

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

Brian P. Goldman *

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 his sentence as too long.¹ That court affirmed his conviction, but then went on to order that his sentence be increased, after the government had opted not 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 judgment, 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-two times – slightly more than twice every three Terms on average. Invited *amici* have included prominent academics, such as Harvard Law School Dean Erwin Griswold⁷ and University of Utah Professor Paul Cassell⁸; a former U.S. Senator, Thomas H. Kuchel of California⁹; future U.S. Attorney General Benjamin R. Civiletti¹⁰ and former Solicitor General

* Law clerk to the Honorable Stephen Reinhardt, U.S. Court of Appeals for the Ninth Circuit. Stanford Law School, J.D. 2010. Yale University, B.A. 2005.

¹ *United States v. Carter* (*United States v. Greenlaw*), 481 F.3d 601, 604 (8th Cir. 2007).

² *See Greenlaw v. United States*, 128 S.Ct. 2559 (2008).

³ Oral argument in *Greenlaw v. United States*, No. 07-330, 2008 WL 1730325, at *34.

⁴ *Greenlaw v. United States*, 128 S.Ct. 976, 976 (2008) (mem.); *see also* Tony Mauro, *Supreme Court Justices Turn to Ex-Clerks for Unusual Role*, LEGAL TIMES, Apr. 14, 2008.

⁵ *Irizarry v. United States*, 128 S.Ct. 2198 (2008).

⁶ *Irizarry v. United States*, 128 S.Ct. 977, 977 (2008) (mem.); *see also* Mauro, *supra* note 4.

⁷ *See Granville-Smith v. Granville-Smith*, 348 U.S. 88 (1954) (mem.).

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

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

Charles Fried¹¹; future civic leaders such as Joel I. Klein,¹² now 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. Walsh¹⁹; renowned civil rights attorneys, including Mark D. Rosenbaum²⁰ and William T. Coleman, Jr. (who also had served previously as Secretary of Transportation)²¹; and attorneys who have since joined the federal bench, including Judge Rhesa 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-two *amici*, exactly half had served previously as law clerks to Justices of the Supreme Court.²⁶

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 not 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 traditional 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

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) (mem.).

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: *Pepper v. United States*, No. 09-6822, 2010 WL 2854802 (U.S. July 22, 2010) (Adam G. Ciongoli (Alito)), *Reed Elsevier, Inc. v. Muchnick*, 129 S.Ct. 1693 (2009) (mem.) (Deborah Jones Merritt (then-Judge Ruth Bader Ginsburg and Justice O'Connor)); *Kucana v. Holder*, 130 S.Ct. 30 (2009) (mem.) (Amanda C. Leiter (Stevens)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 917 (2001) (mem.) (Richard G. Taranto (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)); *U.S. v. Fausto*, 480 U.S. 904 (1987) (mem.) (John M. Nannes (Rehnquist)); *Thigpen v. Roberts*, 464 U.S. 1006 (1983) (mem.) (Rhesa H. Barksdale (White)); *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 & PROCEDURE: JURISDICTION AND RELATED MATTERS § 4002 (2d ed.). The responding parties in such cases are appellees, not respondents. But for purposes of simplicity, 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 *infra* note

has discussed the practice directly only to state conclusorily 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-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 its perceived neutrality and legitimacy. Therefore, this Note attempts to theorize this practice, to (1) understand whether appointed *amici* have allow 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, it’s 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 constrains on federal jurisdiction. I conclude that the practice is rather 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-two past invitations, I conclude that twenty-seven were justified, but fifteen might not have been

140 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); CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 3530 n.42 (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.) and *United States v. Fausto*, 480 U.S. 904 (1987) (mem.)).

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 example, 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.³⁴ In the important executive-power case *Myers v. United States*, the plaintiff challenged his dismissal as a postmaster by President Wilson as violative of 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 Pepper to appear as an *amicus*.³⁶ While 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 lower court victories obtained on bases it deems to be

³⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 139, 154 (1803).

³¹ 88 U.S. 162, 178 (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 *United States v. Miller*, 307 U.S. 174, 174 (1939); see also *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008) (“The respondent 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 *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 361 (1953); *Local Union No. 10, United Ass’n of Journeymen Plumbers & Steamfitters v. Graham*, 345 U.S. 192, 196 (1953).

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

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

³⁶ *Myers*, 272 U.S. at 60, 177.

incorrect or unjust. Part II will explore these 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, the 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 no state law provided 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," the district court challenged Mrs. Granville-Smith for additional evidence of her domicile, particularly her intent to remain in the Virgin Islands.⁴⁰ 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 portion of the Virgin Islands divorce statute providing jurisdiction based solely on six weeks of residence to be unconstitutional and unauthorized by the Virgin 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

³⁷ *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955).

³⁸ *Id.* at 3.

³⁹ As Dean Griswold had explained a few years prior,

In 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 domicil in Nevada. The court thereupon makes a finding of domicil 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 *Id.* at 3-4.

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

⁴³ *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. . . . If 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 *Id.* at 672.

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.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 expressed to his colleagues that the “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 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, 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 Frankfurter explained that “‘instructing counsel’ means

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

⁴⁶ See Respondent’s Statement, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1954) (No. 261) (on file in 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 *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, Attorney for Petitioner, to Harold B. Willey, Clerk of the U.S. Supreme Court (Nov. 8, 1954) (on file in the Felix Frankfurter Papers, Harvard Law School); Telegram from Warren Young, Attorney for Respondent, to Clerk, U.S. Supreme Court (no date) (on file in the Felix Frankfurter Papers, Harvard Law School).

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

⁴⁹ Cert. Memorandum in *Granville-Smith v. Granville-Smith* (No. 261) (1954) (on file in the Earl Warren Papers, Library of Congress). [#3611] 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 Warren (1954) (on file in the Earl Warren Papers, Library of Congress). [#3608]

⁵¹ Letter from Justice Frankfurter to Chief Justice Warren (Nov. 18, 1954) (on file in the Earl Warren Papers, Library of Congress). [#3630]

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

that money had to be drawn from the Treasury in order that the public interest involved in this litigation could be properly presented 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 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 non-uniform state divorce laws, but also he was a former student of Frankfurter’s at Harvard and remained a close friend once Frankfurter joined the Court.⁵⁷ In the end, the Court affirmed in a five-to-three opinion written by 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-one invitations since *Granville-Smith* have been scattered over the past fifty-five 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, preclude 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, “[f]or 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

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

⁵⁴ *Id.*

⁵⁵ Notes of Justice Douglas (Nov. 20, 1954) (on file in the William O. Douglas Papers, Library of Congress). [#4430]

⁵⁶ *Granville-Smith v. Granville-Smith*, 348 U.S. 88 (1954) (mem.).

⁵⁷ See Griswold, *supra* note 39; see also *Felix Frankfurter Dies; Retired Judge Was 82*, HARV. CRIMSON, Feb. 23, 1965. 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 from Erwin Griswold to Justice Frankfurter (Dec. 20, 1954) (on file in the Felix Frankfurter Papers, Harvard Law School).

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

⁵⁹ *Id.* at 4 (internal quotation marks omitted).

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

⁶¹ Memorandum from McKinnie, Legal Officer of the U.S. Supreme Court, at 5 (Oct. 4, 1988) (on file in the Harry Blackmun Papers, Library of Congress). [#4235-36] See also, e.g., Memorandum from McKinnie, at 6 n.1 (May 26, 1989) (on file in the Harry Blackmun Papers, Library of Congress) (recommending, as an alternative, appointing an *amicus* in *New York v. Harris*) [#4219]; Memorandum from Schickele, Legal Officer of the U.S. Supreme Court, at 4-5 (June 13, 1988) (on file in the Harry Blackmun Papers, Library of Congress) (recommending appointing an *amicus* in

explains 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 certworthy cases presenting a procedural anomaly that might have prompted an invitation. The next Part examines those anomalies in detail.

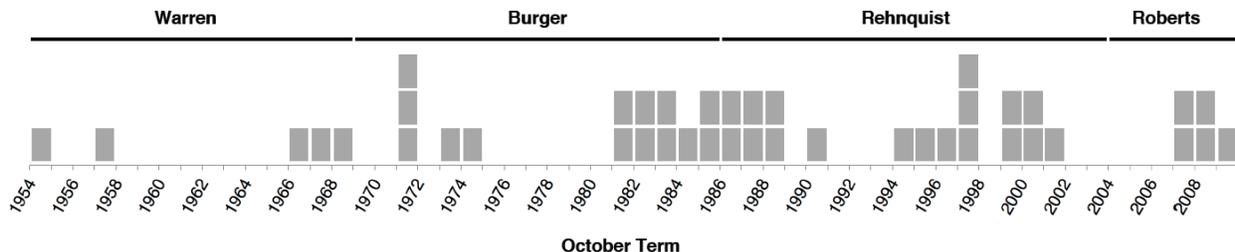


Figure 1. Amicus invitations by Term.

II. A TAXONOMY OF INVITATIONS

Before we can assess whether the invitation of *amici* is justified, we must first understand what conditions necessitated their appointment. Whether a case or controversy persisted at the Supreme Court, and whether the goals of the adversary system were well-served, depends on why the respondent did not defend the judgment below in each case. This Part classifies the forty-two 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-two cases fall into four broad categories: (1) four cases in which the respondent confessed error and reversed its prior-held 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 is 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 discussed 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.

