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### On Avoiding Avoidance, Agenda Control, and Related Matters

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# ESSAY

## ON AVOIDING AVOIDANCE, AGENDA CONTROL, AND RELATED MATTERS

Henry Paul Monaghan\*

*Legal scholars have long posited that, heuristically at least, two basic adjudicatory models—the dispute resolution model and the law declaration model—compete for the Court’s affection along a wide spectrum of issues. The former focuses upon judicial resolution of actual disputes between litigants. Historically, that model has been underpinned by a premise, reflected in a wide range of doctrines, that significant barriers rightly exist to judicial review of the constitutionality of governmental conduct. By contrast, the law declaration model focuses on the Court itself, not the litigants. Emphasizing the judicial authority to say what the law is, it views any restraints on judicial authority solely in functional terms, terms not as litigant centered.*

*The dispute resolution model is usually treated as formally dominant, followed by an exploration of the inroads made by the law declaration model. Examination of recent, seemingly unrelated, decisions shows that this approach now gets matters pretty much backwards, at least so far as the Court is concerned. Embracing in significant measure the premises of the law declaration model, the Court has sought to expand its hierarchical hegemony to ensure that: (a) It can have the final say when any other court, state or federal, rules on the constitutionality of government conduct; and (b) it will possess wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants. The latter development in particular raises troublesome questions about the Court’s appropriate role in our polity.*

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"The court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."<sup>1</sup>

"[W]e have permitted lower courts to avoid avoidance [of constitutional questions] . . . ."<sup>2</sup>

#### INTRODUCTION

The Question Presented in the petition for certiorari<sup>3</sup> filed this Term by the government in one of the healthcare litigation cases reads in pertinent part:

The question presented is:

1. Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

Petitioners also suggest that the Court direct the parties to address the following question:

2. Whether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).<sup>4</sup>

The government's suggestion is, at first glance, rather startling. The Anti-Injunction Act issue was no longer in the litigation. As the government explained, it had raised this defense in the district court, but did not appeal an adverse ruling.<sup>5</sup> In different litigation in the Fourth Circuit challenging the same healthcare legislation, the government had recon-

1. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., joined by Stone, Roberts & Cardozo, JJ., concurring).

2. *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (Kagan, J.).

3. Petition for a Writ of Certiorari, *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 604 (2011) (No. 11-398), 2011 WL 5025286.

4. *Id.* at I.

5. *Id.* at 32.

sidered its position and concluded that the Act did not bar relief. The Fourth Circuit held otherwise.<sup>6</sup> Pointing to a circuit split, the government suggested that counsel might be appointed to defend the Act's applicability.<sup>7</sup> In sum, the government asked the Court to decide an issue that neither litigant disputed. The government was entirely successful; the Court converted the suggestion into an additional question. The Court granted the petition, and directed the parties to brief and argue the Anti-Injunction Act issue.<sup>8</sup> Subsequently, it appointed counsel to "brief and argue . . . in support of the position that the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars the suit" with respect to the minimum coverage provision of the healthcare act.<sup>9</sup>

The government's suggestion is quite understandable. Respected lower court judges had relied upon the exception-ridden anti-injunction provision to bar any preenforcement challenge to a "regulatory penalty" that had characteristics of a regulation, a penalty, and a tax. The government probably anticipated that the Court would add this issue to the Question Presented. That said, however, much more seems involved: Questions related to the validity of the healthcare legislation are issues that the Court quite evidently believes it should resolve, and resolve now if it can. This became quite apparent from the Court's subsequent low-visibility grant of an unopposed motion to add parties to eliminate any potential Article III mootness problems concerning the Act's individual

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6. *Id.* at 32–33.

7. "Under these circumstances, we believe the Court should consider the applicability of the Anti-Injunction Act along with the constitutional issues in this case. If, as we anticipate, respondents take the position that the Anti-Injunction Act does not bar this suit, the Court should also consider appointing an amicus to file a brief defending the position that the Anti-Injunction Act does bar this suit . . . ." *Id.* at 33.

8. *Dep't of Health & Human Servs.*, 132 S. Ct. at 604 (order granting certiorari). The division in the lower courts clearly existed. Prior to the government's petition for certiorari to the supreme Court, a divided Fourth Circuit had held that the Anti-Injunction Act precluded review of the healthcare legislation's merits. See *Liberty Univ., Inc. v. Geithner*, No. 10–2347, 2011 WL 3962915, at \*4 (4th Cir. Sept. 8, 2011) (concluding "the plain language of the [Anti-Injunction Act] bars . . . consideration" of the constitutional challenge); *id.* at \*35 (Davis, J., dissenting) (arguing Anti-Injunction Act "does not strip [courts] of jurisdiction" in cases challenging healthcare legislation). Previously, the Sixth Circuit had held that the Anti-Injunction Act did not bar the court's pre-enforcement jurisdiction to review the healthcare legislation. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539–40 (6th Cir. 2011) (discussing Anti-Injunction Act). After the filing of the government's petition for certiorari, a dissenting judge on the District of Columbia Court of Appeals also indicated that the Anti-Injunction Act barred review of the merits. See *Seven-Sky v. Holder*, 661 F.3d 1, 22 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing Anti-Injunction Act "poses a jurisdictional bar to . . . deciding" constitutionality of healthcare legislation).

9. *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 609, 609 (2011) (order appointing amicus curiae). On the same day the Court also appointed counsel in two other healthcare cases in which it had granted review "in support of the judgment of the Court of Appeals" concerning that court's ruling on severability. *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 608, 608 (2011) (order appointing amicus curiae); *Florida v. Dep't of Health & Human Servs.*, 132 S. Ct. 609, 609 (2011) (order appointing amicus curiae).

mandate.<sup>10</sup> This Essay shows that, quite apart from the jurisdictional or quasijurisdictional character of the issue presented by the government's suggestion and the substitution motion, the government's actions and Court's responses are quite understandable given a wide array of other developments that have occurred.

While the Court takes no overt notice of the distinction, legal scholars have long posited that, heuristically at least, two basic adjudicatory models—the case or dispute resolution model and the law declaration model—compete for the Court's affection along a wide spectrum of issues. The dispute resolution model focuses upon the actual dispute between the litigants. The Court's task is to resolve that dispute. But, with its emphasis on case or controversy, the *Ashwander* doctrine, the adequate and independent state ground doctrine, and various issue forfeiture doctrines, this model has historically been underpinned by a premise that significant barriers legitimately existed to litigant efforts to obtain judicial review of the constitutionality of governmental conduct, and that the Court should not reach out to decide legal issues unnecessary to the disposition of the controversy before it. By contrast, the focus of the law declaration model has been on the courts, not the litigants. Its emphasis is on the judicial role in saying what the law is, and it tends to see any restraints on that authority solely in functional terms, terms not centered on the rights of the litigants.

The usual approach is to treat the dispute resolution model as formally dominant, and then to explore the inroads made on it by the law declaration model. But an examination of a series of what seem unrelated holdings shows that this approach gets matters pretty much backwards, at least so far as the “supreme Court”<sup>11</sup> is concerned.<sup>12</sup> The Court has in

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10. See Order List for the Supreme Court at 2, *Dep't of Health & Human Servs.*, No. 11-398 (U.S. Jan. 17, 2012) (order adding new parties), available at <http://www.supremecourt.gov/orders/courtorders/011712zor.pdf> (on file with the *Columbia Law Review*). The National Federation of Independent Business (NFIB) moved to add two parties after one individual business owner challenging the healthcare legislation, Mary Brown, filed for bankruptcy and closed her business. The addition of two additional business owners sought to eliminate concerns that Mary Brown's changed circumstances had rendered her challenge moot. While the Eleventh Circuit concluded that the NFIB, Mary Brown, and another individual plaintiff—Kaj Ahlburg, who is not a business owner—all had standing to challenge the minimum coverage provision, the government had conceded only the standing of individual business owners like Mary Brown. Brief for Petitioners at 16 n.5, *Dep't of Health & Human Servs.*, No. 11-398 (U.S. Jan. 6, 2012) (discussing government's position on standing), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/11-398\\_petitioner.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-398_petitioner.authcheckdam.pdf). That the government did not oppose this motion perhaps reflects an understanding that in high-profile cases “if [the justices] want to find standing, they will find standing.” Hurdle for Health-Law Suit, *Wall St. J.*, Dec. 5, 2011, at A3 (quoting Professor Richard Fallon, Harvard Law School).

11. The capitalization in this Essay follows that in the Constitution. U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court . . .”).

12. One does not readily imagine the government's suggestion being made to a court of appeals.

significant measure embraced the premises of the law declaration model. While still formally disclaiming any general superintendence over the conduct of other organs of government, the Court seeks to ensure and expand its hierarchical superiority in our judicial system. Current doctrinal developments reflect a powerful drive to ensure that (a) the Court can have the final say when any other court, state or federal, rules on the constitutionality of government conduct; and (b) the Court possess wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants. The first of the two developments is, in the end, unlikely to generate much current concern; but the second will raise questions along a wide array of lines that center on whether such discretion is consistent with the Court's appropriate role in our polity. One interesting question concerning the second development involves whether *legal* standards or rules govern the Court's newly fashioned freedom. Or is this an appropriate area for the existence of a free-standing, open-ended, "all things considered" judicial discretion?

With a focus on the last two Terms, the remainder of this Essay proceeds in several parts. Part I frames the general topic in terms of *Marbury*, *Ashwander*, and issue selection control. Part II describes the considerable case law supportive of a jurisprudence formulated or applied in the interest of enlarging the Court's final say and agenda-setting freedom. Part III turns to the thoughts of commentators, who address the question of the Court's discretion in whole or part, ranging from Alexander Bickel to current commentators, and finally all the way back to the important unresolved tensions between Professors Hart and Wechsler. Part IV explores whether the Court's newfound authority in issue selection can be characterized as involving "legal" reasoning. A brief conclusion submits that it is not clear what to think about these developments.

