by just interpreting the statute’s meaning. History suggests that courts engaging in this form of overreaching might do so to advance their own agendas,²⁸⁵ which is precisely the threat that the adversary system and case or controversy doctrine seek to mitigate. Meanwhile, construing a statute that may be unconstitutional is not to render an opinion about a hypothetical legal universe; to the contrary, the statute is very real and governs the parties until and unless it is later held unconstitutional, so interpreting its meaning is a legitimate exercise of judicial power.

Among the invited-amicus cases, then, the lower courts erred in the three cases in which they asserted arguments the parties had waived.²⁸⁶ In *Clay v. United States*, for example, the district court’s *sua sponte* dismissal of a criminal defendant’s § 2255 motion on the ground that it was untimely was improper.²⁸⁷ The limitations period was not jurisdictional, and thus could be waived by the only party who had an interest in the protection it offered: the government. The U.S. Attorney’s Office in Indiana did not generally waive timeliness objections to § 2255 motions, but it did choose to do so for motions that it thought were timely under its more liberal interpretation of the limitations period, even when it could have moved to dismiss the motion under the Seventh Circuit’s narrower reading. Clay’s motion fell in that window. Because the court had no independent interest in the limitations period that compelled it to consider timeliness, it erred in introducing that issue into the case on the government’s behalf.²⁸⁸ To be sure, the Seventh Circuit need not have *adopted* the government’s interpretation of the limitations period; courts may not be compelled to issue what they view to be incorrect legal pronouncements by concession of the parties. Instead, it should not have addressed the issue at all, or at most could have noted (in dicta) its disagreement with the government’s interpretation while stating that it would respect the government’s waiver of the issue.

On petition for certiorari, the Court would have done fine to deny review—as the government requested notwithstanding its confession of error, and as it

284. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

285. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 645-46 & n.3 (1961) (overruling a prior case and holding that the Fourteenth Amendment does impose the exclusionary rule upon the states, even though neither the defendant nor Ohio asked the Court to reach this issue).

286. *See supra* notes 118-25 and accompanying text.

287. *See supra* notes 118-19 and accompanying text.

288. Bizarrely, the Seventh Circuit acknowledged that the government had waived its defense, but then faulted Clay for having waived his objection of waiver after he did not immediately respond to the court’s introducing the timeliness issue *sua sponte*. *See Clay v. United States*, 30 Fed. App’x 607, 608 n.1 (7th Cir. 2002).

may do in any case even where there was error below—or it could have GVR'd in light of the lower court's overreaching to decide a question that was not properly presented to it.²⁸⁹ But by inviting an amicus to support the Seventh Circuit's position, the Court prolonged consideration of a question that was not in dispute. Consequently, by deciding the merits of case (finding that the petitioner and government's interpretation of the limitations period was correct), the Court rendered an advisory opinion: even if the Court had ruled the other way, the government would have remained free to continue waiving the limitations defense for the window of time that was ambiguous. Vacating and remanding, by contrast, would have put both Clay and the government back in the position they wanted and put the Seventh Circuit on alert about its obligation not to overreach, while leaving for another day (when the government might decide to enforce the narrower period) a determination on the merits.

Dickerson presents a similar error.²⁹⁰ As Erwin Chemerinsky has argued, the Fourth Circuit was wrong to raise the *Miranda* override statute, 18 U.S.C. § 3501, sua sponte not only because the government was entitled to—and did—waive the argument that *Miranda* had been abrogated, but also because in “usurping the judgment of the executive branch about how to exercise its prosecutorial authority,” the court failed to respect the separation of powers.²⁹¹ The Fourth Circuit had taken the view that it was authorized to consider whether § 3501 had overruled *Miranda*—and to apply the statute's less demanding standard for evaluating confessions, assuming the statute was constitutional— notwithstanding the Justice Department's long-running refusal to invoke the statute.²⁹² Citing *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*,²⁹³ the court found that “the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it.”²⁹⁴ But that analogy was inapt.