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.) [#4191-92]; cf. Letter from Francis J. Lorson, Chief Deputy Clerk of the U.S. Supreme Court, to the Chief Justice (Sept. 14, 1987) (HPB) (recommending appointing an *amicus* in *Mackey v. Lanier Collections Agency & Serv., Inc.*). [#4172]

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 Justices Douglas, Frankfurter, Warren, 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 cause of the remaining fifteen invitations is derived from the opinion of the Court and the briefs in each case only.

(1) The Respondent Changes Its Position on the Question Presented

- *Pepper* (2009)
- *Bousley* (1997)
- *Gutierrez de Martinez* (1994)
- *Bob Jones University* (1981)

(3) The Supreme Court Raises a Question *Sua Sponte*

- *Shelton* (2001)
- *Hohn* (1997)

(2) Neither Party Accepts the Lower Court's *Sua Sponte* Decision

Subject matter jurisdiction

- *Kucana* (2008)
- *Reed Elsevier* (2008)
- *Greenlaw* (2008)
- *Becker* (2000)
- *Great-West Life Insurance Co.* (2000)
- *Forney* (1997)
- *Cheng Fan Kwok* (1967)
- *Granville-Smith* (1954)

Non-jurisdictional grounds

- *Irizarry* (2007)
- *Clay* (2001)
- *Dickerson* (1999)
- *Ogbomon* (1996)
- *Ornelas* (1995)
- *Toibb* (1990)
- *Mathews* (1974)

(4) The Respondent Fails to Enter a Proper Appearance Before the Court

... at all

- *Harris* (1988)
- *Bonito Boats* (1987)
- *Mackey* (1987)
- *Verlinden* (1982)
- *Brown* (1981)
- *Kokoszka* (1973)
- *12 200-Foot Reels of Super 8mm Film* (1971)
- *Flair Builders* (1971)

... with proper counsel

- *Gomez* (1971)
- *Daniel* (1968)
- *Stidger* (1966)
- ... with proper counsel
- *Fausto* (1987)
- *O'Connor* (1985)
- *Thigpen* (1983)
- *Keeton* (1983)
- *Kolender* (1982)
- *Cores* (1957)

... due to an anomaly applying for IFP status

- *Halper* (1988)
- *Cox* (1986)
- *Ritchie* (1985)
- *Sharpe* (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 four *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 four 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 relevant here. 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, it is only 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. By contrast, the Solicitor General must authorize any appeal that is taken *by* the government to the 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.⁶⁷ And third, government policy may simply change over time, particularly as new administrations come in to office.⁶⁸

In response to confessions of error, the Court may summarily reverse;⁶⁹ grant, vacate, and remand (GVR) the case “for further consideration in light of the position asserted by the Solicitor General in her brief for the United States”;⁷⁰ simply deny certiorari;⁷¹ or grant and set

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

⁶⁴ *See, e.g.*, Eric Schnapper, *Beckett 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 KAPLAN, *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 John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Role of the Solicitor General*, Memorandum Opinion 77-56, 1 U.S. Op. Off. Legal Counsel 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 accept the views of some and to reject others, and, in proper cases, to formulate views of his own.”).

⁶⁷ *See* 28 C.F.R. § 0.20(b) (2010).

⁶⁸ 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 to 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 non-partisanship. 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. 20-21 (May 1986).

⁶⁹ *See, e.g.*, *Leonard v. United States*, 378 U.S. 544, 544 (1964) (per curiam).

⁷⁰ *See, e.g.*, *Frankel v. United States*, 130 S. Ct. 72, 72 (2009) (mem.); Brief for the United States, *id.* (No. 08-10150), 2009 WL 3236337, at 19 (“[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.”).

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* four times.

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.⁷² 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 'any claim arising in a foreign country.'"⁷³ 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.⁷⁴ 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.⁷⁵ 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."⁷⁶

The Solicitor General 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.⁷⁷ When the Court granted plenary review instead, it appointed an *amicus* to defend the lower court's outright dismissal.⁷⁸ Similarly, in *Pepper v. United States*—the most recent case for which an *amicus* was invited—the Solicitor General reversed the government's position on whether post-sentencing rehabilitation could be considered by a district court as a factor upon subsequent resentencing.⁷⁹ Again the Solicitor General recommended GVRing for further

⁷¹ See, e.g., *Gay v. United States*, 259 A.2d 593 (D.C. 1969), *cert. denied*, 411 U.S. 974 (1973) (denying cert. despite the Solicitor General's confession of error explaining that one of the lower court judges should have recused himself due to a conflict of interest) (cited in Rosenzweig, *supra* note 63, at 2107 n.203).

⁷² *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-20 (1995).

⁷³ *Id.* at 420 (citing 28 U.S.C. § 2680(k) (brackets omitted)).

⁷⁴ *Id.* at 422-23.

⁷⁵ Compare Brief for the United States, *Gutierrez de Martinez v. Lamagno*, 513 U.S. 998 (1994) (mem.) (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).

⁷⁶ Brief for the United States at 8 n.6, *Gutierrez de Martinez v. Lamagno*, 513 U.S. 998 (1994) (mem.) (No. 94-167); 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.

⁷⁷ See Brief for the United States at 11-12, *Bousley v. United States*, 523 U.S. 614 (1998) (No. 96-8516).

⁷⁸ *Bousley v. Brooks*, 522 U.S. 990 (1997) (mem.).

⁷⁹ Brief for the United States at 13-15, *Pepper v. United States*, 130 S. Ct. 3499 (2010) (mem.) (No. 09-6822).

consideration, but once more the Court granted review instead and appointed an *amicus*.⁸⁰

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 non-profit private schools that discriminate in admissions on the basis of race do not qualify as tax-exempt organizations, notwithstanding their religious beliefs.⁸¹ 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.⁸² In the district court and before the Fourth Circuit, the IRS defended its interpretation of the Code.⁸³

Between the Fourth Circuit's ruling and the time the university filed its cert petition, 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."⁸⁴ 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.⁸⁵ Noting that the Solicitor General had confessed error, the university moved for summary reversal.⁸⁶ 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.⁸⁷ Coleman, whose side of the case was supported by a broad coalition of civil rights organizations,⁸⁸ carried the day; the position that neither party to the litigation advocated prevailed by an 8-1 vote.⁸⁹

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

⁸⁰ *Id.*; *Pepper v. United States*, No. 09-6822, 2010 WL 2854802 (U.S. July 22, 2010) (mem.).

⁸¹ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

⁸² *Id.* at 579, 581-82 (citing Revenue Ruling 71-447, 1971-2 Cum. Bull. 230, at 231).

⁸³ *See* *Bob Jones Univ. v. United States*, 639 F.2d 147, 151 (1980); *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 896 (1978).

⁸⁴ *See* Cert. Memorandum in *Bob Jones University v. United States* (No. 81-3), at 5-6 (Sept. 18, 1981) (on file in the Harry Blackmun Papers, Library of Congress). [#3988-89]

⁸⁵ Memorandum from Caldwell, Legal Officer of the U.S. Supreme Court, at 2 (Feb. 26, 1982) (on file in the Harry Blackmun Papers, Library of Congress) [#4009]. In the brief, the Acting Solicitor General expressly disavowed this change of position, noting that the "brief sets for the position of the United States," but that "[h]is views" on the statutory question were reflected in the brief in opposition. Brief for the United States at 1, *Goldboro Christian Schs., Inc. v. United States*, and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Nos. 81-1 and 81-3) (quoted in Schnapper, *supra* note 64, at 1187 n.3).

⁸⁶ Memorandum from Caldwell, Legal Officer of the U.S. Supreme Court, at 1 (Mar. 4, 1982) [#4014].

⁸⁷ *Bob Jones Univ. v. United States*, 456 U.S. 922, 922 (1982) (mem.).

⁸⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 576 (1983) (listing *amicus curiae* briefs filed).

⁸⁹ *Id.* at 605.

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 introduced the undisputed issue into the case itself. Though 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 below, 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—10 of 15—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.⁹⁰ 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-two invitations, including the 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.⁹¹ 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[],”⁹² 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 of judicial review of agency actions”⁹³—notwithstanding the fact that non-reviewability 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 the jurisdiction conferred upon it by the INA and concluded that it lacked

⁹⁰ See KAPLAN, *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.

⁹¹ *Kucana v. Holder*, 130 S. Ct. 827 (2010).

⁹² *Kucana v. Mukasey*, 533 F.3d 534, 537 (7th Cir. 2008), *rev’d sub nom* *Kucana v. Holder*, 130 S. Ct. 827 (2010).

⁹³ Brief for the Respondent Supporting Petitioner at 35-36, *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010) (No. 08-911).

the power to review the Board's order.⁹⁴ 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.⁹⁵ So shortly after the Court granted cert, it invited an *amicus* to defend the Seventh Circuit's view.⁹⁶ 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.⁹⁷

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 actually a default judgment entered *against* him, not a dismissal of his wife's divorce action on jurisdictional grounds.⁹⁸

Attorneys' 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.⁹⁹ 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.¹⁰⁰ The defendant was also awarded attorney's fees.¹⁰¹ The Ninth Circuit affirmed, but on the alternate grounds that ERISA simply did not provide for the type of relief sought.¹⁰² 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

⁹⁴ *Id.* at 539.