## I. OF *MARBURY*, *ASHWANDER*, AND AGENDA CONTROL

### A. *Marbury*

General propositions may or may not decide concrete cases,<sup>13</sup> but they do embody widely held (even if often somewhat diffuse) background understandings. *Marbury*'s declamation that the judicial "duty" is "to say what the law is"<sup>14</sup> is illustrative. Logically, such a "duty" need entail only an obligation to determine what other governmental unit is charged with primary or even complete law declaration responsibility.<sup>15</sup> But history

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13. Cf. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

15. See, e.g., Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 9 (1983) [hereinafter Monaghan, *Administrative State*] (concluding "as a matter of logic . . . the judicial duty 'to say what the law is' is analytically empty."); see also F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 Notre Dame L. Rev. 1447, 1456 (2010) ("If the Constitution itself assigns the power to interpret to the legislatures

gives a far more robust conception: Presented with a legal issue in a case before it, a court ordinarily must render its own independent judgment as to the content of the applicable law, particularly the governing constitutional law.

Although *Marbury* itself reasoned from “first principles,”<sup>16</sup> its reasoning drew quite straightforwardly from widely held conceptions of what judges do.<sup>17</sup> *Marbury* is simply the venerable standard bearer for the doctrine of judicial review, not its creator,<sup>18</sup> and claims of such authority had occurred many times before.<sup>19</sup> The American doctrine can be regarded as crossing into new ground, if at all, only in treating the Constitution as “ordinary” law fully cognizable in the courts.<sup>20</sup> But that gave the Constitution special bite: *Marbury*’s “repeated emphasis that a written constitution imposes limits on every organ of the state . . . welded judicial review to the political axiom of limited government.”<sup>21</sup>

The Court’s law declaration duty has bounds, of course. Numerous legal issues, including those of a constitutional dimension, never reach any court and are resolved elsewhere. In Marshall’s salutary phrase, they

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and limits the authority of the courts to second guess those interpretations, the duty of the courts is to follow the interpretation rendered by the legislature.”).

16. *Marbury* reflects Chief Justice Marshall’s opinion-writing penchant for reasoning from first principles and eschewing already existing supportive precedent. See Lucas H. Powe, Jr., *The Supreme Court and the American Elite, 1789–2008*, at 69 (2009) (describing “Marshall’s usual approach of writing at a high level of abstraction . . . while avoiding mention of judicial precedents”).

17. When adjudicating common law or statutory claims, courts are (and were) under a duty to fashion the applicable law from the legal theories offered by counsel—or, equally importantly, from their own resources. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512–13 (1988) (rejecting rules of tort liability for government contractors proposed by litigants and fashioning own).

18. “Th[e] point . . . for which *Marbury* is famous . . . was hardly in contention.” Powe, *supra* note 16, at 48. For source references, see, for example, Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 68 n.3 (6th ed. 2009) [hereinafter *Hart & Wechsler*]. The most comprehensive discussion of the historical origins of judicial review is Philip Hamburger, *Law and Judicial Duty* (2008).

19. This is the central theme of Professor Hamburger’s comprehensive treatment. See Hamburger, *supra* note 18, at 8 (noting view that judicial review was legal conclusion of *Marbury* “does not make much of a dent in the history of judicial review or its implication that the authority for this power came from the judges themselves”).

20. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1365 (1973) [hereinafter Monaghan, *The Who and When*] (“That the Constitution [in *Marbury*] was to be applied as ‘ordinary law’ by the courts in resolving claims of litigants was a marked advance, squarely rejecting as it did the view ‘hat the document stated only political rules beyond the cognizance of judicial tribunals.”). Some writers argue that the Constitution’s full domestication as ordinary law came only after *Marbury*. See, e.g., Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 4, 109–75 (1990) (tracing “[l]egalization of the Constitution” in post-*Marbury* Marshall court). Professor Snowiss emphasizes decisions subsequent to *Marbury* that applied ordinary common law rules of interpretation in constitutional adjudication.

21. Monaghan, *The Who and When*, *supra* note 20, at 1370 (citation omitted).

present issues of “political law.”<sup>22</sup> Marshall also observed that if the federal judicial power extended to every constitutional question “it would involve almost every subject proper for legislative discussion and decision.”<sup>23</sup> In addition to the questions beyond the reach of any court, constitutional issues that do reach some court frequently cannot be reviewed by the supreme Court.<sup>24</sup> Finally, of course, a case or controversy must exist before it or any other Article III court can act.<sup>25</sup>

*Marbury*’s law declaration duty language was set against a second important understanding in our constitutional jurisprudence: The institution of judicial review was designed to secure the protection of private rights. “The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”<sup>26</sup> As Herbert Wechsler expressed it:

*The [law declaration] duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law, with all that that implies as to a rigorous insistence on the satisfaction of procedural and jurisdictional requirements; the concept that Professor Freund reminds us was so fundamental in the thought and work of Mr. Justice Brandeis. Only when the standing law, decisional or statutory, provides a remedy to vindicate the interest that demands protection against an infringement of the kind that is alleged, a law of remedies that ordinarily at least is framed in reference to rights and wrongs in general, do courts have any business asking what the Constitution may require or forbid,*

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22. John Marshall, Speech in the House of Representatives (Mar. 7, 1800), in 4 The Papers of John Marshall 82, 95–96 (Charles T. Cullen ed., 1984) (stressing Constitution does not vest in federal courts exclusive authority to decide “all questions arising under the constitution, treaties and laws of the United States”; while such issues may be questions of law, some of them are questions of political law, and must be answered by the political branches of government). This reality has, of course, a range considerably wider than the current political question doctrine. This fact plays a considerable role in the Office of Legal Counsel’s conception of its own role. That office understands that it exercises a frequently unreviewable authority to say what the law is. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1483 (2010) (describing how Office of Legal Counsel opinions are initially not public, thus not reviewable by Congress).

23. Marshall, *supra* note 22, at 95, quoted in *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011).

24. E.g. Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 Nw. U. L. Rev. 979, 1005–06, 1015–29 (2010) (discussing decisions on adequate and independent state ground doctrine and defending desirability of nonreviewability in areas of criminal procedure).

25. State courts and non-Article III federal tribunals face no such constitutional inhibition.

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).



and only then when it is necessary for decision of the case that is at hand.<sup>27</sup>

Thus, at the very beginning, two ideas were jointly present: (a) the conception of a law-declaring judicial duty, very strongly set forth in the context of ensuring limited government; and (b) judicial review conceived of as protecting individual rights, a concept in that era (and much of the nineteenth century) that generally imagined litigants asserting rights of life, liberty, and property of the kind secured by the common law of tort and property against private interference.<sup>28</sup> The rest of this story is well known. In the twentieth century, the types of litigants who could gain access to the Article III courts were vastly expanded, a development that Wechsler seemed to accept without question, so long as the controversy remained over "rights and wrongs."<sup>29</sup>

Over time, the two strains that can be traced to *Marbury* have evolved into what are presently characterized as the law declaration and the dispute resolution models.<sup>30</sup> The Court's jurisprudence does not formally separate these models. Quite to the contrary, it merges them. For example, in *Arizona Christian School Tuition Organization v. Winn*, the Court recently said:

In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. The importance of resolving specific cases was visible, for example, in the incremental approach of the common law and in equity's consideration of exceptional circumstances. The Framers paid heed to these lessons. See U.S. Const., art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity . . ."). By rules consistent with the longstanding practices of Anglo-American courts a plaintiff who seeks to invoke the federal judicial power must assert more than just the "generalized interest of all citizens in constitutional governance."<sup>31</sup>

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27. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 6 (1959) [hereinafter Wechsler, *Neutral Principles*] (emphasis added) (citation omitted).

28. See Monaghan, *The Who and When*, supra note 20, at 1365–68 (describing development of "'private rights' model" of adjudication). If, absent official justification, the government official's conduct would have been a tort, the Constitution was conceived of as invalidating the justification, thereby leaving the government official as an ordinary tortfeasor.

29. See Wechsler, *Neutral Principles*, supra note 27, at 6.

30. Hart & Wechsler, supra note 18, at 72–80 (discussing these two models and subsequent supreme Court doctrine). Essentially verbal variations of this dichotomy can readily be found. But the variation is only the labels. See, e.g., Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 Colum. L. Rev. 1, 1–7 (1985) (dividing adjudication into "arbitration" and "regulation" models); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 625–36 (1992) (proposing "dispute resolution" and "public values" models).

31. 131 S. Ct. 1436, 1441–42 (2011) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)).

But current commentators, although they recognize that the models are only heuristic devices that bleed into one another, tend to emphasize the tensions between the two models.<sup>32</sup>

Over time, moreover, understanding of the nature of the judicial law-declaring duty has sharpened. It is now understood that a court need not invariably supply the content of *all* of the applicable law. No such doctrine could survive the rise of the administrative state.<sup>33</sup> Much of the law governing the modern administrative state reflects a premise that the core judicial duty “is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.”<sup>34</sup> Ultra vires review, in other words.<sup>35</sup>

Early constitutional decisions expressed conceptions that at least bear a family resemblance to ultra vires review, often stating that an authority to invalidate could rightly be exercised only in “clear” cases. In *Fletcher v. Peck*, Chief Justice Marshall himself wrote that:

[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.<sup>36</sup>

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32. See Hart & Wechsler, *supra* note 18, at 72–75 (describing “competing account[s] of the courts” provided by these two models).

33. This is not to suggest that the current shape of judicial review of administrative agencies was inevitable. See generally Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 *Colum. L. Rev.* 939 (2011) (documenting shift from nineteenth century models of review of administrative action to modern “appellate style” judicial review embodied in Administrative Procedure Act).

34. Monaghan, *Administrative State*, *supra* note 15, at 33; see also Merrill, *supra* note 33, at 1002–03 (contrasting this conception with traditional appellate review model).

35. Such a conception is quite visible in step two of the *Chevron* doctrine, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), the most recent iteration of which appears in *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (applying *Chevron* in tax context). For a recent, brief, and lucid exposition of the various justifications offered for *Chevron* in light of *Marbury*, see Note, Justifying the *Chevron* Doctrine: Insights from the Rule of Lenity, 123 *Harv. L. Rev.* 2043, 2045–49 (2010) (evaluating four traditional rationales for deference to agency interpretations); see also *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011) (insisting on judicial deference to agency interpretations of own rules). For a more detailed discussion of the history of judicial review of administrative action, notably the influence of the appellate review model on the development of the modern standard, see generally Merrill, *supra* note 33; Monaghan, *Administrative State*, *supra* note 15.

36. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). For an even earlier expression of this view, see Justice Paterson’s opinion in *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.) (“[T]o authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.”). *Marbury* itself can be read as a clear mistake case: Congress was clearly wrong to believe that it could expand the Court’s original jurisdiction.

And in his enormously influential article written at the end of the nineteenth century, James Bradley Thayer insisted that the Court could invalidate acts of Congress only on the basis of a clear mistake.<sup>37</sup> This formulation in particular sounds a great deal like *ultra vires* review, not independent judgment on the “true meaning” of the constitutional text.<sup>38</sup> And, of course, *ultra vires* review resonates quite well in constitutional law with the political question doctrine,<sup>39</sup> as well as with any stan-

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37. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893) (“[The Court] can only disregard the Act [of Congress] when those who have the right to make laws have not merely made a mistake, but have made a very clear one . . .”). As I previously stated, “Thayer’s general theory that judicial review was intended to restrain only plainly *ultra vires* governmental action [has] proved attractive to great judges.” Monaghan, *Administrative State*, *supra* note 15, at 7 n.35 (collecting sources).

Eminent writers, however, have rejected this view. In 1928, Charles Evans Hughes wrote:

It is urged that as legislation should be held to be repugnant to the Constitution only in clear cases, and as this is recognized as a principle of decision, a division in the Court should be regarded as enough to show reasonable doubt. Plainly, that suggestion cannot be carried to its logical limit. If it were, the action of a single judge in the court of first instance, holding an act to be constitutional would be conclusive, for is he not a reasonable man? Or, if that judge decided the act to be unconstitutional, and in the Circuit Court of Appeals two judges agreed with him, but the third dissented, should not the majority bow to his dissent as sufficiently indicating doubt? We have similar considerations with respect to State court decisions.

Charles Evans Hughes, *The Supreme Court of the United States* 239–40 (1928). Hughes’s analysis is itself by no means free of difficulty. A clear mistake rule might mean that every court in the judicial hierarchy must make its own judgment free of the views of the court below. Moreover, if the court is multimembered, division within the court is not relevant. It is the judgment of the court and not its members that is important.

38. For a particularly striking modern example, see *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding section of Voting Rights Act against constitutional challenge). The classic elaboration and defense of this kind of review remains Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 200 (1971) (describing cases in which “although the Supreme Court purports to say that the challenged measure is constitutional, in truth the decision is only that the measure does not conflict with the Constitution given the finding or judgment that Congress has expressed upon its subdivision of the ultimate question”).

39. Indeed, Herbert Wechsler believed that the sole function of this doctrine was an inquiry into whether the Court thought that the Constitution had assigned determination of a constitutional question to another branch, and that few such examples existed. See Wechsler, *Neutral Principles*, *supra* note 27, at 6–9 (“[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised . . .”). Time has run out on that view. See Hart & Wechsler *supra* note 18, at 232–34 (describing Wechsler’s “classical” position on political question doctrine and its relationship to competing views). Professor Paulsen, by contrast, seems to believe that in fact allocation of decisionmaking authority in Wechsler’s sense plays no role in political question cases. See Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762, 1816–22 (2009) (arguing “courts do possess full, co-equal, co-ordinate, independent interpretive authority, along with Congress and the President” over international law issues).

dard of judicial review that accords deference to the policy or fact-finding determinations of other governmental units.<sup>40</sup>

All that said, however, *Marbury*, conventionally understood—that is, as requiring independent judicial judgment on questions of law—has taken deep roots in our legal order, especially so in constitutional cases.<sup>41</sup> In *City of Boerne v. Flores*, to take a prominent example, the Court, invoking *Marbury*, admonished Congress for attempting to define the substantive content of the rights secured by the Fourteenth Amendment.<sup>42</sup> That task was part of the judicial duty, not part of Congress's legislative responsibility.<sup>43</sup>

## B. Ashwander

Whatever the precise allocation of functions between the Court and other units of government in determining constitutional meaning or application, the Court has in the past recognized that, in our Republic, invalidating (especially congressional) legislation is a serious matter. The canonical citation is, of course, to Justice Brandeis's concurrence in *Ashwander v. TVA*,<sup>44</sup> written in 1936. The Court, he said, "has frequently

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40. For recent examples struggling with *Marbury* and claims for deference, see *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011) (applying strict scrutiny to state's factual conclusions and concluding "[t]he State's evidence is not compelling"); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2988 (2010) (noting Court is "final arbiter" of constitutional constraints' reach that owes "no deference to universities" when considering such questions, but also noting "we have cautioned courts . . . to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review'" (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 484 U.S. 176, 206 (1988))). Four justices challenged the propriety of any deference. *Id.* at 3008 (Alito, J., dissenting); cf. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) ("[E]valuation of the facts by the Executive [regarding terrorist organizations], like Congress's assessment, is entitled to deference.").

41. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006), for example, the Court invoked *Marbury* in rejecting an argument that it was bound by or should defer to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations. See also Hessick, *supra* note 15, at 1457–58 n.48 (collecting citations).

42. 521 U.S. 507 (1997).

43. The *Boerne* Court stated:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. [*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)] . . . When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. . . . [I]t is this Court's precedent, not [the Act of Congress], which must control.

*Id.* at 535–36.

44. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., joined by Stone, Roberts & Cardozo, JJ., concurring).

called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress."<sup>45</sup> He then declared that:

The Court [has] developed, for its governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.<sup>46</sup>

Brandeis then proceeded to describe seven such canons (three of which in fact went to subject matter jurisdiction).<sup>47</sup> None, especially Canon 7, "the" famous "avoidance canon," on which so much has been written, were for Brandeis proxies for implementing "resistance norms"<sup>48</sup> or "deliberation-forcing" requirements,<sup>49</sup> etc. To repeat Brandeis's words, these canons were "for [the Court's] own governance."<sup>50</sup> They were, as Michael Wells observes, designed to ameliorate the "friction between democratic principles and judicial authority."<sup>51</sup> More importantly, Brandeis's formulation makes clear that the canons were *not* conceived of as involving any right of the litigants.

While Brandeis himself may not have believed that adherence to the canons was *indispensable* to the legitimacy of judicial review, nonetheless for him (as well as for Justices Stone, Roberts, and Cardozo) they seemed to possess a dignity far deeper than simple admonitions of caution; that is, they held at least a quasi-legitimacy status.<sup>52</sup> Such a view would have been by no means unique. In a series of lectures given at Columbia in 1928, almost a decade before *Ashwander*, Charles Evans Hughes wrote that: "The Court will not undertake to decide questions of the constitutional validity of legislation *unless these questions are necessarily presented and*

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45. Id. at 345.

46. Id. at 346.

47. Id. at 346–48.

48. See Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1584–85 (2000) (arguing "[c]ourts are engaged in constitutional adjudication when they 'avoid' constitutional issues and canon erects 'obstacles' to legislation that borders on unconstitutionality).

49. See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597 (1992) (suggesting avoidance canon and other clear statement rules "may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake").

50. *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring).

51. Michael L. Wells, The "Order-of-Battle" in Constitutional Litigation, 60 SMU L. Rev. 1539, 1548 (2007).

52. Justice Brandeis's focus was on judicial review of acts of Congress, not state legislation. See *Ashwander*, 297 U.S. at 345–48 (Brandeis, J., concurring) (directing his analysis toward Court's determinations of "the validity of an act of Congress"). This Essay does not pursue that limitation further, or whether in cases involving state law, the applicability of the canons would be governed by state law. See generally Abbe R. Gluck, Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine, 120 Yale L.J. 1898, 1907 (2011) (analyzing jurisprudential issues of state law statutory interpretation by federal courts and concluding "federal courts should apply state methodology to state statutes").

*must be determined.*"<sup>53</sup> Hughes so wrote in explaining that the maintenance and success of the judicial review in our constitutional order rested not on its entrenchment, "but on the quality of the men selected and the restraint imposed by the principles which they adopted for the control of their exercise of the judicial power."<sup>54</sup> For him, a general avoidance canon was one of five such principles, and his other four clearly were of constitutional dimension.<sup>55</sup>

The following "rules" elaborated by Justice Brandeis "for [the Court's] own governance" are most pertinent to this Essay:

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."<sup>56</sup> "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary . . . ."<sup>57</sup>

3. The Court will not "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"<sup>58</sup>

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.<sup>59</sup>

And "the" famous avoidance canon:

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."<sup>60</sup>

Carefully read, *all* the quoted canons point in the same direction: In Hughes's language, do not decide constitutional issues unless they are "necessarily presented and must be determined."<sup>61</sup> Canons 2 and 4, not

53. Hughes, *supra* note 37, at 36 (emphasis added). The closeness of this formulation to that of Wechsler, *Neutral Principles*, *supra* note 27, at 6, will not escape the reader.

54. Hughes, *supra* note 37, at 29 (emphasis added).

55. *Id.* at 30-41.

56. *Ashwander*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)).

57. *Id.* (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

58. *Id.* at 347 (quoting *Liverpool*, 113 U.S. at 39).

59. *Id.*

60. *Id.* at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

61. Early references to *Ashwander* recognized Justice Brandeis's concurring opinion as an important, if largely uncontroversial, explanation of the Court's longstanding avoidance practice. See, e.g., Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577, 632 (1938) (describing Justice Brandeis's effort as "perhaps the most notable opinion expounding the rationale of jurisdiction in constitutional controversies"); Harry Shulman, *The Demise of Swift v. Tyson*, 47 Yale L.J. 1336, 1343 (1938) (calling Justice Brandeis's opinion "the most elaborate exposition" of constitutional avoidance doctrine). *Ashwander* and its seven avoidance canons also enjoyed lengthy treatment in the edition of Professor Dowling's constitutional law casebook published one year after the decision. See Noel T. Dowling, *Cases on American Constitutional Law* 36-38 (2d ed. 1937). While other

Canon 7—"the" avoidance canon—seem the most fundamental. Their more celebrated cousin can be viewed as simply a subset of those more basic propositions.<sup>62</sup> In fact, Canon 7 may push in a direction different from Canons 2 and 4. Application of that canon often effectively leaves the statute a dead letter; by contrast, the other canons may leave the statute fully operational, at least temporarily.