In *U.S. National Bank*, the D.C. Circuit had been faced with a party that disputed the meaning of a statute that had been removed from the U.S. Code. The party conceded that the statute was nonetheless still in effect because it was never properly repealed, even though challenging the statute's continued

289. *Cf. Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983) (“Because of the position that the University has taken irrespective of the outcome of this lawsuit, we conclude that the case is moot and that the Court of Appeals had no jurisdiction to decide it. Accordingly, we grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand to that court for entry of an appropriate order directing the District Court to dismiss the action as moot.”).

290. *See supra* notes 120-25 and accompanying text.

291. Chemerinsky, *supra* note 28, at 292.

292. *See United States v. Dickerson*, 166 F.3d 667, 671-72 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

293. 508 U.S. 439 (1993).

294. *Dickerson*, 166 F.3d at 672.

existence would have been its strongest argument.²⁹⁵ The court took it upon itself to investigate, and determined that the statute had, in fact, properly been repealed and thus was not in force. This judicial issue creation was proper. Like determining their jurisdiction, courts are obliged to ensure that they are interpreting a rule of decision that actually exists. Were they not, parties could bring entirely fictional statutes to courts for interpretation, which would produce archetypal advisory opinions.²⁹⁶

Unlike the mysterious “§ 92” in *U.S. National Bank* that had disappeared from the U.S. Code, however, there should have been no question as to *Miranda*'s continued existence. *U.S. National Bank* considered whether one act of Congress had actually repealed a prior act of Congress; either § 92 was in force (despite having been deleted from the reported Code) or it was not. Section 3501, by contrast, was an act of Congress that purported to overrule a decision of the Supreme Court. Unlike the statutory override of a statute, which wipes the predecessor from the books, a statutory override of a Supreme Court decision is not self-executing and does not erase precedent from the U.S. Reports. Rather, until a court held that § 3501 had abrogated *Miranda*, *Miranda* remained good law. And as the Fourth Circuit noted, “[T]he Court has never considered whether the statute overruled *Miranda*.”²⁹⁷ The Court had not considered that question in the thirty-one years since § 3501 had been passed precisely because the government waived its many opportunities to invoke the statute, thus denying courts that opportunity. But as a party, and particularly as a prosecutor, that was its prerogative. Seizing the opportunity for itself, without invitation by a party, the Fourth Circuit took a tremendous step outside the judicial role and into the domain of a coordinate branch of government.

As in *Clay*, the Supreme Court compounded the error by inviting an amicus. Rather than respect the executive branch's decision not to enforce a statute it thought unconstitutional, and thus leave the question of *Miranda*'s constitutional status for another day, the Court opted to resolve the dispute once and for all. Although its conclusion on the merits was the opposite of the Fourth Circuit's, its error was the same: it issued a pronouncement of constitutional law that the dispute before it did not require it to make. Instead, vacating and re-

295. See *Indep. Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *rev'd sub nom.* *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) (holding that the statute was still in force, but that the circuit court was right to raise this issue itself).

296. See *U.S. Nat'l Bank*, 508 U.S. at 446-47 (“‘The judicial Power’ extends to cases ‘arising under . . . the Laws of the United States,’ and a court properly asked to construe a law has the constitutional power to determine whether the law exists. The contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory.” (omission in original) (internal citations omitted)).

297. *Dickerson*, 166 F.3d at 671.

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manding would have better squared with the case-or-controversy-based requirement that courts only act when necessary.

Most of the other invited-amicus cases that resulted from sua sponte holdings fall into the former, justified category. In the two cases in which the Solicitor General confessed error regarding some aspect of the sentence imposed by the lower court, the government sided with the petitioner on an issue that it could not waive—an issue that implicated an independent interest of the court.²⁹⁸ As explained earlier, courts play an independent role in sentencing and are not bound by the arguments of the prosecution or defense. While the government has complete prosecutorial discretion in choosing what charges to bring and how to seek a conviction, it does not control the sentencing process and cannot “waive” a higher sentence by disclaiming it. As with jurisdictional questions decided sua sponte by a court, the government will generally defend courts’ judgments on appeal even if courts provide more than the government asked for (e.g., by dismissing a civil suit on jurisdictional grounds, or by imposing a tougher-than-expected sentence). But when the government disagrees with the lower court’s action, its capitulation is no barrier to justiciability, because the lower court’s independent interests stand on their own. So again, as with the jurisdictional cases, the invited amicus is a reasonable device for ensuring that the lower court’s interests are represented.