⁹⁵ Brief for the Respondent in Opposition, *Kucana v. Holder*, 129 S. Ct. 2075 (2009) (mem.) (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.

⁹⁶ *Kucana v. Holder*, 130 S. Ct. 30 (2009) (mem.).

⁹⁷ *Becker v. Montgomery*, 532 U.S. 757, 761-62 (2001); *Forney v. Apfel*, 524 U.S. 266, 269 (1998); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 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, e.g., *Becker*, 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[tly] 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.

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 5 n.4, *Forney v. Apfel*, 524 U.S. 266 (1998) (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.

⁹⁸ See *supra* at note 46 and accompanying text.

⁹⁹ *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

¹⁰⁰ *Id.* at 208-09.

¹⁰¹ *Great-West Life & Annuity Ins. Co. v. Knudson*, No. 98-56472, 208 F.3d 221, 2000 WL 145374, at *1 (9th Cir. Feb. 7, 2000)

¹⁰² *Id.* at *1. The decision is inconclusive as to whether the non-cognizability of the claim for relief is a jurisdictional defect or a decision on the merits. See *id.* at *1 n.5.

divided—or, if it was correct that courts lacked jurisdiction to provide such relief, they also lacked jurisdiction to award attorneys’ fees. 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.¹⁰³ Rather than accept the respondent’s argument, the Court appointed an *amicus* instead.¹⁰⁴

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.¹⁰⁵ Objectors to the class settlement had appealed the approval to the Second Circuit, hoping to have the settlement reopened and restructured to benefit them.¹⁰⁶ 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 of that settlement. Because no party defended the jurisdictional holding below, the Court invited an *amicus* to defend it.¹⁰⁷

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 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.¹⁰⁸ 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.¹⁰⁹ 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 “the role of high-ranking Department of Justice officials in determining whether or not a sentencing appeal should be pursued” 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.”¹¹⁰ 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 cert and invited an *amicus* to defend the Eighth Circuit’s broader

¹⁰³ *Great-West Life*, 534 U.S. at 226 n.1 (Ginsburg, J., dissenting).

¹⁰⁴ *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 917 (2001) (mem.).

¹⁰⁵ *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010).

¹⁰⁶ *Id.* at 1242.

¹⁰⁷ *Id.* at 1243.

¹⁰⁸ *United States v. Carter*, 481 F.3d 601, 607-08 (8th Cir. 2007), *rev’d sub nom Greenlaw v. United States*, 128 S. Ct. 2559 (2008).

¹⁰⁹ *Id.* at 608 (citing FED. R. CRIM. P. 52(b), which says, “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”).

¹¹⁰ Brief for the United States at 11, *Greenlaw v. United States*, 128 S. Ct. 829 (2008) (mem.) (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 11-12 (internal quotation marks and citation omitted).

view of its jurisdiction.¹¹¹

2. Non-jurisdictional grounds

Another seven of the forty-two 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 non-jurisdictional. 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 other, he represented the petitioner. This Subpart examines 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 (non-jurisdictional) 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.¹¹² As with the jurisdictional cases, the government was uninterested in supporting what it thought was an incorrect procedural barrier to review, even though it believed the petitioner's section 2255 motion to be meritless.¹¹³

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. *Dickerson v. United States* is a clear example.¹¹⁴ In *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.¹¹⁵ But the government had not argued that position; indeed, in the thirty-one years since Congress had purported to override *Miranda* with section 3501, the Justice Department hadn't invoked the statute except for a few isolated

¹¹¹ *Greenlaw v. United States*, 128 S. Ct. 976 (2008) (mem.).

¹¹² *Clay v. United States*, 537 U.S. 522 (2003); see Brief for the United States in Opposition at 4, *Clay v. United States*, 536 U.S. 957 (2002) (mem.) (No. 01-1500).

¹¹³ Brief for the United States in Opposition, *supra* note 112, 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. *Toibb v. Radloff*, 501 U.S. 157, 158-59 (1991). As the case reached the Court, the United States Trustee had stepped in to replace the trustee, who had been dismissed. *Toibb*, 501 U.S. at 160 n.4. Representing the Trustee, the Solicitor General suggested that the question was important and certworthy 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, *Toibb v. Radloff*, 498 U.S. 1060 (1991) (mem.) (No. 90-368). The Solicitor General's suggested that the Court "might wish to appoint counsel to defend the judgment below," which it did. *Id.* at 9; see 498 U.S. 1065 (1991) (mem.).

¹¹⁴ See generally Chemerinsky, *supra* note 28.

¹¹⁵ *United States v. Dickerson*, 166 F.3d 667, 692 (4th Cir. 1999), *rev'd sub nom Dickerson v. United States*, 530 U.S. 428 (2000).

instances during the Nixon Administration.¹¹⁶ Instead, the Department had presumed that *Miranda* still governed its conduct, largely because it believed Section 3501 to be unconstitutional and because it preferred *Miranda*'s bright-line rules to the pre-*Miranda* totality-of-the-circumstances test of voluntariness for confessions.¹¹⁷ So when Dickerson sought review in the Supreme Court, the government urged reversal of the position it had expressly disowned for decades.¹¹⁸ Professor Paul Cassell, who in the Fourth Circuit had represented a public interest organization as an *amicus* urging the court to raise section 3501 on its own, was tapped to defend the decision before the Court.¹¹⁹

(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 *Irizarry v. United States* after the district court had failed to give the defendant proper notice that it was considering an upward deviation from the Sentencing Guidelines.¹²⁰ When the Eleventh Circuit affirmed nonetheless and the defendant petitioned for cert, the Solicitor General maintained the government's position that notice had been required, though it argued the error was harmless.¹²¹ When the Court granted cert, it appointed an *amicus* to argue that no notice had been required for such a sentencing decision.¹²² 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.¹²³

(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 lower court findings of reasonable suspicion to make a stop and probable cause to make a warrantless search.¹²⁴ But the Seventh Circuit had

¹¹⁶ See Comment, Eric D. Miller, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1033-35 (1998).

¹¹⁷ See Brief for the United States at 26-29, 31-38, *Dickerson v. United States*, 528 U.S. 1045 (1999) (mem.) (No. 99-5525); see also Miller, *supra* note 116, at 1036-37.

¹¹⁸ Brief for the United States, *supra* note 117, at 50.

¹¹⁹ *Dickerson v. United States*, 528 U.S. 1045 (1999) (mem.).

¹²⁰ Brief of Appellee at 18, *United States v. Irizarry*, 458 F.3d 1208 (11th Cir. 2006) (No. 05-11718-DD).

¹²¹ See *United States v. Irizarry*, 458 F.3d 1208 (11th Cir. 2006); Brief for the United States in Opposition, *Irizarry v. United States*, 128 S. Ct. 2198 (2008) (No. 06-7517).

¹²² *Irizarry v. United States*, 552 U.S. 1135 (2008) (mem.).

¹²³ See Brief for the United States, *Ogbomon v. United States*, 519 U.S. 1073 (1997) (mem.) (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, *Ogbomon v. United States*, 519 U.S. 1073 (1997) (mem.) (No. 95-8736). The Court then dismissed the writ as improvidently granted. 519 U.S. 1073 (1997) (mem.).

¹²⁴ *Ornelas v. United States*, 517 U.S. 690, 695 n.4 (1996); see Brief for the United States at 11-12, *Ornelas v. United States*, 517 U.S. 690 (1996) (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.").

previously determined that it would review such Fourth Amendment determinations for clear error only,¹²⁵ which it did in *Ornelas*.¹²⁶ So the Court appointed an amicus to defend the Seventh Circuit's preferred rule.¹²⁷

And *Mathews v. Weber*—the only case in this set of non-jurisdictional *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 respondent's, to a magistrate judge.¹²⁸ The defendant, the Secretary of Health, Education, and Welfare, contended that such referrals were unauthorized by statute and possibly unconstitutional.¹²⁹ 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.¹³⁰ To defend the district court rule, the Court invited an *amicus* to appear.¹³¹

C. The Supreme Court Raises a Question Sua Sponte

The next category differs significantly from the others: it is not the judgment below that is unrepresented, but instead a specific position the Court would like 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 cert is granted¹³² or when ordering reargument in a case.¹³³ 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.¹³⁴ Hohn had sought review of the circuit court's denial of a certificate of appealability in his Section 2255 motion to vacate his sentence.¹³⁵ The Solicitor General had confessed error and agreed that, based on the

¹²⁵ *United States v. Spears*, 965 F.2d 262, 269 (7th Cir. 1992).

¹²⁶ *United States v. Ornelas-Ledesma*, 16 F.3d 714, 719 (7th Cir. 1994), *rev'd sub nom Ornelas v. United States*, 517 U.S. 690 (1996).

¹²⁷ *Ornelas v. United States*, 516 U.S. 1008 (1995) (mem.).

¹²⁸ *Mathew v. Weber*, 423 U.S. 261, 263-65 (1976).

¹²⁹ *Id.* at 265.

¹³⁰ Memorandum from Chief Justice Burger (May 21, 1975) (on file in 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."). [#3894]

¹³¹ *Weinberger v. Weber*, 421 U.S. 985 (1975) (mem.).

¹³² 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 question: . . ."); *Feltner v. Columbia Pictures Television, Inc.*, 521 U.S. 1151 (1997) (mem.); *Arizonans for Official English v. Arizona*, 517 U.S. 1102 (1996) (mem.).