What unites the canons is the Court's reluctance to declare legislation, particularly acts of Congress, unconstitutional.<sup>63</sup> The Court, we know, has invoked the avoidance canon in recent decisions of importance. *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*) provides a striking example.<sup>64</sup> In an 8-1 opinion, the Court invoked "the" avoidance canon to deflect a constitutional challenge to section 5 of the Voting Rights Act.<sup>65</sup> Arguably strained statutory construction permitted the Court to avoid the intense political firestorm that a (quite plausible) holding of invalidation would have created.<sup>66</sup>

contemporaneous articles overlooked Justice Brandeis's avoidance argument—and Hart and Wechsler omitted the Brandeis opinion (except to note its relevance to Brandeis's skepticism on declaratory judgments) from their first edition—the supreme Court completed *Ashwander's* canonization with its discussion of constitutional avoidance in *Rescue Army v. Mun. Court*, 331 U.S. 549, 568–69 (1947). More recently, Brandeis's understanding was also Wechsler's: Courts should consider constitutional issues "only . . . when it is necessary for the decision of the case that is at hand." Wechsler, *Neutral Principles*, *supra* note 27, at 6.

62. Canon 7 has been sharply criticized on grounds of no immediate concern to this essay. Hart & Wechsler, *supra* note 18, at 78–80, contains a comprehensive collection of the criticisms. See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 815–16 (1983) (arguing avoidance canon "create[s] a judge-made constitutional 'penumbra'"); Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74 (asserting avoidance canon may at times be as great a "judicial intrusion" as outright invalidation because it leads courts to interpret statutes "in ways that its drafters did not anticipate, and . . . may not have preferred" (citation omitted)).

63. Hughes's language was focused upon congressional legislation and thus technically Brandeis's formulations are more encompassing.

64. 129 S. Ct. 2504 (2009).

65. *Id.* at 2513 (discussing Court's institutional role when judging acts of Congress and principle of constitutional avoidance).

66. See also *Perry v. Perez*, Nos. 11–713, 11–714, 11–715, 2012 WL 162610, at \*4 (U.S. Jan. 20, 2012), where the Court's unanimous per curiam opinion, quoting *NAMUDNO*, 129 S. Ct. at 2513, said that section 5 raised "'serious constitutional questions.'" But at the oral argument the Chief Justice emphasized that the "constitutionality of the Voting Rights Act isn't at issue here, right?" Transcript of Oral Argument at 53, *Perry v. Perez*, 2012 WL 162610, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-713.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-713.pdf) (on file with the *Columbia Law Review*). For a normative argument that the Court's approach was particularly justified because it was consistent with the (small "c") constitutional philosophy of the Voting Rights Act, see William N. Eskridge Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* 117–18 (2010) (characterizing Voting Rights Act as "classic example of a superstatute" that "propounded a bold new principle of law"). The late Professor Frickey went even further. He viewed Canon 7 as a judicial mechanism for self-defense, and thought that it could be employed to contradict plain meaning. Philip P. Frickey, *Getting from Joe to Gene* (McCarthy): The

### C. Agenda Control

With the 2009 and 2010 Court Terms as its special focus, this Essay examines one facet of the “judicial duty”: the role of discretion when the Court decides what to decide. This Essay submits that the Court’s jurisprudence seems to rest upon two important and mutually reinforcing impulses designed to reinforce the Court’s hierarchical supremacy within the judicial system<sup>67</sup>: *First*, “final say.” The Court continues to piously disclaim any general, freestanding superintendence role over other organs of government;<sup>68</sup> but if another court makes such a claim—that is, another court has passed on an issue of federal constitutional law regulating the conduct of public officials—the Court believes that it should be able to review that ruling, and it fashions doctrine towards that end.<sup>69</sup> *Second*, “agenda selection freedom.” The Court seeks as much freedom as possible over what is to be finally and authoritatively decided.

In implementing these deep impulses, the Court has considerably relaxed the historical Article III barriers of standing and mootness.<sup>70</sup> Current doctrine effectively excludes on constitutional grounds only ideological litigants, most (but not all) cranks, and (more troublingly) many “beneficiaries” of governmental programs. Moreover, the Court is adroit at reading jurisdiction-stripping statutes out of existence.<sup>71</sup> After it gained discretionary control over whether to review state court judgments, it soft-

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Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court, 93 Calif. L. Rev. 397, 459–61 (2005) (discussing application of avoidance canon to promote “underenforced constitutional norms”).

For other examples of the invocation of the avoidance canon, see *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343–44 (1999) (deciding case on statutory grounds and finding it “unnecessary to reach the constitutional issue presented”); *United States v. Locke*, 471 U.S. 84, 92 (1985) (discussing avoidance canon). But, unsurprisingly, the Court also tells us that the canon cannot be used to distort the clear meaning of a statute. See *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (“In this case, we do not think the plain text . . . leaves any room for the canon of avoidance.”); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010) (“It is therefore clear that plaintiffs are asking us not to interpret [the statute], but to revise it.”).

67. See also Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847, 935 (2005) (arguing Court’s “authorization of unnecessary constitutional rulings can be understood as part of larger trend in which the Court has asserted its supremacy over the other branches of government and has come to see its primary role as the declaration of constitutional norms rather than the resolution of ordinary disputes”).

68. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441–42 (2011) (invoking history of dispute resolution model in rejecting taxpayer Establishment Clause challenge).

69. While the focus of this Essay is on constitutional law for ease of exposition, the observation seems generally applicable to any important issue of federal law.

70. The relevant materials are collected in Hart & Wechsler, *supra* note 18, at 100–98. They have been extensively discussed by many writers, including this one, and while they are relevant to the thesis of this Essay they are not its focus and are not separately discussed.

71. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 660–62 (1996) (holding Antiterrorism and Effective Death Penalty Act did not strip Court of jurisdiction over original habeas corpus petitions). Yours truly was among the counsel in that case.



ened the final judgment requirement of the governing statute, 28 U.S.C. § 1257, so as to minimize the possibility of state court constitutional rulings that could escape its inspection.<sup>72</sup> For much the same reason, *Camreta v. Greene* allowed successful official immunity holders to seek review of circuit court holdings that their conduct had violated constitutional norms.<sup>73</sup> Less noticeably perhaps, but in fact of great importance, the Court rather freely injects issues into cases, adding questions and, in the same vein, often appointing amici to defend the judgment below even though no litigant has chosen to continue the fight, let alone present the issue.<sup>74</sup> And, despite the belief that the Court's issue-forfeiture rules (waivers, stipulations, concessions) bind it as well as the litigants, these doctrines are frequently employed to enlarge (not restrict) its ability to avoid avoidance.<sup>75</sup>

While the Court has not articulated a coherent explanation or justification for its current avoiding-avoidance practices,<sup>76</sup> what unites them is clear: Because the Court stands hierarchically at the head of the federal legal order, it is charged with its superintendence in order to ensure coherence, unity, stability, and orderly law development. On that recognition, the Court increasingly sees its core responsibility as that of law declaration. Put differently, the Court sees its "essential role," to borrow Henry Hart's famous phrase,<sup>77</sup> as law declaration, not dispute resolution. As such, it displays impatience with doctrines that limit its authority in that respect, especially so when the result would deny its review of the decisions of other courts on issues of systemic constitutional importance. These developments, I would emphasize, involve the prerogatives of the supreme Court only, not of other courts; and, even more importantly, no concern with the "rights" of the litigants drives the Court's thinking.

The Court is moving, not linearly, but noticeably, towards a jurisprudence in which only a relaxed case or controversy doctrine, a weakened final judgment rule, and the adequate and independent state ground doctrine restrict the Court's authority to fully and effectively superintend

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72. A parallel development occurred with respect to the collateral order doctrine. See *infra* note 112 and accompanying text (noting that, under collateral order doctrine, law-based denials of claims of official immunity are immediately appealable).

73. See 131 S. Ct. 2020, 2028–33 (2011) (noting departure from Court's "usual rule pertaining to prevailing parties" because circuit court constitutional law decisions in official immunity cases "create[] law that governs . . . behavior").

74. See *infra* notes 121–155 and accompanying text (discussing agenda control through issue injection and appointment of amici to defend judgments).

75. Parallel and reinforcing developments appear in the nonconstitutional context as well, which are noted in this Essay. See *infra* notes 156–164 and accompanying text (discussing nonconstitutional cases in which Court refused to recognize issues raised for first time in respondents' merits briefs).

76. Unsurprisingly, issues of this character often barely appear on the media radar screen, because they are often smuggled into terse footnotes.

77. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) [hereinafter Hart, *Exercise in Dialectic*].

the judicial system on matters of federal law. Towards that end, the Court insists upon having a final say as well as a broad discretion as to agenda selection. This second development is more troublesome because it also allows the Court to alter the very disputes that are presented to it for resolution. But, quite arguably, it also allows the Court, which operates at the intersection between law and politics, to accommodate more readily the manifold pressures on it—such as law development and the play of “politics,” grandly conceived—as well as the inescapable human dimensions present in any system of adjudication.

In this jurisprudential scheme the *Ashwander* avoidance canons cannot ultimately be seen as genuine constraints on the process of constitutional adjudication, if in fact they ever were. For the Court, avoidance vel non has become simply a question of judicial discretion, not quasi-legitimacy.<sup>78</sup> Moreover, *Ashwander* itself was designed to avoid declarations of unconstitutionality. Current doctrine exhibits no such bias, avoiding avoidance is often used in order to sustain the constitutionality of legislation. Not surprisingly, therefore, as this Essay shows in many contexts, a rather robust avoiding-avoidance practice has emerged.

I do not want to overclaim on the evidence. Of course, agenda control is not a new phenomenon. It may be, as Tom Lee suggests, simply that the tools have changed—what we now see are tools much more familiar to lawyers, such as the use of forfeiture rules and stipulations. But my impressions are that the intensity of practice has increased, even if there is no epistemic break with the past. The causes of that increase are of course partly historical, particularly the changed nature of the court’s docket.<sup>79</sup> My colleagues Peter Strauss and Tom Merrill observe that the

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78. I put to the side the *Ashwander* canons—not canon—in the state law context. My colleague, Abbe Gluck, argues in her pathbreaking article that state law rules of construction bind federal courts in ascertaining the meaning of state law in federal court and this includes any state law-rooted *Ashwander* doctrine. See Gluck, *supra* note 52, at 1990 (“[T]he normative and doctrinal underpinnings of *Erie*, together with the way in which courts already treat analogous methodologies, point to the conclusion that federal courts should apply state statutory interpretation methodology to state statutory questions . . .”). By implication, she argues that there is no independent federal basis for application of an *Ashwander* doctrine if the relevant state law does not sanction it. The arguments are powerfully made, but it is not necessary for the purposes of this Essay to further explore them.