The same is true of the lower court’s automatic-referral rule that sent Social Security benefits determinations to magistrate judges in *Mathews v. Weber*;²⁹⁹ docket management is an independent interest of the courts and not an issue the parties could waive. In *Mathews*, the respondent’s position illustrated this clearly: “he d[id]n’t care who ‘decides’ his case,” so he neither sought to “waive” nor sought to defend the lower court’s decision.³⁰⁰ Instead, he simply stayed out of a dispute that was in fact between the government and the district court. *Ornelas v. United States*, in which the government confessed error as to the standard of review the lower court used in a Fourth Amendment challenge, fits the same mold.³⁰¹ Unless mandated by statute, the standard of review that applies to a specific claim is generally a court-created rule, which reflects judicial policymaking concerning the appropriate amount of deference to show lower courts for particular issues. So when the government confessed error and suggested the Seventh Circuit had acted too deferentially, that court had an independent interest in defending its preferred standard, the defense for which was provided by the invited amicus. Unlike the timeliness claim that was raised on the government’s behalf in *Clay*, the government could not have waived the stricter standard of review, so a decision by the Court had a real effect on par-

298. See *supra* Part II.B.2.b.

299. See *supra* notes 134-37 and accompanying text.

300. Memorandum from Chief Justice Warren Burger to the Conference, *supra* note 136.

301. See *supra* notes 130-33 and accompanying text.

ties in future cases that could not be rendered advisory by the government's unilateral actions.

3. *The Supreme Court raises a question sua sponte*

The two cases in which the Court itself raised questions sua sponte can be evaluated the same way. In *Hohn v. United States*,³⁰² the Court questioned its own subject matter jurisdiction, which it was obligated to satisfy itself it possessed. To do this, the Court decided it would benefit from having a “devil’s advocate” make the case against jurisdiction. While most lower courts simply consider the question themselves, or occasionally ask the parties for briefing on the question, there is no reason the Court should be barred from seeking assistance from an outsider any more than it should be stopped from asking a law clerk to write an internal memorandum on its jurisdiction in a case. Because the court-created issue was an appropriate one, inviting an amicus posed no problem.

The issue in *Shelton*, by contrast, fits in the unjustified class of issues raised sua sponte.³⁰³ Midcourse, petitioner Alabama pulled back from the strongly antidefendant position on a Sixth Amendment question it had taken in its petition for certiorari. Yet the Court was interested in that broader position—which is why it had granted certiorari on the question presented, presumably—so it invited an amicus to make the argument that it had wished the petitioner to make. That was overreaching. Alabama was the “master of its own petition.”³⁰⁴ Had it decided to withdraw its petition entirely and simply accept the decision below, the Court would have had no power to retain the case, however important it may have seemed. Similarly, it was not for the Court to decide how the question presented would be litigated. If at the time Alabama modified its position the Court was no longer interested in the question, it should have dismissed the writ of certiorari as improvidently granted, and waited for another case to present the question it had thought it was going to answer in that case.

One might object that this approach would not best use the Court’s time and judicial resources, and it would allow uncertainty in an area of the law to linger longer.³⁰⁵ True enough, but the Constitution does not structure courts or

302. See *supra* notes 140-45 and accompanying text.

303. See *supra* notes 146-50 and accompanying text.

304. Cf. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-16 (1989) (“Plaintiffs are masters of their complaints and remain so at the appellate stage of a litigation.”).

305. Indeed, Chief Justice Rehnquist proposed “an additional exception” to the doctrine of mootness specifically “for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case,” in view of the “unique resources—the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring” that the Court expends once it has granted certiorari. *Honig v. Doe*, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J., concurring). Nothing in Article

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the government with efficiency in mind. Rather, it prioritizes constraints on power, which by design are inefficient. Thus, while courts might be frustrated by biting their tongues until a litigant raises the theory they would prefer to use in resolving a question, constitutional structure would suggest they should accept that check on their authority.