¹³³ See, e.g., *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (mem.) ("This case is restored to the calendar for reargument. 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.).

¹³⁴ *Hohn v. United States*, 522 U.S. 944 (1997) (mem.).

¹³⁵ *Hohn v. United States*, 524 U.S. 236, 238 (1998).

constitutional nature of Hohn’s claim, the certificate should have issued.¹³⁶ It suggested that the Court GVR in light of its confession.¹³⁷ 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.”¹³⁸ 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.”¹³⁹ The case thus resembles closely those described in Part I.B.1, *supra*, involving an *amicus* arguing an represented side of a court-created debate over jurisdiction, but it differs 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.¹⁴⁰ 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.¹⁴¹ When the defendant prevailed, the state sought cert 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 Amendment right to counsel?”¹⁴² But after cert was granted, 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.”¹⁴³ 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.’”¹⁴⁴

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

The final category of *amicus* invitations consists of twenty-one cases—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 do not result from the respondent’s repudiation of the decision below. Rather, in each case there is no reason to believe the respondent did not wish to

¹³⁶ *Id.* at 240.

¹³⁷ *Id.*

¹³⁸ *Id.* at 240-41 (citing 28 U.S.C. § 1254).

¹³⁹ *Id.* at 241.

¹⁴⁰ See *Alabama v. Shelton*, 534 U.S. 987 (2001) (mem.) (emphasis added).

¹⁴¹ See *Alabama v. Shelton*, 535 U.S. 654, 657-61 (2002).

¹⁴² Petition for a Writ of Certiorari, at i, *Alabama v. Shelton*, 532 U.S. 1018 (2001) (mem.) (No. 00-1214) (internal citations omitted).

¹⁴³ *Shelton*, 535 U.S. at 661.

¹⁴⁴ *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*.”) (internal citations omitted).

preserve its victory below. Instead, matters of stubbornness, cost, and/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 "decided" . . . that he will not 'play ball.'"¹⁴⁵ In six of these cases, the respondent confessed that the cost of continuing to litigate the case was not worthwhile. 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.¹⁴⁶ 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."¹⁴⁷

Similar claims were made by a defendant who threatened to go out of business if its victory below were revoked,¹⁴⁸ a bankruptcy trustee who complained that there were insufficient funds in the bankruptcy estate to continue litigating the case,¹⁴⁹ and three other respondents who simply did not want to spend more.¹⁵⁰ Following the model in *Stidger*, the Court invited an

¹⁴⁵ Memorandum from R. T. L., Law Clerk, to Chief Justice Warren, at 2 (Nov. 30, 1968) (on file in the Earl Warren Papers, Library of Congress) [#3734].

¹⁴⁶ *Commissioner v. Stidger*, 386 U.S. 287 (1967). Memorandum from Phillip E. Johnson, Law Clerk, to Chief Justice Warren, at 1 (Oct. 19, 1966) (on file in the Earl Warren Papers, Library of Congress). [#3649]

¹⁴⁷ Memorandum from Philip E. Johnson, *supra* note 147, at 1-2. [#3649-50]

¹⁴⁸ *Daniel v. Paul*, 395 U.S. 298 (1969); *see* Memorandum from R. T. L., *supra* note 145, at 1-2 (noting that in response to the Court's call for a response to the cert. 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.

¹⁴⁹ *Kokosza v. Bedford*, 417 U.S. 642 (1974); *see* Memorandum from Ginty, Legal Officer (Feb. 13, 1974) (on file in the Harry Blackmun Papers, Library of Congress) ("Resp 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's case on the basis of the decision and the judgment below."). [#3875-56]

¹⁵⁰ *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, to Justice Blackmun, at 1 (Mar. 2, 1972) (on file in 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 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.") [#3767]. *Brown: Brown v. Hartlage*, 456 U.S. 45 (1982); *see* Letter from Victor L. Baltzell, Jr., Counsel for Respondent, to Alexander L. Stevas, Clerk of the Supreme Court (July 13, 1981) (on file in 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.") [#3933]. *Mackey: Mackey v. Lanier Collections Agency & Servs., Inc.*, 486 U.S. 825 (1988); *see* Letter from Carl S. Pedigo, Jr., Counsel for Respondent, to Sandy Nelsen, Assistant

amicus in each 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*.¹⁵¹

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 the lower court judgment from review; we can only speculate. But for whatever reason, in five cases the respondent either ceased responding to communications from the Court,¹⁵² refused to allow its attorney to file briefs,¹⁵³ or had been absent from the case even prior to its arrival at the Court.¹⁵⁴ And again, the Court responded by appointing an *amicus* to defend the judgment below rather than coerce the respondent to appear.

Clerk (Sept. 1, 1987) (on file in 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.”) [#4173].

¹⁵¹ These were *Daniel*, see Memorandum from R. T. L., Law Clerk, to Chief Justice Warren, at 12 n.3 (Mar. 16, 1969) (on file in the Earl Warren Papers, Library of Congress) [#3722], and *Flair Builders. 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 *Int’l Union of Operating Eng’rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 487 (1972) (“J. Robert Murphy, as amicus curiae, in support of the judgment below”); see Memorandum from Michael A. LaFond, *supra* note 150, at 1 (“The attorneys assert that they are willing a brief and to participate in oral argument at their own expense.”).

¹⁵² *New York v. Harris*, 495 U.S. 14 (1990); see Memorandum from Joseph F. Spaniol, Jr., Clerk of the Supreme Court, to Justice Marshall (Aug. 8, 1989) (on file in 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) [#4208]. 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., to Bernard Harris (July 12, 1989) (on file in the Harry Blackmun Papers, Library of Congress) [#4209]. 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. *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123 (1973); see Memorandum from Robert E. Gooding, Jr., Law Clerk (Feb. 22, 1971) (HAB) (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) [#3794].

¹⁵³ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); see Memorandum from Schickele, Legal Officer, at 2-3 (May 9, 1988) (on file in the Harry Blackmun Papers, Library of Congress) (explaining that after the Court had called for a response to the cert. petition, counsel “informed his client of its obligation to file a response, [but] the client had not authorized him to file a response and discharged his law firm”) [#4184-85]; Memorandum from Schickele, at 3 (June 13, 1988) (on file in 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”) [#4290]. 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, to the Chief Justice (Oct. 8, 1982) (on file in 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 forthcoming for the respondent, unless the Court appoint an amicus curiae to file such brief.”) [#4517].

¹⁵⁴ *Gomez v. Perez*, 409 U.S. 535 (1973) (per curiam). The appellant challenged the constitutionality of 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.” *L--- G--- v. F--- O. 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 at 1, *Gomez v. Perez*, 408 U.S. 920 (1972) (mem.) (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 (mem.) (1972).

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.¹⁵⁵ 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.¹⁵⁶ In the other four, the respondent was denied leave to argue *pro se* in the Court but refused to accept or was ineligible for appointed counsel.¹⁵⁷ One respondent, for example, “suffer[ed] from some emotional difficulties”¹⁵⁸ and had filed a multiple letters and briefs that were “nothing more than an incoherent jumble of arguments,”¹⁵⁹ which prompted to 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.”¹⁶⁰ The respondent’s prospective attorney agreed to defend the judgment below, but only as an *amicus*, not as respondent’s representative.¹⁶¹ Another

¹⁵⁵ 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 Rhessa H. Barksdale, Esquire, of Jackson, Mississippi, 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-four 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 (1983) (No. 82-1330), with Brief for Respondent, *id.* 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 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 (April 20, 1984) (on file in the Harry Blackmun Papers, Library of Congress) [#4286-87].

¹⁵⁶ *United States v. Cores*, 356 U.S. 405 (1957). The “Representation of appellee” was discussed by the Court on November 22, 1957, two weeks before the *amicus* was appointed, but available materials do not explain what was at issue. See Docket Sheet in No. 455 (1957) (on file in the William O. Douglas Papers, Library of Congress) [#3634].

¹⁵⁷ 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 *in forma pauperis* 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 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 Burger to the Conference (Oct. 27, 1982) (on file in 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’”) [#4523].

¹⁵⁸ Letter from Beth Heifetz, Law Clerk, to Justice Blackmun, at 2 (Jan. 8, 1986) (on file in the Harry Blackmun Papers, Library of Congress) [#4347].

¹⁵⁹ Letter from Jim Fanto, Law Clerk, to Justice Blackmun (Oct. 4, 1986) (on file in the Harry Blackmun Papers, Library of Congress) [#4334]; see Brief for Respondent, *O’Connor v. Ortega*, 480 U.S. 709 (1987) (No. 85-530).

¹⁶⁰ Memorandum from Schickele, Legal Officer, at 3 (Jan. 6, 1986) (on file in the Harry Blackmun Papers, Library of Congress) [#4343]; see, e.g., Memorandum from Chief Justice Burger to the Conference, at 2 (Jan. 28, 1986) (on file in the Harry Blackmun Papers, Library of Congress) (“I seriously doubt that I would sit to hear a *pro se* oral argument from this respondent.”) [#4354]; Letter from Magno J. Ortega to Clerk of the Supreme Court (Jan. 12, 1986) (on file in the Harry Blackmun Papers, Library of Congress) [#4355].