79. Brandeis and Hughes wrote at a time when the Court was asked to restrain governmental efforts to limit shape of the economic order and its perceived social byproducts, such as unemployment and old age. Those days are now long gone, of course. For a recent and engaging retelling, see generally Burt Solomon, *FDR v. The Constitution* (2009) (painting nice portraits of players involved in court-packing fight). And after the Court handed down its race discrimination and early voting rights rulings, the Court has receded into the governmental background. It is now truly “the least dangerous” branch, *The Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961), at least politically speaking, even if one cannot go so far as to consign it to virtual irrelevancy as so discerning a critic as Fred Schauer recently did. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 *Harv. L. Rev.* 4, 44 (2006) (concluding “[f]or most of the highly salient issues of modern times, the

increase may be the result of the decline in the Court's workload. In the mid-1980s, the Court was still deciding about 150 cases a year; it is now down to the low 80s.<sup>80</sup> It would not be unnatural for the Court to search for vehicles that would facilitate its ability to engage in meaningful law declaration. And, as Jamal Greene observes, that search would be aided and abetted by their law clerks (particularly the pool clerks) whose natural instincts would focus on petitions that might be good vehicles for important statements on the law.

The developments I have described and will explore in greater detail seem new, at least in their intensity. But do they find at least an ancestor in *Marbury* itself? *Marbury* said nothing about the nature of judicial duty that was applicable to it alone.<sup>81</sup> Any court would have considered whether it had subject matter jurisdiction, whether *Marbury* had a right to his commission, whether mandamus was an appropriate remedy, whether separation of powers principles barred relief, etc. But the order in which the Court addressed the issues has been a fashionable target of criticism.<sup>82</sup> Relevant here, however, an avoidance canon would have counseled against treating *Marbury's* appointment as having occurred before delivery of the commission and/or the holding that section 13 of the Judiciary Act authorized an original writ of mandamus. Had the Court taken either route, it would have avoided facing the question of whether section 13 unconstitutionally expanded the Court's original ju-

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Court has been largely absent"). The Court remains an important instrument of government. Major issues still flow into its domain. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (invalidating Arizona public financing law); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (invalidating massive federal court class action); *Brown v. Plata*, 131 S. Ct. 1910, 1923, 1945–47 (2011) (ordering significant reduction of about 37,000 in California's prison population). Professor Matthew E.K. Hall's empirically oriented study argues that the Court's capacity to change actual behavior is at its maximum when the Court's decisions are both relatively popular and can be directly administered by the inferior courts. Matthew E.K. Hall, *The Nature of Supreme Court Power* 5, 156–57 (2011). In any event, as the priestly interpreter of our Constitution, the Court necessarily remains important: "Every tribe needs its totem and its fetish, and the Constitution is ours." Max Lerner, *Constitution and Court as Symbols*, 46 *Yale L.J.* 1290, 1294 (1937), quoted in Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. Rev.* 353, 353 (1981).

80. Writing in 2006, Kenneth Starr observed, "the Supreme Court's docket has shrunk from 146 signed opinions during Chief Justice Rehnquist's first year occupying the Court's center seat to just 74 signed opinions during his final year." Kenneth Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 *Minn. L. Rev.* 1363, 1368 (2006). In the last term, there were fewer than 80 signed opinions of the Court, as well as seven per curiams. *The Supreme Court 2010 Term*, 125 *Harv. L. Rev.* 362, 362 (2011).

81. Monaghan, *The Who and When*, *supra* note 20, at 1365 ("*Marbury* found the power of constitutional exposition to be an incident of the Court's obligation to decide the particular 'case or controversy' before it.>").

82. See generally William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *Duke L.J.* 1, 6–33 (providing detailed analysis of Justice Marshall's *Marbury* opinion).

risdiction, as well as the need to proclaim and defend the doctrine of judicial review.

## II. THE SUPREME COURT, FINAL SAY, AND AGENDA CONTROL

### A. Introduction

The traditional understanding, as Wechsler insisted, has been that, like other courts, the supreme Court has no freestanding commission to engage in law declaration or to superintend other organs of government. The “judicial duty” extended no further than deciding legal issues necessary for resolution of the dispute before it over private rights.<sup>83</sup> (This is how inferior courts routinely proceed: “The court, to decide this case, need not reach the question whether . . . .”) But as a description of the current supreme Court, Wechsler’s world has become so distant that it is hard to step back into its mindset.<sup>84</sup> While still frequently engaged in what we could regard as little more than ordinary dispute resolution,<sup>85</sup> the supreme Court’s law declaration function has long since assumed overriding importance. The Court has guidance and governance (superintendence) functions that no other court remotely possesses.<sup>86</sup>

The Court has always been an important instrument of government. Writing in 1835, de Tocqueville observed that “we shall readily admit that a more imposing judicial power was never constituted by any people.”<sup>87</sup> American history after the Civil War surely confirms his observation.<sup>88</sup> By the time of the passage of the Judges’ Bill in 1925, which made a large

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83. See Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1008 (1965) [hereinafter Wechsler, *Courts and Constitution*] (“Under *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared.”); Wechsler, *Neutral Principles*, supra note 27, at 6 (characterizing judicial duty “to decide the litigated case and to decide it in accordance with the law”).

84. For an excellent recent attempt, see Merrill, supra note 33 (tracing history of appellate review model). And, of course, other writers like Caleb Nelson and Jim Pfander could be cited.

85. See, e.g., *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 726 (2011) (settling, by eight-to-one vote, meaning of Bankruptcy Code provision). This Essay counts cases like *Ransom*—where the only importance of the decision, apart from its importance to the parties, is that the law be settled, however it be settled—as dispute resolution cases. Justice Scalia dissented from the Court’s ultimate disposition. *Id.* at 730 (Scalia, J., dissenting); see also Antonin Scalia, *The Dissenting Opinion*, 19 J. Sup. Ct. Hist. 33, 42 (1994) (condemning “artificially unanimous opinions,” and suggesting he will not sign an opinion unless in substantial agreement). But it passes my understanding why he would convert that dissent into a lengthy written opinion when no visible principle of statutory interpretation was implicated.

86. This has been a constant theme in the illuminating writings of Jim Pfander, many of which are now collected in James E. Pfander, *One Supreme Court* (2009).

87. Alexis de Tocqueville, *Democracy in America* 130 (Henry Reeves trans., The Law Book Exch., Ltd. 2003) (1838).

88. However, it was not until after the Civil War that the supreme Court assumed its priestly role as guardian of the Constitution. Prior to that point most of the great constitutional debates occurred in Congress, particularly the Senate.

part of the Court's jurisdiction discretionary, the importance of the Court's superintendence (rather than error correction) function was certainly understood. Just prior to his appointment as chief justice, William Howard Taft wrote that the Act made clear that "[t]he function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest."<sup>89</sup> Frankfurter and Landis added:

At the heart of the proposal was the conservation of the Supreme Court as the arbiter of legal issues of national significance. But this object could hardly be attained so long as there persisted the obstinate conception that the Court was to be the vindicator of all federal rights. This conception the Judges' Bill completely overrode. Litigation which did not represent a wide public interest was left to state courts of last resort and to the circuit courts of appeals, always reserving to the Supreme Court power to determine that some national interest justified invoking its jurisdiction.<sup>90</sup>

And this recognition has been the impulse behind every subsequent effort to enlarge the Court's discretionary docket.<sup>91</sup>

The Court's current place in our constitutional order distinguishes it in kind, not in degree, from other courts. That development seems to me to have been pretty much inevitable. In the opening sentence of his Columbia lectures, Charles Evans Hughes stated: "The Supreme Court of the United States is distinctly American in conception and function, and owes little to prior judicial institutions aside from the Anglo-Saxon tradition of law and judicial processes."<sup>92</sup> That realization, however qualified

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89. William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 *Yale L.J.* 1, 2 (1925). See generally *Act of Feb. 13, 1925*, Pub. L. No. 68-415, 43 Stat. 936 (current version at 28 U.S.C. § 1257 (2006)).

90. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 260-61 (Transaction Publishers 2009) (1928) (footnotes omitted); see also Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 *Colum. L. Rev.* 1919, 1962 (2003) ("The increasingly discretionary nature of the Court's appellate jurisdiction, symbolized by the Judiciary Act of 1925, greatly intensified the conception of the Supreme Court as a tribunal entrusted with the ultimate responsibility of maintaining the uniformity of valid federal law.").

91. In 1988, Congress eliminated the remaining area of mandatory review of state court judgments by making all judgments reviewable only by a writ of certiorari. See *Act of June 27, 1988*, Pub. L. No. 100-352, § 3, 102 Stat. 662, 662 (codified as amended at 28 U.S.C. § 1257). For a recent comprehensive account of the evolution of the Court's docket from an obligatory to a discretionary one, see Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. Pa. L. Rev.* 1, 7-18 (2011).

92. Hughes, *supra* note 37, at 1. Some emphasis should be placed on "aside from the Anglo-Saxon tradition of law and judicial processes;" otherwise the point is in important ways overstated. See Hamburger, *supra* note 18, at 103-47 (tracing concept of judicial duty in English common law). Hughes overlooks the importance of Scottish thinking and practice in the initial development of American thinking about the structure of a hierarchically unified judicial system with a supreme Court at its head. See generally James

(and his own “aside from” qualification is of critical importance), must play an important role in determining the nature of the supreme Court’s law declaration duty if that Court is to continue to be an effective instrument of government in our constitutional order. The Court shares that belief.

This Part works out deep impulses connecting seemingly unconnected doctrines. But I do not wish to overstate the evidence. The path described is not straightforward one in which the Court gobbles up appellate jurisdiction at every opportunity.<sup>93</sup> The Court has no institutional need for such a voracious appetite. Instead, the Court increasingly desires to exercise a highly discretionary prerogative to superintend law declaration by other courts.