4. *The respondent fails to enter a proper appearance before the Court*

None of the failure-to-appear cases pose the problem found in some *sua sponte* cases of the Court deciding questions that the parties, within their discretion, have taken out of play. So the concerns about judicial overreaching to issue pronouncements of law may appear to be less severe. But they are not absent either because these cases raise a separate set of justiciability doubts, namely: why were they not moot? The case or controversy requirement applies throughout litigation, and a case can become nonjusticiable on appeal if an actual controversy ends.³⁰⁶ If these cases should have been dismissed as moot but the Court invited an amicus to breathe new life into them, then it engaged in the same type of overstepping as the lower courts in the *sua sponte* cases, which raises the concern that it was reaching out to decide issues rather than restricting itself to the set of live cases brought to it.

In the eleven cases in which the respondent declined to appear at all, there was reason to doubt an ongoing controversy. At the trial level, a civil defendant who refuses to participate may suffer the penalty of a default judgment because she frustrates the administration of justice in refusing to provide the necessary adversary posture for the case to proceed.³⁰⁷ As the D.C. Circuit has noted,

[T]he default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection. Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy.³⁰⁸

So too might we worry about a responding party on appeal failing to respond in an attempt to preserve its victory below or in order to delay. The analog to a default judgment at the appeals stage would be vacatur and remand—the same as if the case had become moot due to external factors. Had the respondent been the plaintiff below, the remand order would instruct dismissal of

III appears to support the position that the Supreme Court may render what amount to advisory opinions for the sake of judicial economy.

306. *See, e.g.,* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

307. *See* FED. R. CIV. P. 55.

308. *H.F. Livermore Corp. v. Aktiengesellschaft Gebrüder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970).

the complaint. Had the respondent been the defendant, the order would be to show cause why a default judgment should not be entered. Indeed, the justification for the equitable remedy of vacatur would seem to be even stronger when the respondent's own misconduct prevents the Court from hearing an appeal than when external circumstances moot the case.

On the other hand, such a response to a failure to appear on appeal is rather harsh. "[C]ontemporary procedural philosophy encourages trial on the merits," so default judgments are disfavored at the trial level.³⁰⁹ Similarly, modern appellate procedure does not sanction an appellee who fails to appear with vacatur. Instead, Federal Rule of Appellate Procedure 31(c) provides only that an appellee who does not file a brief "will not be heard at oral argument unless the court grants permission." Courts of appeals have interpreted this penalty to be exclusive and have rejected appellants' requests for an automatic reversal of the lower court order when the appellee does not show.³¹⁰ Although the policy justification for this rule has not been articulated, and is a question deserving of further research, we may hypothesize that courts (1) are sensitive to placing unduly strict burdens on litigants, and (2) are comfortable that a live case persists notwithstanding the appellee's silence, so long as there is reason to think the appellee's interests remain adverse to the appellants and that the appellee would benefit from an order affirming the judgment below. This view has logical force. At the trial stage, a truly obstinate defendant would leave the court no choice but to enter a default judgment against it because, beginning as it does with a clean slate, the court would have no basis for determining the defendant's interests or the facts or arguments it would have advanced. On appeal, by contrast, the slate is not clean; the court can assess the appellee's side of the case both from the lower court order in its favor and its filings below. Although asking judges to fill in the missing appellee's arguments in opposition to the present appellant's arguments does present some risk that judges will identify with the appellee more as an advocate, it is difficult to see how that risk is substantial, particularly in view of the fact that it is the appellee who has disrespected the court by failing to appear. The same logic would hold on review at the Supreme Court. And indeed, as noted earlier, the Court was open to hearing petitioner-only appeals for most of its history, without being concerned that it was violating the case or controversy requirement.³¹¹ If the Court is empo-

309. 10A WRIGHT ET AL., *supra* note 27, § 2681 (3d ed. 1998).