¹⁶¹ Memorandum from Chief Justice Burger, *supra* note 160, at 2 (“Under the circumstances, I cannot fault Mr. Klein for ‘firing’ his client.”) [#4354].

respondent was “commit[ted] to a principle of the right of self-representation before this court.”¹⁶² 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 “publicity stunt.”¹⁶³ The Court declined, and instead invited the author of an *amicus* brief supporting respondent to argue the case.¹⁶⁴

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 situation.¹⁶⁵ 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.¹⁶⁶ 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!”¹⁶⁷ 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

¹⁶² Letter from Mark D. Rosenbaum, former counsel to appellee in *Kolender v. Lawson*, to Alexander L. Stevas, Clerk of the Supreme Court (Oct. 21, 1982) (on file in the Thurgood Marshall Papers, Library of Congress) [#4526].

¹⁶³ Memorandum from Alexander L. Stevas, Clerk of the Supreme Court, to the Chief Justice (Nov. 3, 1983) (on file in 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) [#4253]; Letter from Larry C. Flynt to Justice Blackmun (Nov. 3, 1983) (on file in the Harry Blackmun Papers, Library of Congress) (“I trust that for the sake of justice and the preservation of the judicial system you will permit me to argue this case in the spirit of the grand American tradition by allowing me to retain the counsel of my choice—namely me.”) [#4274]; Letter from Norman Roy Grutman, counsel for petitioner, to Alexander L. Stevas, Clerk of the Supreme Court, at 2 (Nov. 3, 1983) (on file in the Harry Blackmun Papers, Library of Congress) [#4277]. 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.” Letter from Alfred Wong, Marshal of the Court (Nov. 8, 1983) (on file in the Harry Blackmun Papers, Library of Congress) [#4252].

¹⁶⁴ *Keeton v. Hustler Magazine, Inc.*, 464 U.S. 958 (1983) (mem.).

¹⁶⁵ See SUP. CT. R. 39 (formerly Rule 46).

¹⁶⁶ *Ritchie*: *Pennsylvania v. Ritchie*, 478 U.S. 1019 (1986) (mem.) (denying respondent’s motion to proceed further *in forma pauperis* and inviting his attorney to brief and argue the case as *amicus*); Memorandum from Niddrie, Legal Officer (June 24, 1986) (on file in the Harry Blackmun Papers, Library of Congress) (explaining that “Resp’s attorney is unable to contact resp” and seeks leave to proceed *in forma pauperis* without the required affidavit, and recommending “that the Court grant counsel’s request for *ifp* status on condition that the costs incurred by the Court will be taxed against resp if he is located and found to have sufficient assets”) [#4385]; *Sharpe*: *United States v. Sharpe*, 469 U.S. 809 (1984) (mem.) (denying respondent’s motion to proceed further *in forma pauperis* and for appointment of counsel, and inviting his attorney to brief and argue the case as *amicus*); Memorandum from Niddrie, Legal Officer (Sept. 20, 1984) (on file in the Harry Blackmun Papers, Library of Congress) [#4318-22]; *Cox*: *Vermont v. Cox*, 481 U.S. 1012 (1987) (mem.) (denying respondent’s motion to proceed further *in forma pauperis* and inviting his attorney to brief and argue the case as *amicus*); Memorandum from McKinnie, Legal Officer (Apr. 14, 1987) (on file in 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) [#4137-40].

¹⁶⁷ Note from L. N. to Justice Blackmun (Apr. 15, 1987) (on file in the Harry Blackmun Papers, Library of Congress), written on Memorandum from McKinnie, *supra* note 166, at 4 [#4140].

conviction arose from not understanding the instructions on a similar statement.”¹⁶⁸ Again, rather than compromise in its requirements for proceeding with IFP status, the Court opted to appoint an *amicus* instead.¹⁶⁹

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.”¹⁷⁰ 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”¹⁷¹; that “the absence of adversary proceedings below is somewhat disturbing”¹⁷²; and that the “resp[ondent]’s position deserves good representation.”¹⁷³ The idea that the judgment below might go undefended has understandably 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.”¹⁷⁴

¹⁶⁸ *United States v. Halper*, 490 U.S. 435, 437 (1989), *abrogated by* *Hudson v. United States*, 522 U.S. 93 (1997); Memorandum from McKinnie, Legal Officer, at 3 (Oct. 4, 1988) (on file in the Harry Blackmun Papers, Library of Congress) [#4233].

¹⁶⁹ *United States v. Halper*, 488 U.S. 906 (1988) (mem.). The appellee had 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 4 n.4, *United States v. Halper*, 490 U.S. 435 (1989) (No. 87-1383).

¹⁷⁰ Letter from Justice Frankfurter, *supra* note 51.

¹⁷¹ Note from James J. Knicely, Law Clerk, to Justice Blackmun (Oct. 19, 1973), *handwritten on* Cert. Memorandum in *Kokoszka v. Belford* (No. 73-5265), at 4 (Oct. 15, 1973) (on file in the Harry Blackmun Papers, Library of Congress) [#3873].

¹⁷² Memorandum from Michael Conley to Justice Blackmun (Jan. 11, 1991) (on file in the Harry Blackmun Papers, Library of Congress) (concerning *Toibb v. Radloff*, No. 90-368) [#90-368-PDF-at-6].

¹⁷³ Note from Jim Fanto, Law Clerk, to Justice Blackmun (Feb. 5, 1987), *handwritten on* Memorandum from Schickele, Legal Officer, at 6 (Feb. 3, 1987) (on file in the Harry Blackmun Papers, Library of Congress) (concerning *United States v. Fausto*, No. 86-595) [#4403].

¹⁷⁴ *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (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

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 Stephen Landsman has described, “[t]he 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.”¹⁷⁵ In that singular 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 also they 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.¹⁷⁶ 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 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.”¹⁷⁷ 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.¹⁷⁸ 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

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.”)

¹⁷⁵ Stephen Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487, 490 (1980).

¹⁷⁶ 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* 44-45 (5th ed. 2007); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. U. L.R. 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.

¹⁷⁷ *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

¹⁷⁸ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006).

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.”¹⁷⁹ 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.”¹⁸⁰ 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 it should help ensure that all relevant issues have been aired. The *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.”¹⁸¹ Indeed, the Court has acknowledged the benefit of having an *amicus* “to assist our deliberations.”¹⁸² And even where the *amicus* makes “ingenious” arguments that are “ultimately unpersuasive,” the Court can be more certain about its decision to reverse the undefended decision below.¹⁸³ 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 any 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.¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ Indeed, a skilled

¹⁷⁹ William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873 n.25 (citing Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 39 (H. Berman ed., 1971) (internal quotation marks omitted)).

¹⁸⁰ Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the ABA and AALS*, 44 A.B.A. J. 1159, 1161 (1958).

¹⁸¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 159 (1803).

¹⁸² *Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000).

¹⁸³ *Kucana v. Holder*, 130 S. Ct. 827, 841 (2010) (Alito, J., concurring).

¹⁸⁴ See, e.g., Letter from Rhessa H. Barksdale, Invited *Amicus* in *Thigpen v. Roberts* (No. 82-1330), to Chief Justice Burger (Aug. 3, 1984) (on file in 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 to us to practice law, was very rewarding to my Firm and me.”) [#4290].

¹⁸⁵ 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”).

¹⁸⁶ See, e.g., *Greenlaw v. United States*, 128 S. Ct. 2559, 2567-68 (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).

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.¹⁸⁷ Eight years later, the Court abandoned its holding in *Halper*, which it deemed "ill considered" and "unworkable."¹⁸⁸ To caution that "[h]ard cases make bad 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."¹⁸⁹ His effective job as an *amicus* no doubt helped the *Halper* Court to make that mistake.¹⁹⁰ 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.¹⁹¹

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.¹⁹² 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. But every category of the invited-*amicus* cases 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*,¹⁹³ *Reed Elsevier*,¹⁹⁴ *Dickerson*,¹⁹⁵ and *Hohn*,¹⁹⁶ 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."¹⁹⁷ But 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 arbiter to more active inquisitor, and in constraining the parties'

¹⁸⁷ *United States v. Halper*, 490 U.S. 435, 448-49 (1989).

¹⁸⁸ *Hudson v. United States*, 522 U.S. 93, 101 (1997).

¹⁸⁹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2272-73 (2009) (Roberts, C.J., dissenting).

¹⁹⁰ See Posting of Lyle Denniston to SCOTUSBlog, *Digging Up a Discredited Precedent*, <http://www.scotusblog.com/2009/06/digging-up-a-discredited-precedent> (June 9, 2009, 3:07 p.m.).

¹⁹¹ Rubenstein, *supra* note 179, at 1867-68.

¹⁹² Landsman, *supra* note 175, at 526.

¹⁹³ See *supra* note 81 and accompanying text.

¹⁹⁴ See *supra* note 105 and accompanying text.

¹⁹⁵ See *supra* note 115 and accompanying text.

¹⁹⁶ See *supra* note 134 and accompanying text.

¹⁹⁷ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 514 (1989).

freedom to shape their own case, it undermines their sense of procedural justice.¹⁹⁸

To be clear, this claim is descriptive, not normative. As I discuss in depth below,¹⁹⁹ 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 such questions, but rather it does have an interest of its own.²⁰⁰ In those cases, the party-control norm must give way to other values. So I do not suggest that the Supreme Court in *Hohn* or the Second Circuit in *Reed Elsevier* were wrong to question their jurisdiction *sua sponte*. Rather, I simply note the harm to autonomy that results, even if that harm is justified sometimes.