### B. Examples

1. *Final Say Control Through Removing Access Barriers.* — *Camreta v. Greene*,<sup>94</sup> of “avoid avoidance” renown, is itself but another installment in the Court’s *Saucier*<sup>95</sup> jurisprudence. However, it illustrates that the Court will not willingly permit lower courts to have the final say on important constitutional issues.

*Saucier* had held that a court should first determine whether a constitutional right had been violated before considering whether the defense of official immunity barred any damage action.<sup>96</sup> This, the Court reasoned, would promote constitutional law development on a case-by-case basis.<sup>97</sup> That directive drew sharp outcries from busy lower court judges who sought to avoid thorny constitutional law issues when the litigation

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E. Pfander & Daniel D. Birk, Article III and the Scottish Judiciary, 124 Harv. L. Rev. 1613 (2011) (describing influence of Scottish judicial system on founding generation).

93. See, e.g., *Walker v. Martin*, 131 S. Ct. 1120, 1127–31 (2011) (upholding unexplained state court discretionary decision to refuse to waive procedural default of a constitutional claim as an adequate state ground for decision denying federal habeas challenge); see also *infra* notes 116–120 and accompanying text (discussing *Walker*). While the Court still expresses a preference for as-applied challenges, suffice it here to say that its case law is not easy to reconcile. See Hart & Wechsler, *supra* note 18, at 165–83 (collecting cases); Nathaniel Persily & Jennifer S. Rosenberg, Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court’s Recent Election Law Decisions, 93 Minn. L. Rev. 1644, 1646–48 (2009) (noting “preference for as-applied challenges,” but describing doctrine as inconsistent); Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 745–46 (2010) (describing confluence of as-applied challenges and severability doctrine).

94. 131 S. Ct. 2020 (2011).

95. *Saucier v. Katz*, 533 U.S. 194 (2001).

96. *Id.* at 201.

97. *Id.* Historically, of course, concurring and dissenting opinions were the major engines for the introduction of ideas generating law development or restricting its growth. That role exists, but the role of a dissent in shaping the majority opinion should not be overlooked. See, e.g., Ruth Bader Ginsburg, The Role of Dissenting Opinions, 95 Minn. L. Rev. 1, 3 (2010) (“On the utility of dissenting opinions, I will mention first their in-house impact [in improving the majority opinion].”). Concurring opinions often are also important guides for lower courts in determining what the Court has decided:

before them was readily disposed of on immunity grounds.<sup>98</sup> Reacting to that criticism, *Pearson v. Callahan*, invoking avoidance canons, converted *Saucier* into a rule of judicial discretion.<sup>99</sup> *Camreta* itself carried that process one step further. Once again invoking *Ashwander*'s avoidance language, the Court suggested that the best practice was not to address the constitutional claim.<sup>100</sup> Nonetheless, the Court not only did not overrule *Saucier*, it acknowledged that avoidance doctrine "threatens to leave standards of official conduct permanently in limbo."<sup>101</sup> The result, Justice Kagan said, is that:

Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.<sup>102</sup>

In the end, however, the focus was on the Court itself: If a court of appeals takes up its *Saucier* option, the supreme Court claimed a superintendence prerogative. The Ninth Circuit had laid down an important rule with respect to warrantless interrogation in the public school context, and only after doing so did it sustain the damage immunity defense. The Court held that the immunity holder, though victorious below, could nonetheless seek the Court's review as a "party" under 28 U.S. § 1254, apparently because of the deterrent effect of the constitutional ruling on the official's future conduct. But the driving force was the role of the Court itself: "This Court, needless to say, also plays a role in clarifying

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The analysis throughout this book demonstrates that concurrences are the perfect vehicle in which the justices can communicate their understanding of the majority opinion. The concurrences that bracket the majority opinion provide information to other actors about what the case means, about how far the rationale can be extended to other cases, and about how much support the rationale of the majority opinion has. Although previous literature merged concurrences with dissents or treated concurrences equally, my overarching argument in this book is that concurrences are not the same and that justices use concurrences to communicate and to send signals to each other, the legal community, and the public.

Pamela C. Corley, *Concurring Opinion Writing on the U.S. Supreme Court* 96 (2010).

98. See in particular Judge Leval's influential article. Pierre Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275–81 (2006) (criticizing *Saucier* as "a blueprint for the creation of bad constitutional law").

99. 555 U.S. 223, 241–42 (2009) ("Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.").

100. *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) ("[O]ur usual adjudicatory rules suggest that a court should forbear resolving this [constitutional] issue.").

101. *Id.*

102. *Id.* (quoting *Pearson*, 555 U.S. at 237).

rights.”<sup>103</sup> Translation: “We are not prepared to allow the Ninth Circuit to make constitutional rulings that we cannot review.”<sup>104</sup>

Less than a week later, *Ashcroft v. Al-Kidd* reinforced that point.<sup>105</sup> The Court addressed the scope of its role in qualified immunity cases. That immunity shields federal and state officials from damage claims if either (1) the official’s conduct did not violate a statutory or constitutional right, or (2) the right was not “clearly established” at the relevant time.<sup>106</sup> Writing for the Court, Justice Scalia acknowledged that lower courts (consistent with *Camreta*) had discretion to decide which prong to address.<sup>107</sup> The Ninth Circuit had rejected both prongs of immunity defense. A ruling rejecting either part of that holding would have sufficed for reversal, but Justice Scalia said:

Courts should think carefully before expending “scarce judicial resources” to resolve difficult and novel questions of constitutional or statutory interpretation that will “have no effect on the outcome of the case.” . . . When, however, a Court of Appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote.<sup>108</sup>

Translation: Same as in *Camreta*, “[w]e are not prepared to allow the Ninth Circuit to make constitutional rulings that we cannot review.” Four justices objected to any consideration of the first prong, which they believed presented difficult issues. Every member of the Court, however, proceeded on the premise that this was all a matter within the Court’s discretion.<sup>109</sup> No rights of the litigants were implicated.

The *Saucier* developments fit nicely with the Court’s softening of the “final judgment” barrier of 28 U.S.C. § 1257 (governing review of state court judgments) in *Cox Broadcasting Corp. v. Cohn*.<sup>110</sup> There, the Court emphasized the flexibility of the concept, and its particular concern was

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103. *Id.* at 2032.

104. There were two concurring opinions and one dissent, but only one opinion squarely challenged this premise. See *id.* at 2036–37 (Sotomayor, J., concurring) (noting majority opinion’s treatment of *Camreta*’s right to appeal “does not accord with our past practice”).

105. 131 S. Ct. 2074 (2011).

106. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

107. *Ashcroft*, 131 S. Ct. at 2080 (citing *Pearson*, 555 U.S. at 236).

108. *Id.* (citations omitted).

109. Cf. *Walker v. Martin*, 131 S. Ct. 1120 (2011) (upholding state court discretionary ruling as adequate ground for decision and rejecting federal habeas challenge); see also *infra* notes 116–120 and accompanying text (discussing *Walker*).

110. 420 U.S. 469 (1975).



to ensure that important state court constitutional rulings not escape its ultimate review.<sup>111</sup> (A parallel development has occurred with respect to the collateral order doctrine in the federal courts. A law-based denial of a claim of official immunity is immediately appealable.)<sup>112</sup> Similar developments occurred when the Court in *ASARCO Inc. v. Kadish* held that state officials bound by a state court injunction could invoke the Court's appellate jurisdiction even though the state court plaintiffs lacked Article III standing.<sup>113</sup> And, in *Michigan v. Long*, the Court held that state court decisions invoking federal and state cases would be assumed to have rested on a proposition of federal law absent a clear statement to the contrary.<sup>114</sup>

All these decisions show that the Court is reluctant to leave important propositions of federal law for final disposition in the hands of judicial actors other than itself.<sup>115</sup> Decisions such as this are, of course, fully consistent with a law declaration/judicial superintendence conception of the Court's rule.

*Walker v. Martin*,<sup>116</sup> decided in the same Term as *Camreta* and *Ashcroft*, provides an illuminating limit of this case law. Like many other courts, the California Supreme Court possesses a discretionary prerogative to excuse procedural defaults that would otherwise bar assertion of federal constitutional claims. In considering the flood of original habeas proceedings before it, the California Supreme Court often declines to exercise this authority without explanation.<sup>117</sup> In *Harrington v. Richter*, the Court had held that a state court order denying post-conviction relief without expressing any reasons still qualified as an adjudication on the merits under the provision of the federal habeas corpus statute, 28 U.S.C. § 2254(d), which requires federal courts to apply a deferential reasonableness standard to state court dispositions of federal constitutional

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111. See Hart & Wechsler, *supra* note 18, at 526–31 (analyzing holding of *Cox Broadcasting Corp. v. Cohn*, particularly with regard to Court's concern that constitutional rulings will escape Court's reach); see also *supra* note 71 and accompanying text (discussing Court's treatment of jurisdiction-stripping statutes).

112. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (allowing immediate appeal of denial of absolute immunity); see also *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (applying same reasoning to qualified immunity).

113. 490 U.S. 605, 618 (1989); see also *Nixon v. United States*, 506 U.S. 224 (1993) (maintaining suit even though it was intrabranched dispute within Executive Department).

114. 463 U.S. 1032, 1040–41 (1983) (noting when “a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law” the Court “will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so”).

115. Cf. *Davis v. United States*, 131 S. Ct. 2419, 2432–33 (2011) (rejecting argument that Court's holding means criminal defendants would have no incentive to request that courts override precedents). The Court noted “in any event, [our holding] will not prevent judicial reconsideration of prior Fourth Amendment precedents.” *Id.* at 2433. In short, the fish will not escape from the Court's net.

116. 131 S. Ct. 1120 (2011).