310. *See, e.g., In re Talbert*, 344 F.3d 555, 557 (6th Cir. 2003) ("Neither the Federal Rules of Appellate Procedure nor our local rules suggest that an appellee's failure to file a brief should be penalized by a decision in favor of the appellant. Instead, Fed. R. App. P. 31(c) provides in such a case that 'the appellee will not be heard at oral argument except by permission of the court.' . . . While Rule 31(c) also authorizes us to dismiss the appeal where the *appellant* fails to file a brief to support his burden of persuasion, we believe that an appellee's failure to file a brief should normally carry with it only the oral argument sanction called for by the Rule." (internal citations omitted) (quoting *Allgeier v. United States*, 909 F.2d 869, 871 n.3 (6th Cir. 1990)).

311. *See supra* notes 30-33 and accompanying text.

wered to hear a petitioner's appeal without the respondent present at all, then surely there is no justiciability problem with inviting an amicus to at least provide some semblance of an adversary proceeding and to insulate the court from having to assemble the respondent's arguments itself.

The only case or controversy cause for concern that might arise with this set of cases is that the *reason* the respondent has failed to appear is itself an issue that moots the case. This is not a worry where continuing adversity of interests is clear from the respondent's communications with the Court,³¹² or where an amicus is invited because the respondent only appears pro se. Even where the respondent suddenly refuses to communicate with the Court, the case remains justiciable because a decision to reverse would affect the respondent's rights (adversely) and a decision to affirm would preserve the position it was in.³¹³ But where there is reason to doubt that the Court's decision would have any effect, maintaining jurisdiction by appointing an amicus looks more suspect.

This risk presented itself in the three cases involving government appeals of the successful claims of criminal defendants who had gone missing.³¹⁴ While the reason an amicus was appointed in each case—the respondent's inability to sign the IFP affidavit—appears rather trivial at first, it highlights a more fundamental flaw: if the decision below were reversed, the respondent might nonetheless remain free. This dilemma produced a great deal of debate within the Court. In the first case, *United States v. Sharpe*, the respondents, who had prevailed in the Fourth Circuit on their motion to suppress evidence collected in violation of the Fourth Amendment, had become fugitives from new federal and state charges.³¹⁵ The Court determined it could decide the Fourth Amendment question since, “[b]ecause our reversal of the Court of Appeals’ judgment may lead to the reinstatement of respondents’ convictions, respondents’ fugitive status does not render this case moot.”³¹⁶

Justice Stevens dissented. He took the position that a criminal defendant is generally refused an appeal when he is not “where he can be made to respond

312. See, e.g., Letter from Victor L. Baltzell, Jr. to Alexander L. Stevas, *supra* note 156 (informing the Court that his client, the respondent in *Brown v. Hartlage*, No. 80-1285, “hopes that his failure to file a brief will not be interpreted as an abandonment of his steadfast opposition to the relief sought by the Petitioner” and that “Mr. Hartlage is confident that the entire record before the Court discloses adequate basis for both the affirmance of the state court decisions and the denial of the relief sought by the Petitioner”).

313. In *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973), for example, the claimant-respondent would have been entitled to collect his pornographic films had the Court affirmed, notwithstanding the fact that he had refrained from appearing in the Court. See *supra* note 158 and accompanying text.

314. See *supra* note 172 and accompanying text.

315. See Letter from Mark J. Kadish to Alexander Stevas, *supra* note 216.

316. *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985).

to any judgment we may render.”³¹⁷ Consequently, the defendant’s appeal to the lower court, even though taken before he became a fugitive, should be vacated. While he agreed with the Court that the possible reinstatement of respondents’ convictions did not render the case “technically moot,” Justice Stevens appealed to the principles of the adversary system in arguing the case should not be heard:

An escape, however, may compromise the adversary character of the litigation. The lawyer for the escapee presumably will have lost contact with his client; his desire to vindicate a faithless client may be less than zealous; and, as noted, the Court cannot have its normal control over one of the parties to the case before it. The risk that the adversary process will not function effectively counsels against deciding the merits of a case of this kind.³¹⁸