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*, extra-litigation 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.²⁰¹

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 impact. 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."²⁰² Surely neither side felt much sense of 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 Professor Amanda Frost notes, "[t]urning to an *amicus* is a perfectly acceptable solution to a breakdown

¹⁹⁸ Cf. Stephen 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).

¹⁹⁹ See *infra* Part III.B.2.

²⁰⁰ See, e.g., *Louisville & Nashville Ry. 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.")

²⁰¹ See Chemerinsky, *supra* note 28, at 292-301 (noting particular separation-of-powers concerns that arise when then government's autonomy is undermined in its role as a prosecutor).

²⁰² *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

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.”²⁰³ So while refraining from *sua sponte* decision making most respects litigant autonomy, inviting an *amicus* is a beneficial alternative where that restraint is not possible, 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.²⁰⁴ 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.²⁰⁵ 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 respondent.²⁰⁶ It is unlikely that any of these respondents felt particularly validated by their hearing in the Court or 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 U.S. 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.²⁰⁷

But what of respondent criminal defendants who could not be located to sign IFP affidavits, or the respondents who sought to proceed *pro se*—had they waived their right 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.²⁰⁸ On the one hand, the Court’s insistence upon completed affidavits before appointing the defendants’ attorneys to serve as their counsel seems an excess

²⁰³ Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 467, 505 (2009).

²⁰⁴ Cf. MODEL R. PROF. CONDUCT § 1.2 (scope of representation & allocation of authority between client and lawyer); *id.* § 1.4 (communication); *id.* § 1.6 (confidentiality of information); *id.* §§ 1.7-1.18 (conflicts of interest and other duties of loyalty).

²⁰⁵ 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. Central Bank of Nigeria*, 416 U.S. 480, 482 (1983) (Stephen N. Shulman argued as *amicus* and filed an *amicus* brief for the Republic of Guinea).

²⁰⁶ Letter from Joel I. Klein to Francis J. Lorson, Chief Deputy Clerk (Jan. 21, 1986) (on file in 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, No. 85-830]”) [#4358]; see also *supra* note 150 and accompanying text.

²⁰⁷ See FED. R. APP. P. 31(c); see, e.g., *In re Talbert*, 344 F.3d 555, 557 (6th Cir. 2003).

²⁰⁸ See *supra* note 166 and accompanying text (discussing *Pennsylvania v. Ritchie* and *United States v. Sharpe*).

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."²⁰⁹ 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.²¹⁰

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 their choice, and in one case, *Kolender v. Lawson*, the respondent's former counsel was appointed to argue as *amicus*.²¹¹ Participating at oral argument themselves would have 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),²¹² and three of the four *pro se* respondents chose to place matters of principle above authorizing counsel to represent them.²¹³ 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 decision maker] from becoming too active a participant in the proceedings."²¹⁴ In a non-adversarial 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 into the hearing uncommitted, for it has itself appointed the channels along which the public inquiry is to run."²¹⁵ The consequence of a court "becom[ing] an active inquirer" is a failure "to convince society at large

²⁰⁹ *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam); see also. In *Molinaro*, the fugitive was the petitioner, so his direct appeal was dismissed. In these cases, the fugitive is the respondent, 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.

²¹⁰ 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 Letter from Mark J. Kadish to Alexander Stevas, Clerk of the Supreme Court (May 11, 1984) ("[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."); Memorandum from Niddrie, *supra* note 166, at 2 ("[Counsel for Sharpe] may have an ethical duty to proceed—even without his clients.") [#4319].

²¹¹ See *supra* note 157 and accompanying text.

²¹² *Martinez v. Court of Appeal*, 528 U.S. 152, 154 (2000).

²¹³ *O'Connor*: Memorandum from Chief Justice Burger to the Conference (Jan. 28, 1986) (on file in 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) [#4353-54]; *Keeton*: Letter from Larry C. Flynt to Justice Blackmun, *supra* note 163 (invoking "the grand American tradition [of] allowing me to retain the counsel of my choice—namely me") [#4274]; *Kolender*: Letter from Mark D. Rosenbaum, *supra* note 162 (noting the "principle of the right of self-representation before this court").

²¹⁴ *Landsman*, *supra* note 175, at 491.

²¹⁵ *Fuller & Randall*, *supra* note 180, at 1161.

that the court system is trustworthy” by virtue of “appear[ing] to be an advocate rather than a neutral arbiter.”²¹⁶ On the surface, appointing an *amicus* appears to avoid some of these pitfalls: it allows the Court to assume a 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.²¹⁷ 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 non-neutrality 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.”²¹⁸ As noted earlier, the Court has responded in various cases by denying cert; granting, vacating, and remanding for consideration of the confession of error (GVR); and appointing an *amicus*.²¹⁹ Between 1977 and 2006, the Court GVRed a case in light of the Solicitor General’s confession of error fifty-six times.²²⁰ Meanwhile, the Court decided to appoint an *amicus* in sixteen cases in which the Solicitor General confessed error, notwithstanding the government’s requests express requests in some of them that the Court GVR,²²¹ that cert be denied on the grounds that the error below was harmless,²²² or that the decision below be reversed outright.²²³

Which route the Court elects to take can reflect an interventionist decision that is fraught with prejudgment of the merits of the case. Denying cert might say, “we don’t care about this issue, even though the government acknowledges an injustice.”²²⁴ Appointing an *amicus*, by contrast, signals an intent to reach the merits because the Court has some doubts about the legal question, even though the parties do not. But GVRing 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 the “Court should mechanically accept

²¹⁶ Landsman, *supra* note 175, at 491.

²¹⁷ See Landsman, *supra* note 175, 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.”).

²¹⁸ Rosenzweig, *supra* note 53, at 2080.

²¹⁹ See *supra* Part .

²²⁰ Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 734 fig.2 (2009).

²²¹ 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 at 13-15, *Pepper v. United States*, 130 S. Ct. 3499 (2010) (mem.) (No. 09-6822); Brief for the United States at 17, *Greenlaw v. United States*, 128 S. Ct. 829 (2008) (mem.) (No. 07-330); Brief for the United States at 12, *Bousley v. United States*, 523 U.S. 614 (1998) (No. 96-8516).

²²² See, e.g., Brief for the Respondent in Opposition at 19, *Kucana v. Holder*, 129 S. Ct. 2075 (2009) (mem.) (No. 08-911); Brief for the United States in Opposition at 13, *Clay v. United States*, 536 U.S. 957 (2002) (mem.) (No. 01-1500); Brief for the United States in Opposition at 16, *Irizarry v. United States*, 128 S. Ct. 828 (2008) (mem.) (No. 06-7517).

²²³ 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.”)

²²⁴ To be sure, most cert denials 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. Even cert 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.

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 decried²²⁵; to the contrary, as Justices²²⁶ and commentators²²⁷ alike have observed, there are instances when plenary review is 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.²²⁸ The decision to grant or deny a petition is never neutral with respect to the merits,²²⁹ and unlike a district court's acceptance of every case that is filed, it need not be.²³⁰ So, even if the decision to invite an *amicus*, rather than GVR in light of a confession of error or deny cert, does betray some amount of prejudice on the merits, that would hardly be unique to appointed-*amicus* cases.

But with the exception of the failure-to-appear category of cases, inviting an *amicus* is meaningfully different and a more severe departure from the neutrality principle than the general cert process. While the discretionary docket allows the Court to choose which questions to take up, it is limited to those questions over which parties 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 by anyone. Absent that constraint, there is risk that the Court will reach out for those issues it wishes to decide even though it need not, and even though the lower court might reconsider its own position on remand in light of the parties' agreement. Thus, as with the harm imposed by *sua sponte* decision making 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.

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

²²⁵ *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.").

²²⁶ See, e.g., *Stutson v. United States*, 516 U.S. 163, 178-90 (1996) (Scalia, J., dissenting) (GVR inappropriate in response to federal agency's new interpretation of statute); *Alvarado v. United States*, 497 U.S. 543, 545 (1990) (GVR inappropriate where government concedes error in reasoning but deems it harmless) (Rehnquist, C.J., dissenting); see also *Wellons v. Hall*, 130 S. Ct. 727, 732-33 (2010) (Scalia, J., dissenting); *Webster v. Cooper*, 130 S. Ct. 456, 456 (2009) (Scalia, J., dissenting); *Youngblood v. West Virginia*, 547 U.S. 867, 872 (2006) (Scalia, J., dissenting); *Dep't of Interior v. South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting).

²²⁷ See, e.g., Bruhl, *supra* note 220, at 753-54; Rosenzweig, *supra* note 53, at 2095-2101, 2111-14.

²²⁸ SUP. CT. R. 10.

²²⁹ 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).

²³⁰ But see Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

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."²³¹ At various times, proposals were circulated to dismiss the case as moot²³² and for lack of standing.²³³ Ultimately, after much internal straining, the writ of certiorari was dismissed as improvidently granted.²³⁴ *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."²³⁵ And *Bob Jones University* produced great uncertainty within the Court as to whether the IRS's change of position had mooted the case.²³⁶ 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.²³⁷ This Subpart evaluates the fit between the practice of inviting *amici* 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."²³⁸ 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.²³⁹ Similarly, courts' relative institutional 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.²⁴⁰ Moreover,

²³¹ Memorandum from Emily Buss, Law Clerk, to Justice Blackmun (Nov. 21, 1987) (on file in the Harry Blackmun Papers, Library of Congress) (concerning *Vermont v. Cox*, No. 86-1108) [#4141].