117. Habeas corpus applications could be filed directly in the state supreme court, and after summary rejection, prisoners filed petitions in federal court. *Id.* at 1125–26.

claims.<sup>118</sup> But in *Walker*, the state court's practice was, in turn, challenged as an inadequate state ground.<sup>119</sup> The Court rejected the challenge:

A discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies. Discretion enables a court to home in on case-specific considerations and to avoid the harsh results that sometimes attend consistent application of an unyielding rule. A state ground, no doubt, may be found inadequate when "discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law . . . ." Martin does not contend, however, that in his case, the California Supreme Court exercised its discretion in a surprising or unfair manner.<sup>120</sup>

This federalism-driven result strikes me as eminently sensible. *Camreta* and others? Easily distinguishable, of course, because the state court did not purport to render a holding on federal constitutional law that would escape the supreme Court's superintendence.

2. *Agenda Control Through Issue Injection.* — Following the Judges' Bill and later developments, the Court now has virtually complete discretion over its appellate docket.<sup>121</sup> Strategic denials of review, for example, are hardly unknown.<sup>122</sup> The Court has all but closed the door on any effort by the courts of appeals to affect the Court's docket through the certification process.<sup>123</sup> But even in cases the Court has agreed to review, the Court claims a wide discretion *in deciding what to decide*. This is apparent even at the grant stage. Limited grants of certiorari are common.<sup>124</sup> Moreover, the Court occasionally reformulates the questions presented, and indeed sometimes exceeds the boundaries of the questions presented.<sup>125</sup> More importantly here, the Court injects questions, even

118. 131 S. Ct. 770, 784 (2011) (discussing applicability of 28 U.S.C. § 2254(d) (2006)).

119. See *Walker*, 131 S. Ct. at 1124 ("The question presented: Does California's timeliness requirement qualify as an independent state ground adequate to bar habeas corpus relief in federal court?").

120. *Id.* at 1130 (citations omitted).

121. See *supra* note 91 (outlining evolution of supreme Court's docket).

122. See David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 *Const. Comment.* 151, 154–55 (2010) (characterizing strategic behavior of supreme Court certiorari process). Seth Stern and Stephen Wermiel reported an instance in which Justice Brennan advised Justice Goldberg not to vote for review because they lacked a fifth vote to prevail on the merits of the issue. Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* 197 (2010) (quoting Justice Brennan as asking, "And where, Arthur, were you going to get the fifth vote?").

123. Hart & Wechsler, *supra* note 18, at 1454 (discussing decline in court of appeals' use of certification procedure).

124. See, e.g., *Gonzalez v. Thaler*, 131 S. Ct. 2989 (2011) (order granting certiorari). For discussion, see Hart & Wechsler, *supra* note 18, at 1460–63. For a general but now somewhat dated study of the Court's certiorari process, see H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 217–70 (1991).

125. See, e.g., *Ankenbrandt v. Richards*, 502 U.S. 1023 (1992) (rephrasing question presented by petitioner).

constitutional ones that no litigant sought to raise. To take one recent example, in *M.B.Z. ex rel. Zivotofsky v. Clinton*, the Court's order reads:

Petition for writ of certiorari . . . granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns."<sup>126</sup>

*Pace* Messrs. Brandeis and Hughes, but no *Ashwander* concerns are expressed here.<sup>127</sup>

The most widely noticed recent example of issue creation is, of course, *Citizens United v. FEC*.<sup>128</sup> After argument and submission, the Court entered the following order:

This case is restored to the calendar for re-argument. The parties are directed to file supplemental briefs addressing the following question: For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, and the part of *McConnell v. Federal Election Commission*, which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?<sup>129</sup>

Who asked? Petitioner's constitutional challenge had been abandoned in the court below, had not been mentioned in the jurisdictional statement, and a (strained) statutory construction was available to avoid the Court-injected constitutional issue.<sup>130</sup>

Judicial issue creation—at least when the issue does not concern the Court's subject matter jurisdiction—is far from problem free. It puts pressure on two related, albeit not identical, models of judicial behavior: the adversary system model and the dispute resolution model,<sup>131</sup> both of which share the important premise that the litigants should be in control

126. *M.Z.B. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011) (order granting certiorari); see also *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (acknowledging Court's "'power to decide important questions not raised by the parties'" under exceptional circumstances (quoting *Blonder-Tongue Labs, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971))). But see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (noting Rule 14.1(a) "is prudential in nature, but we disregard it 'only in the most exceptional cases'" (quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976))).

127. See, e.g., *United States v. Jones*, 131 S. Ct. 3064 (2011) (order granting certiorari) (adding Fourth Amendment issue).

128. 130 S. Ct. 876 (2010).

129. *Citizens United*, 129 S. Ct. 2893, 2893 (2009) (mem.) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v. FEC*, 540 U.S. 93 (2003)).

130. See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 182 (noting possibility of avoidance through "plausible interpretation of the applicable campaign finance statute").

131. See *infra* notes 302–324 and accompanying text (discussing recent commentary on these models and issue injection and litigant stipulations).

of the case.<sup>132</sup> And, on occasion, issue creation bothers members of the Court. In *Christian Legal Society v. Martinez*, for example, Justice Ginsburg chided a litigant for its “unseemly attempt to escape from [its] stipulation.”<sup>133</sup> She put her criticism in terms of the rights of the litigants:

Litigants, we have long recognized, “[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established.” . . . This entitlement is the bookend to a party’s undertaking to be bound by the factual stipulations it submits.<sup>134</sup>

In *Greenlaw v. United States*,<sup>135</sup> Justice Ginsburg once again expressed similar concerns. After the Eighth Circuit had affirmed petitioner’s sentence, it went on sua sponte to order a sentence increase.<sup>136</sup> At oral argument, Justice Ginsburg questioned that action:

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?<sup>137</sup>

Ultimately writing for the Court, Justice Ginsburg reemphasized the postulates of the adversary system.<sup>138</sup>

3. *Agenda Control Through the Appointment of Amici to Defend Judgments.* — Interestingly, in *Greenlaw* itself, Justice Ginsburg overlooked the fact that she had posed her question to counsel who himself represented no

132. Amanda Frost provides a lucid exposition of adversary system model in *The Limits of Advocacy*, 59 *Duke L.J.* 447 (2009), discussed *infra* notes 307–315 and accompanying text; see also Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *Duke L.J.* 1, 2–3 (2011) (criticizing Court for reliance on legislative facts not tested by adversarial process).

133. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2984 (2010).

134. *Id.* at 2983 (quoting *H. Hackfield & Co. v. United States*, 197 U.S. 442, 447 (1905)); see also *id.* at 3005 (Alito, J., dissenting) (agreeing “the parties must be held to their Joint Stipulation”).

135. 554 U.S. 237 (2008).

136. Transcript of Oral Argument at 33–34, *Greenlaw*, 554 U.S. 237 (No. 07-330) (noting government had not sought such an increase by cross-appeal).

137. *Id.* at 34 (quoted in Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 *Stan. L. Rev.* 907, 909 (2011)).

138. Justice Ginsburg wrote:

In 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. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant’s rights.

*Greenlaw*, 554 U.S. at 243–44. Descriptively, her limitation is not accurate.

litigant.<sup>139</sup> Despite the government's concession that the Eighth Circuit was wrong on its sentence-enhancing statutory construction holding and the government's suggestion that remand was appropriate, the Court appointed counsel "to brief and argue this case, as *amicus curiae*, in support of the Court of Appeals' judgment."<sup>140</sup> That practice is now a standard aspect of the Court's issue selection practice.<sup>141</sup> In *Bond v. United States*, for example, the government partially abandoned a position on standing that it had taken below.<sup>142</sup> After granting certiorari, the Court "appointed an *amicus curiae* to defend the judgment of the Court of Appeals."<sup>143</sup> Similarly, in *Tapia v. United States*, the Court said that "[b]ecause the United States agrees with [petitioner's] interpretation of the statute, we appointed an *amicus curiae* to defend the judgment below."<sup>144</sup> The entry for *Pepper v. United States*<sup>145</sup> in the Court's Journal of Proceedings for December 6, 2010, particularly caught the writer's eye:

Argued by Mr. Alfredo Parrish, appointed by this Court, for the petitioner, by Mr. Roy W. McLeese, III, for the respondent, supporting the petitioner, and by Mr. Adam G. Ciongoli for *amicus curiae*, appointed by this Court, supporting the judgment below. Justice Kagan recused.<sup>146</sup>

Beginning with *Marbury* itself the Court has, of course, heard many one-party cases; that is, the respondent did not enter an appearance. Nonetheless, the tangible interest of the party seeking review was clearly at stake.<sup>147</sup> But what, exactly, is the basis for appointing counsel in order to "support or defend" the judgment below? Litigants have interests; but judgments? If the litigants have no actual interest in defending the judgment, or have abandoned positions taken below, what conception of judicial authority authorizes the Court to intervene?<sup>148</sup> While the Court seems completely confident of its authority to appoint such amici, it provides no explanation for the practice.<sup>149</sup> What does the Court's now in-

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139. Goldman, *supra* note 137, at 909.

140. *Greenlaw*, 554 U.S. at 243.

141. For an extensive treatment of the topic complete with a taxonomy, see Goldman, *supra* note 137, at 918–39. Goldman traces the modern practice to *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955). Goldman, *supra*, at 914–17.

142. 131 S. Ct. 2355 (2011).

143. *Id.* at 2361.

144. 131 S. Ct. 2382, 2386 (2011).

145. 131 S. Ct. 1229 (2011).

146. Supreme Court, Journal (Dec. 6, 2010), available at <http://www.supremecourt.gov/orders/journal.aspx> (on file with the *Columbia Law Review*); see also *Setser v. United States*, 131 S. Ct. 3017, 3017 (2011) (appointing amicus "in support of the judgment below").

147. Goldman, *supra* note 137, at 912–13 (noting frequency of "one-party appeals" before early supreme Court).

148. I put to the side the indigent litigant desiring to proceed but financially unable to do so.

149. See *United States v. Providence Journal Co.*, 485 U.S. 693, 703–04 (1988) (taking Court's authority to do so as clear). For a collection of the rather sparse writing on this topic, see Goldman, *supra* note 137, at 911 n.28.

grained (but unexplained) practice tell us about the Court's role in constitutional order?