Instead, Justice Stevens would have “treat[ed] [the case] as though the respondents’ escape had mooted the appeal,” and vacated the judgment below with instructions to dismiss the defendants’ appeal.³¹⁹ That approach, he noted, “would make it unnecessary for this Court to decide the constitutional question that is presented.”³²⁰ Deciding the constitutional question anyway for the sake of expounding Fourth Amendment law, he suggested, “would support the wholesale adoption of a practice of rendering advisory opinions at the request of the Executive—a practice the Court abjured at the beginning of our history.”³²¹

Justice Stevens’s view did not carry the day, nor did it the next year when *Pennsylvania v. Ritchie* presented the same problem.³²² But his view better accords with the case or controversy requirement. While both he and the Court were correct that, as a matter of mootness doctrine, the cases were justiciable, his argument for prudential restraint serves the aims of restricting courts’ review of legal questions to only those they need resolve. If the Court used the case as a vehicle to create new Fourth Amendment precedent when it need not have, as Justice Stevens suggested it did, it overstepped in precisely the manner the adversary system seeks to avoid. Appointing an amicus to give the proceedings a more adversary “feel” did nothing to change the advisory nature of the opinion the Court rendered.

317. *Id.* at 722 (Stevens, J., dissenting) (quoting *Smith v. United States*, 94 U.S. 97, 97 (1876)).

318. *Id.* at 724.

319. *Id.* at 724-25.

320. *Id.* at 725.

321. *Id.* at 726 (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

322. See Memorandum from Justice John Paul Stevens to the Conference (July 1, 1986) (on file with the Harry Blackmun Papers, Library of Congress) (suggesting that *Pennsylvania v. Ritchie*, No. 85-1347, be vacated and remanded); Memorandum from Justice William H. Rehnquist to the Conference (July 1, 1986) (on file with the Harry Blackmun Papers, Library of Congress) (disagreeing with Justice Stevens’s proposal and citing *Sharpe*, where “John advanced the same argument in dissent, and the majority rejected it”).

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While the eighteen other failure-to-appear cases may not be either beyond the Court's jurisdiction or prudentially moot, we may nonetheless question whether they, or any one-sided appeals, should be taken up by the Court as a matter of discretion. Even though the Court may have jurisdiction over cases in which the respondent is absent but likely retains an interest in preserving its victory, it need not (and perhaps should not) spend one of its scarce grants of certiorari on such a poor vehicle for resolving the question presented. It seems the modern Court might agree; it has not granted certiorari in a case in which the respondent failed to appear since 1988. Moreover, in only six of the eighteen other failure-to-appear cases did the Court actually exercise its discretion to grant certiorari knowing that one of the failure-to-appear anomalies was present.³²³ In seven cases, the respondent's failure to appeal became apparent only after certiorari had been granted³²⁴—and in the case of *Keeton*, only days before oral argument was scheduled to be heard. While the Court could have dismissed the writ as improvidently granted in such cases, prudential considerations may well weigh in favor of hearing an otherwise justiciable case once merits briefing has begun. The final five cases, including *Kolender*, arose on direct appeal, so the Court lacked discretion to deny review.³²⁵

IV. A SUMMARY AND A BRIEF PRESCRIPTION

As Part III demonstrates, three primary questions should drive the decision whether to invite an amicus. First, did the respondent waive, or could it have waived, the argument that an amicus would present? If so, an invitation would be inappropriate. Such an invitation would deny the litigant parties control over their case and would result in a premature pronouncement of law by the Supreme Court—one that might ultimately have no effect. By contrast, when the respondent could not have waived the argument because it concerns an independent interest of the courts that they are obligated to address themselves, the invited amicus may be a helpful tool for the Court to use in ensuring that interest is represented on appeal, even where the party who nominally benefits from that interest rebuffs it. In ruling on such cases, the Court does not risk rendering an advisory opinion, but instead resolves a concrete and legitimate dispute between the parties and the lower court.