²³² Draft opinion of Justice Brennan, *Vermont v. Cox* (NO. 86-1108) (Nov. 17, 1987) [#4122].

²³³ Draft opinion of Justice Brennan, *Vermont v. Cox* (No. 86-1108) (Nov. 13, 1987) [4123-26].

²³⁴ *Vermont v. Cox*, 484 U.S. 173 (1987) (mem.); see, e.g., Memorandum from Justice Blackmun to the Conference (Nov. 23, 1987) (on file in 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.") [#4122].

²³⁵ *United States v. Sharpe*, 470 U.S. 675, 726 (1985) (Stevens, J., dissenting)

²³⁶ See, e.g., Memorandum from Caldwell, Legal Officer, at 2 n.2 (Jan. 21, 1982) (on file in the Harry Blackmun Papers, Library of Congress) (suggesting the case be vacated and remanded for consideration of mootness) [#3995]. But see Memorandum from Caldwell, Legal Office, at 3 (Feb. 26, 1982) (on file in the Harry Blackmun Papers, Library of Congress) (suggesting the case was no longer moot) [#4010].

²³⁷ U.S. CONST., art. III, § 2.

²³⁸ *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

²³⁹ See Lea Brilmeyer, *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.").

²⁴⁰ Cf. CHEMERINSKY, *supra* note 176, 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.").

legislatures' political accountability gives legitimacy to their policy determinations. By contrast, when courts engage in agenda-setting and policymaking, they may be viewed as acting politically and unaccountably, and thus their legitimacy may be tarnished.²⁴¹ 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.²⁴²

Related separation-of-powers concerns animate the prohibition against advisory opinions—judicial rulings on legal questions presented outside the context of a live case.²⁴³ 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.²⁴⁴ Although the term as originally conceived applied to extra-judicial legal advice rendered by a court to the executive or legislature,²⁴⁵ 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."²⁴⁶ As when the parties lack standing, cases that would produce opinions that are advisory only are deemed nonjusticiable because they would compel courts to act as legislatures, forced to make policy trade-offs and predictions about hypothetical factual scenarios, which in turn would weaken and short-circuit the political process.²⁴⁷

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 class of issues that, while not contested by the parties, are not breaches of "judicial self-restraint" when decided either: 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

²⁴¹ 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.")

²⁴² *Massachusetts v. EPA*, 127 S. Ct. 1438, 1471 (2007) (Roberts, C.J., dissenting).

²⁴³ See *Flast*, 392 U.S. at 96.

²⁴⁴ *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

²⁴⁵ See RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50 (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).

²⁴⁶ WRIGHT ET AL., *supra* note 27, § 3529.1 (collecting cases) (footnotes omitted).

²⁴⁷ See, e.g., Frankfurter, *supra* note 245, at 1005-07.

Court.²⁴⁸ 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.²⁴⁹ So why did the Court appoint *amici* four times after the government reversed the position its opponent was challenging?

In *Gutierrez de Martinez v. Lamagno*,²⁵⁰ 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 adversary 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.²⁵¹ Had the government actually believed Bousley 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 section 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.²⁵² 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 cert-stage brief: GVRing the case.²⁵³ The Court erred in appointing an *amicus* instead.

²⁴⁸ See, e.g., *Pottawattamie County v. McGhee*, 130 S. Ct. 1047 (2010) (mem.) (dismissing writ of certiorari upon settlement).

²⁴⁹ See, e.g., *Kremens v. Bartley*, 431 U.S. 119 (1977) (repeal of statutes challenged as unconstitutional rendered 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 any "reasonable expectation" that the conduct will be resumed. See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (court maintained jurisdiction because the "defendant [was] free to return to his old ways").

²⁵⁰ See *supra* note 72 and accompanying text.

²⁵¹ See *supra* notes **Error! Bookmark not defined.**-78 and accompanying text.

²⁵² See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

²⁵³ Brief for the United States at 11-12, *Bousley v. United States*, 523 U.S. 614 (1998) (No. 96-8516).

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’s bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General.”²⁵⁴ Then-Justice 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.²⁵⁵ Dissenting from that decision, he opined that “it 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.”²⁵⁶ 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 making.²⁵⁷ 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 GVRing should simply be denying certiorari altogether and letting the erroneous judgment stand, as the Court does in many cases it deems wrongly decided but not certworthy, but not granting plenary review and employing *amicus* support for an adversary presentation.

By contrast, the recent *amicus* invitation in *Pepper v. United States* was not improper, 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.²⁵⁸ And, like it had in *Bousley*, the Solicitor General suggested in response to the cert petition that the Court GVR the case in light of its new position rather than order full briefing and argument in the case. But, unlike *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 indeterminate range set by Congress for the crime of conviction,²⁵⁹ subject to the requirements imposed on them by higher courts under their supervisory powers.²⁶⁰ The Eighth Circuit in *Pepper* found that, under its precedent, district courts could not consider a defendant’s post-sentencing rehabilitation upon re-sentencing following vacatur of an initial sentence.²⁶¹ 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, receive a windfall in the form of a reduced sentence for good behavior in prison.”²⁶²

²⁵⁴ See Drew S. Days, III, *The Solicitor General and the American Ideal*, 49 S.M.U. L. REV. 73 (1995).

²⁵⁵ *Mariscal v. United States*, 449 U.S. 405 (1981) (per curiam).

²⁵⁶ *Id.* at 406-07 (Rehnquist, J., dissenting).

²⁵⁷ See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792) (opinion of Iredell, J.).

²⁵⁸ Brief for the United States at 13-15, *Pepper v. United States*, 130 S. Ct. 3499 (2010) (mem.) (No. 09-6822).

²⁵⁹ See, e.g., 18 U.S.C. § 3553; 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 he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine.”).

²⁶⁰ See e.g., *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

²⁶¹ *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)).

²⁶² *United States v. Sims*, 174 F.3d 911, 912 (8th Cir. 1999).

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. GVRing 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.

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 moot.²⁶³ The University agreed.²⁶⁴ 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.²⁶⁵ Noting that the Secretary of Treasury would "honor this order," the Solicitor General withdrew his suggestion of mootness.²⁶⁶ 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 cert grant.²⁶⁷ The Court declined and heard the case with an *amicus* instead.²⁶⁸

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 over 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 by 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

²⁶³ Memorandum from Caldwell, Legal Officer, at 2 (Jan. 14, 1982) (on file in the Harry Blackmun Papers, Library of Congress) [#3991]; see also Memorandum from Caldwell, Legal Officer, at 2 n.2 (Jan. 21, 1982) (on file in the Harry Blackmun Papers, Library of Congress) ("Because 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.") [#3995].

²⁶⁴ *Id.*

²⁶⁵ Memorandum from Caldwell, Legal Officer, at 3 (Feb. 25, 1982) (on file in the Harry Blackmun Papers, Library of Congress) [#4003]; see generally *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom* *Allen v. Wright*, 468 U.S. 737 (1984).

²⁶⁶ Memorandum from Caldwell, *supra* note 85, at 2 [#4009]; see Note from Kit Kinports to Justice Blackmun (Mar. 17, 1982) ("I continue to believe that these cases should be [dismissed as improvidently granted]."), *written on* Memorandum from Caldwell, Legal Officer, at 2 (Mar. 17, 1982) (on file in the Harry Blackmun Papers, Library of Congress) [#4020].

²⁶⁷ Memorandum from Caldwell, *supra* note 86, at 2 [#4015].

²⁶⁸ See *supra* note 87 and accompanying text.

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 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.²⁶⁹ 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 with respect to that issue. 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. Though 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.²⁷⁰ 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 either be vacated or left alone as with other non-certworthy errors. 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.²⁷¹ In fact, ignoring this omission would be more likely to yield an advisory opinion than a court's addressing this uncontested issue: where the court *should* create an antecedent issue that would let it resolve the case most directly (on jurisdictional grounds), it would instead speak to a merits question where it literally lacks the power to do so.²⁷² So in the eight invitation cases in which a lower court made a determination of its jurisdiction *sua sponte*,²⁷³ the lower courts did

²⁶⁹ *Allen v. Wright*, 468 U.S. 737 (1984).

²⁷⁰ *See, e.g., United States v. United States District Court*, 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).

²⁷¹ *See, e.g., Mt. Health City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977).

²⁷² *Cf. Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (“Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion.”).

²⁷³ *See supra* notes 91-111 and accompanying text.

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.²⁷⁴ 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 noted on his docket sheet for *Cheng Fan Kwok v. INS*, "Bill Dempsey appointed to represent the Third Circuit Court of Appeals."²⁷⁵

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 adjudication is unavoidable."²⁷⁶ Courts engage in such "constitutional avoidance" even when parties raise constitutional arguments themselves; thus, it would be an extreme form of over-reaching 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 over-reaching might do so to advance their own agendas,²⁷⁷ which is precisely the threat that the adversary system and case-or-controversy doctrines 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

²⁷⁴ 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).

²⁷⁵ Docket Sheet in *Cheng Fan Kwok v. INS*, No. 638 (1967) (on file in the Earl Warren Papers, Library of Congress) [#3708].