Second, does the respondent not appear because the case is now moot? If the respondent's change in position or failure to appear has mooted the case, no amicus should be invited, but instead the lower court judgment should be vacated to relieve the petitioner from the adverse precedent below and to leave

323. Those cases were *Harris*, *Bonito Boats*, *Fausto*, *O'Connor*, *Kokoszka*, and *Daniel*.

324. Those cases were *Mackey*, *Thigpen*, *Keeton*, *Verlinden*, *Brown*, *Flair Builders*, and *Stidger*.

325. Those cases were *Halper*, *Kolender*, *12 200-Ft. Reels of Super 8mm. Film*, *Gomez*, and *Cores*.

the question presented for another day. Alternatively, when the Court has reason to believe that an ongoing controversy exists notwithstanding a respondent's failure to appear, it should be within its discretion to appoint an amicus rather than hear a one-sided appeal.

Finally, does prudence counsel against deciding the question presented in a less than fully adversarial case? In cases in which there is a live controversy but the respondent declines to appear (e.g., because he insists on proceeding pro se or simply refuses to "play ball"), it may be most sensible to deny certiorari and await another case that presents the question of interest to the Court, rather than allow the case to proceed in a way that harms party autonomy. In its discretion, the Court might vacate the judgment below in certain cases where the equities weigh in favor of doing so, such as where an obstinate respondent does not want to pay to litigate further. But national precedent is best not set in the absence of concrete disputes between highly motivated adversaries, notwithstanding an amicus's ability to provide some semblance of adversity. Amicus invitations might not be imprudent, however, where the Court lacks discretion to deny certiorari because the case arises on direct appeal, or where the respondent appears at the certiorari stage but then declines to continue litigating only after certiorari has been granted and the petitioner's brief has been submitted.

According to these criteria, fifteen of the forty-three amicus invitations would be found unjustified or imprudent. Figure 3 categorizes each invitation by its cause and how it fares under this analysis. One trend is notable: in the last nine Terms there have been six appointments, all of which were justified. The most recent unjustified invitations came in October Term 2001: *Alabama v. Shelton*, in which the Court in effect declined to allow Alabama to soften its position, and *Clay v. United States*, in which an amicus represented the Seventh Circuit's improper decision to invoke a defense the government had chosen to waive. Should this trend continue, it may signal that the Court is paying increasing attention to its own jurisdictional restrictions by avoiding reaching out to decide questions that are not squarely presented by adverse parties.³²⁶ Be-

326. But perhaps not. In a recent case that is rather similar to an invited amicus case, the Court appeared to reach out to keep alive a case that was mooted by private respondents' confession of error. In *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, the respondents, originally the plaintiffs, had prevailed in the lower courts on an antitrust claim against the petitioner. 129 S. Ct. 1109, 1116 (2009). The circuit court's decision conflicted with the decisions of other courts of appeals, so the Court granted certiorari. *See id.* at 1116-17. After certiorari was granted, however, the respondents abandoned their theory of the case, which they agreed was incorrect, and sought leave to amend their complaint to advance a different theory. *See id.* at 1117. They acknowledged that they were mooting the case, and thus asked that the judgment in their favor be vacated. *See id.* The Court declined to dismiss the appeal as moot and vacate the decision below, however, and instead it reached the merits and reversed, thus resolving against respondents a legal issue they no longer asserted, and setting national precedent in the process. The Court decided to reach the merits because, first, it had some doubt as to whether respondents' change of position was absolute (notwithstanding their request that the judgment in their favor be vacated), second, "the parties have invested a substantial amount of time, effort, and resources in briefing and arguing the merits

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cause such self-restraint better safeguards the accuracy of judicial decisionmaking, litigant autonomy, and the Court's actual and perceived neutrality, a continued pattern of only cautious use of invited amici should be welcomed.

CONCLUSION

The forty-three times the Court has invited an amicus curiae to present an abandoned side of a case have tested the extreme outer bounds of our adversary system. These cases originated in malfunctions in the idealized adversary system, including actions taken by courts overstepping their role, waivers by litigants of the best arguments on their side, and situations in which judges are not meant to be neutral arbiters. How the Court has handled these situations sheds light on how committed it actually is to the goal of judicial restraint that the adversary system promotes. A number of the cases reveal that commitment is weak when the Court is presented with a vehicle to address a question of great interest, such as whether *Miranda* could be overridden by statute or whether discriminatory schools should be denied tax exemptions, even though the litigants do not dispute that question and its resolution could be left for a future, contested, case. Rather than appoint an amicus in such situations to give cases the style of an adversary proceeding, but not the substance, I have suggested the Court should instead adopt a more minimalist approach: as a matter of prudence, either deny certiorari, or treat the question presented as moot, vacate the decision below, and remand for further proceedings. Doing so would help ensure that neither lower courts nor the Supreme Court renders advisory opinions that unduly interfere with future litigants' rights or short-circuit the political process.

of this case," and third, an amicus that had submitted a brief supporting the respondents' original position was granted leave to participate in oral argument. *Id.* Because the amicus was not formally invited to support the judgment below, *Pacific Bell Telephone* is not included in the primary set of cases examined by this Note. For all practical purposes, however, the amicus that was permitted to argue played that role. As such, the Court's reliance on an amicus to maintain the appearance of a live controversy was error. The Court denied the plaintiffs-respondents the right to remain masters of their complaint, instead seizing control of their suit to issue a ruling on the merits on a question that the parties no longer contested. Concurring, four Justices would have accepted the confession of error, and accordingly vacated the judgment below and remanded, rather than "try . . . to answer these hypothetical questions here" on the merits. *Id.* at 1124 (Breyer, J., concurring in the judgment). The concurrence's position better respected the case or controversy limitation on the Court's power.

FIGURE 3
Propriety of Amicus Invitations by Case, Cause, and Term of Invitation

Cause for Amicus Invitation	Cases in Which Amicus Invitation Was Justified	Cases in Which Amicus Invitation Was Not Justified (or Imprudent)
(1) Respondent changes position	<i>Bond</i> (2010) <i>Pepper</i> (2009) <i>Gutierrez de Martinez</i> (1994)	<i>Bousley</i> (1997) <i>Bob Jones University</i> (1981)
(2) Lower court raises issue sua sponte	<i>Kucana</i> (2008) [°] <i>Reed Elsevier</i> (2008) [°] <i>Greenlaw</i> (2007) [°] <i>Irizarry</i> (2007) <i>Becker</i> (2000) [°] <i>Great-West Life Insurance Co.</i> (2000) [°] <i>Forney</i> (1997) [°] <i>Ogbomon</i> (1996) <i>Ornelas</i> (1995) <i>Mathews</i> (1974) <i>Cheng Fan Kwok</i> (1967) [°] <i>Granville-Smith</i> (1954) [°]	<i>Clay</i> (2001) <i>Dickerson</i> (1999) <i>Toibb</i> (1990)
(3) Supreme Court raises issue sua sponte	<i>Hohn</i> (1997) [°]	<i>Shelton</i> (2001)
(4) Respondent fails to appear ³²⁷	<i>Halper</i> (1988)* <i>Mackey</i> (1987)** <i>Thigpen</i> (1983)** <i>Keeton</i> (1983)** <i>Kolender</i> (1982)* <i>Verlinden</i> (1982)** <i>Brown</i> (1981)** <i>12 200-Ft. Reels of Super 8mm. Film</i> (1971)* <i>Flair Builders</i> (1971)** <i>Gomez</i> (1971)* <i>Stidger</i> (1966)** <i>Cores</i> (1957)*	<i>Harris</i> (1988) <i>Bonito Boats</i> (1987) <i>Fausto</i> (1987) <i>Cox</i> (1986) <i>O'Connor</i> (1985) <i>Ritchie</i> (1985) <i>Sharpe</i> (1984) <i>Kokoszka</i> (1973) <i>Daniel</i> (1968)

Note: [°]Jurisdiction issue was raised sua sponte. *Invitation arose on direct appeal. **Respondent initially appeared to oppose certiorari.

327. As noted above, some of these invitations were probably not imprudent because they arose on direct appeal (signaled with a *) or because the respondent initially appeared to oppose certiorari (signaled with a **). See *supra* notes 324-25 and accompanying text. The others were either not justified because the cases were moot or because it was imprudent to grant certiorari in a case in which it was known that the respondent would not participate.