²⁷⁶ *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944).

²⁷⁷ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 645-46 & 646 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 the State asked the Court to reach this issue).

they asserted arguments the parties had waived.²⁷⁸ In *Clay v. United States*, for example, the district court's *sua sponte* dismissal of a criminal defendant's section 2255 motion on the ground that it was untimely was improper.²⁷⁹ 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 section 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.²⁸⁰ 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 cert, the Court would have done fine to deny cert—as the government requested notwithstanding its confession of error, and as it may do in any case even where there was error below—or it could have GVRed in light of the lower court's overreaching to decide a question that was not properly presented to it.²⁸¹ 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 longer 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.²⁸² As Dean 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 of separation of powers.²⁸³ 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

²⁷⁸ See *supra* notes 112-**Error! Bookmark not defined.** and accompanying text.

²⁷⁹ See *supra* notes 112-113 and accompanying text.

²⁸⁰ 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. Appx. 607, 608 n.1 (7th Cir. 2002).

²⁸¹ Cf. *Iron Arrow Honor Society 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.”).

²⁸² See *supra* notes 114-119 and accompanying text.

²⁸³ Chemerinsky, *supra* note 28, at 292.

long-running refusal to invoke the statute.²⁸⁴ Citing *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*,²⁸⁵ 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.”²⁸⁶ 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 existence would have been its strongest argument.²⁸⁷ 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.²⁸⁸

Unlike the mysterious “section 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 section 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 section 3501 had abrogated *Miranda*, *Miranda* remained good law. And as the Fourth Circuit noted, “the Court has never considered whether the statute overruled *Miranda*.”²⁸⁹ The Court had not considered that question in the thirty-one years since section 3501 had been passed precisely because the government waived its many opportunities 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 litigant, 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 to leave the question of *Miranda*’s constitutional status for another day, the Court opted to resolve the dispute once and for all. Though 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 remanding would have better

²⁸⁴ See *United States v. Dickerson*, 166 F.3d 667, 671-72 (4th Cir. 1999).

²⁸⁵ 508 U.S. 439, 445-48 (1993).

²⁸⁶ *Dickerson*, 166 F.3d at 672.

²⁸⁷ *Ins. Agents of Am., Inc. v. Clarke*, 95 F.2d 731 (D.C. Cir. 1992), *rev’d sub nom* *U.S. Nat’l Bank of Ore. v. Independent 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).

²⁸⁸ *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.”) (internal citations omitted).

²⁸⁹ *Dickerson*, 166 F.3d at 671.

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, but rather an issue that implicated an independent interest of the court.²⁹⁰ 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*²⁹¹; 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 to defend the lower court’s decision.²⁹² 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.²⁹³ Unless mandated by statute, which standard of review applies to a specific claim is generally a court-created rule, which reflects judicial policy-making 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, which defense the invited *amicus* provided. 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 parties 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*,²⁹⁴ 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

²⁹⁰ See *supra* notes 120-123 and accompanying text.

²⁹¹ See *supra* notes 128-131 and accompanying text.

²⁹² Memorandum from Chief Justice Burger, *supra* note 130.

²⁹³ See *supra* notes 124-127 and accompanying text.

²⁹⁴ See *supra* notes 134-139 and accompanying text.

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.

Shelton, by contrast, fits in the unjustified class of issues raised *sua sponte*.²⁹⁵ Mid-course, petitioner Alabama pulled back from the strongly anti-defendant position on a Sixth Amendment question it had taken in its cert petition. Yet the Court was interested in that broader position—which is why it had granted cert 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.”²⁹⁶ 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.²⁹⁷ True enough, but the Constitution does not structure courts or 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.²⁹⁸ 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

²⁹⁵ See *supra* notes 140-144 and accompanying text.

²⁹⁶ Cf. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 514-16 (1989) (“Plaintiffs are masters of their complaints and remain so at the appellate stage of a litigation.”).

²⁹⁷ 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 probable jurisdiction in the case,” in view of the “unique resources—the time spent preparing to decide the case by reading the briefs, hearing oral argument, and conferring” that the Court expends once it has granted cert. *Honig v. Doe*, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J., dissenting). Nothing in Article III appears to support the position that the Supreme Court may render what amount to advisory opinions for the sake of judicial economy.

²⁹⁸ See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

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.²⁹⁹ As the D.C. Circuit has noted, “the 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.”³⁰⁰ 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 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.³⁰¹ 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.³⁰² Though 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. Though 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

²⁹⁹ FED. R. CIV. P. 55.

³⁰⁰ *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970).

³⁰¹ *WRIGHT ET AL.*, *supra* note 27, § 2681.

³⁰² *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.”).

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.³⁰³ If the Court is empowered 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,³⁰⁴ or where an *amicus* is invited because the respondent only appears *pro se*. Even where the respondent suddenly refused to communicate with the Court, the case remained justiciable because a decision to reverse would have affected its rights (adversely) and a decision to affirm would have preserved the position it was in.³⁰⁵ 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.³⁰⁶ 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.³⁰⁷ 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."³⁰⁸

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 to any judgment we may render."³⁰⁹ 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

³⁰³ See *supra* notes 30-33 and accompanying text.

³⁰⁴ See, e.g., Letter from Victor L. Baltzell, Jr., *supra* note 150, at 1 (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. . . . 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.").

³⁰⁵ In *United States v. 12 200-Foot Reels of Super 8mm. Film*, 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 152.

³⁰⁶ See *supra* note 166 and accompanying text.

³⁰⁷ See Letter from Mark J. Kadish, *supra* note 210.

³⁰⁸ *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985).

³⁰⁹ *Id.* at 723-24 (Stevens, J., dissenting) (quoting *Smith v. United States*, 94 U.S. 97, 97 (1876)).

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.”³¹⁰ Instead, he 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.³¹¹ That approach, he noted, “would make it unnecessary for this Court to decide the constitutional question that is presented.”³¹² 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.”³¹³

Justice Stevens’s view did not carry the day, nor did it the next year when *Pennsylvania v. Ritchie* presented the same problem.³¹⁴ 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.

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 cert 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 cert knowing that one of the failure-to-appear anomalies was present.³¹⁵ In seven cases, the respondent’s failure to appeal became apparent only after cert had been granted – and in the case of *Keeton*, only days before oral argument was scheduled to be heard.³¹⁶ While the Court could have dismissed the writ as improvidently granted in such cases, prudential considerations may well weigh in favor of hearing the case once merits briefing has begun. The final five cases, including *Kolender*, arose on direct appeal, so the Court lacked discretion to deny review.³¹⁷

³¹⁰ *Id.* at 724 (Stevens, J., dissenting).

³¹¹ *Id.* at 724-25 (Stevens, J., dissenting).

³¹² *Id.* at 725 (Stevens, J., dissenting).

³¹³ *Id.* at 726 (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

³¹⁴ Memorandum from Justice Stevens to the Conference (July 1, 1986) (on file in the Harry Blackmun Papers, Library of Congress) (suggesting that *Pennsylvania v. Ritchie*, No. 85-1347, be vacated and remanded) [#4372]; Memorandum from Justice Rehnquist to the Conference (July 1, 1986) (on file in 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”) [#4371].

³¹⁵ Those cases were *Harris*, *Bonito Boats*, *Fausto*, *O’Connor*, *Kokoszka*, and *Daniel*.

³¹⁶ Those cases were *Mackey*, *Thigpen*, *Keeton*, *Verlinden*, *Brown*, *Flair Builders*, and *Stidger*.

³¹⁷ Those cases were *Halper*, *Kolender*, *12 200-Foot Reels of Super 8 mm. Film*, *Gomez*, and *Cores*.

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 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 refuses 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. *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 cert has been granted and the petitioner's brief has been submitted.

According to these criteria, fifteen of the forty-two *amicus* invitations would be found unjustified or imprudent. Table 1 categorizes each invitation by its cause and how it fares under this analysis. One trend is notable: in the last eight Terms there have been five 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. Because such self-restraint better safeguards the accuracy of judicial decision making, litigant autonomy, and the Court's actual and perceived neutrality, a continued pattern of only cautious use of invited *amici* should be welcomed.

Table 1. Propriety of *amicus* invitations (by case, cause, and Term of invitation).

Cause for <i>amicus</i> invitation	Cases in which <i>amicus</i> invitation was justified	Cases in which <i>amicus</i> invitation was not justified (or imprudent)
(1) Respondent changes position	<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 <i>sua sponte</i> ³¹⁸	<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 Ins.</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 <i>sua sponte</i>	<i>Hohn</i> (1997) [°]	<i>Shelton</i> (2001)
(4) Respondent fails to appear ³¹⁹	<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-Foot 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)

³¹⁸ Cases in which a jurisdiction issue was raised *sua sponte* are signaled with a °.

³¹⁹ As noted above, some of these cases were probably justified because they arose on direct appeal (signaled with a *) or because the respondent initially appeared to oppose certiorari (signaled with a **). See *supra* notes 316-317 and accompanying text.

CONCLUSION

The forty-two 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 receive tax exemptions, even though the litigants do not dispute that question and its resolution could wait for another day. 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 judgment below and remand for further proceedings. Doing so would help ensure that neither lower courts nor the Supreme Court render “advisory opinions” that unduly interfere with future litigants’ rights or short-circuit the political process.