To intensify the importance of the question, add the role of the amici in enlarging issues before the Court. Standard doctrine frowned on such a practice.<sup>150</sup> It is increasingly clear, however, that for the Court this is only a matter of judicial discretion.<sup>151</sup> In *Turner v. Rogers*, decided in the waning days of this last Term, the Court granted certiorari to determine whether an indigent in a civil contempt proceeding that could result in incarceration had an absolute right to appointed counsel, a question which the Court then unanimously answered in the negative.<sup>152</sup> But over Justice Thomas's four-person dissent, the Court reached out to adopt the position of its invited amicus, the United States; it went on to hold that the procedures actually used in the contempt proceeding were unconstitutional.<sup>153</sup> (The government, I should add, now participates, most frequently as an amicus, in about seventy-five percent of the cases heard by the Court on the merits.)<sup>154</sup> The dissent against allowing an amicus to enlarge issues runs several pages. Interestingly, however, like the majority, Justice Thomas also treats the matter as involving nothing more than a discretionary rule of practice.<sup>155</sup> Perhaps even more interestingly, the Court itself devotes not a single sentence in the response to this challenge.

4. *Agenda Control Through Forfeiture Rules.* — The extent to which the Court's treatment of litigant concessions, stipulations, waivers, and procedural defaults (collectively, "forfeiture rules") operates to give the Court (not the litigants) control over issue selection may be underappreciated. In each of the foregoing circumstances, a litigant has, intentionally or not, surrendered some claim of fact or law. The standard assumption is that the resulting forfeiture limits the law-declaring authority of the Court in the same way that it binds the litigants. And surely that is often the

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150. See *Turner v. Rogers*, 131 S. Ct. 2507, 2524–25 (2011) (Thomas, J., dissenting) (collecting cases).

151. See, e.g., *Davis v. United States*, 512 U.S. 452, 457 n.\* (1994) ("Although we will consider arguments raised only in an amicus brief, . . . we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position."); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing question raised only in amicus brief).

152. 131 S. Ct. at 2512.

153. *Id.* at 2520. There were ten amici in the case. Docket, *Turner v. Rogers*, 131 S. Ct. 2507 (10–10).

154. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323, 1338 (2010). For a brief argument that the government now files far too few petitions for certiorari, see Adam D. Chandler, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 Yale L.J. 725 (2011).

155. "[I]t is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an amicus." *Turner*, 131 S. Ct. at 2524 (Thomas, J., dissenting) (italics omitted); see also *infra* notes 170–180 and accompanying text (discussing courts' treatment of amicus argument in *Snyder v. Phelps*).

case. In *Ortiz v. Jordan*, for example, the Court refused to permit a defendant to challenge the sufficiency of the evidence establishing a constitutional violation because of a procedural default in the district court.<sup>156</sup> In *Madison County v. Oneida Indian Nation*, to take another random illustration, the Court vacated a grant of certiorari to determine the scope of tribal sovereign immunity when respondents waived that claim after the grant.<sup>157</sup>

On first impression these cases seem sensible and unremarkable. The law-declaring duty is bounded not only by “case or controversy” but also by the need to have a smoothly functioning judicial system. The latter surely requires rules with respect to the orderly presentation of claims, including constitutional ones. But the problem is more difficult than appears at first glance. Consider, for example, the *Case of the Turkish Tires*.<sup>158</sup> There, the Court avoided a difficult constitutional question concerning in personam jurisdiction. A unanimous Court held that North Carolina could not exercise jurisdiction in a suit by the estate of two North Carolina teenage boys who had been killed in an accident in France allegedly caused by a defective tire manufactured by a Turkish subsidiary of The Goodyear Tire and Rubber Company.<sup>159</sup> (Goodyear, the parent, did not contest personal jurisdiction over it.) Newly appointed appellate counsel sought to defend the judgment by injecting a new argument in the merits brief—that North Carolina was entitled to ignore Goodyear’s corporate structure in favor of a “‘single enterprise’ theory” that would “pierce Goodyear corporate veils, at least for jurisdictional purposes.”<sup>160</sup> Happily (for the Court, that is), this difficult argument could be avoided because it had not been raised in the court below or in respondents’ opposition to certiorari. “Respondents have therefore forfeited this contention . . . .”<sup>161</sup> The Court cited its own Rule 15.2, which provides in relevant part that “[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, *may be deemed waived* unless called to the Court’s attention in the brief in opposition.”<sup>162</sup>

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156. 131 S. Ct. 884, 890–91 (2011) (noting defendants had failed to renew their challenge to sufficiency of evidence by appropriate post-verdict motion).

157. 131 S. Ct. 704, 704 (2011) (per curiam) (vacating with instructions to Second Circuit to “revisit its ruling on sovereign immunity”).

158. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). I owe the title to Alexi Lahav. She renamed the companion decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), as the *Case of the Giant Shears*. For the record, Professor Manning objects to any levity by this author. Scrooge!

159. *Goodyear*, 131 S. Ct. at 2857 (“North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction.”).

160. *Id.*

161. *Id.*

162. Sup. Ct. R. 15.2 (emphasis added).

Rule 15.2, added in 1990, does not purport to be a limit on the Court's authority, nor could it. Suppose the Court had written the following:

We recognize the necessity, even with respect to constitutional cases, for the orderly presentation of claims. But we deem the argument not waived. The constitutionality of judicial action taken by a sovereign state is at issue here. We should be loathe to hold such conduct unconstitutional unless we have addressed every plausible argument for the exercise of such state authority. On that basis, the arguments made in the merit briefs are properly before us.

Should the Court have taken this path? Even if the issue was a hard one? Or should it have invoked *Hughes* and *Brandeis* and said that since the argument had not been properly presented it was not "necessary" to decide it, even though the result was a declaration of unconstitutionality so far as these litigants were concerned?<sup>163</sup>

This Essay, however, is interested in a different phenomenon, namely, how litigant forfeiture rules frequently enlarge the Court's discretion over issue selection; operationally, they often allow the Court to reach constitutional questions that a majority believes should be decided. The difference between the litigants before it and the Court itself bears emphasis. Forfeiture rules are vigorously enforced against litigants. As the *Case of the Turkish Tires* shows, respondents, for example, are routinely precluded from advancing arguments in support of the judgment that were not raised in their opposition to certiorari.<sup>164</sup> This allows the Court to avoid difficult issues. Sometimes, however, the effect is quite different. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, for example, the Court refused to consider two arguments

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163. Or, on remand, the issue is still open before the state supreme court, and it will depend on its forfeiture rules.

164. See *Goodyear*, 131 S. Ct. at 2857 (2011) (forfeiting respondent's claim, which did not appear below or in brief); *Michigan v. Bryant*, 131 S. Ct. 1143, 1151 n.1 (2011) (noting State's failure to preserve argument). The same practice occurs in the nonconstitutional context. In *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010), the Court again refused to consider an argument raised for the first time in respondent's merits brief. *Id.* at 2861. Justice Sotomayor's dissent struggled mightily to show that the substance of the argument had been preserved. *Id.* at 2868–69 (Sotomayor, J., dissenting). More graphically, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), a case involving the Fair Labor Standards Act, the Court refused to address an issue raised for the first time in the merits briefs. *Id.* at 1336. Justice Scalia's dissent focused on that very issue as dispositive, and only thereafter did he argue that the issue was indeed properly before the Court. *Id.* at 1340–41 (Scalia, J., dissenting). The Court can avoid litigant forfeiture through the plain error doctrine. See, e.g., *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242, 2244 n.3 (2011) (bypassing potential litigant forfeiture issue and requiring "clear and convincing evidence" of patent invalidity); *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (noting Second Circuit's consideration of argument not raised below is "irreconcilable" with Court's "plain error" precedent).



raised for the first time in respondents' merits brief.<sup>165</sup> The result? Application of forfeiture doctrine eliminated potential roadblocks to Justice Scalia's palpable desire to establish that the takings prohibition applied to judicial as well as legislative conduct. (Justice Scalia failed to get a majority this round, and quite plainly he was none too happy about it.)<sup>166</sup>

*Snyder v. Phelps* provides another nice example of how forfeiture doctrines empower judicial issue selection.<sup>167</sup> Snyder's state law tort suit against Westboro Church and its several members arose out of the church's well-known pattern of picketing military funerals in order to maximize exposure to its antihomosexual, "God hates America" message. Simplified, after a jury had sustained the claim for intentional infliction of emotional injury and awarded both compensatory and punitive damages, the district court reduced the punitive award.<sup>168</sup> In the Fourth Circuit, an amicus suggested that the plaintiff had not established the elements of the state law cause of action.<sup>169</sup> Concurring, Judge Shedd agreed.<sup>170</sup> Citing *Ashwander*, he said: "Our judicial power to decide a case is not limited by the arguments and actions of the parties."<sup>171</sup> Recognizing that supreme Court cases had permitted some amici issue enlargement,<sup>172</sup> the majority nonetheless followed its usual pattern and declined to address the issue, pointing out that the church had conceded that issue and so only the First Amendment was at stake.<sup>173</sup> *Ashwander* was put aside in a footnote:

Because the sufficiency of the evidence issue was waived, the *Ashwander* principle—that a court should not “decide questions of a constitutional nature unless absolutely necessary”—is inapplicable here. . . . The resolution of the First Amendment issues

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165. 130 S. Ct. 2592, 2610 (2010) (noting neither argument appeared in opposition paper and “since neither is jurisdictional, we deem them both waived” (citation omitted)). The Court permits petitioners to raise new arguments, but not new issues in support of the Question Presented. See Hart & Wechsler, *supra* note 18, at 498 (distinguishing new claims from new arguments).

166. See, in particular, his sharp criticism of Justice Kennedy, whom he may at one time have had for a majority. *Stop the Beach*, 130 S. Ct. at 2604–08. Justice Kennedy believed the issue was a difficult one; Justice Scalia, by contrast, did not.

167. 131 S. Ct. 1207 (2011).

168. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). Discussion of two other state law tort claims is omitted.

169. Brief of the Thomas Jefferson Center for the Protection of Free Expression at 16–30, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) (No. 09-751).

170. *Snyder*, 580 F.3d at 227 (Shedd, J., concurring) (“I am persuaded that we should consider the issues raised by the [amicus] . . .”).

171. *Id.*

172. *Id.* (citing *Teague v. Lane*, 489 U.S. 288, 300 (1989)).

173. *Id.* at 217 (majority opinion) (“Because the Defendants have voluntarily waived any contention that the evidence is insufficient to support the verdict, we are obligated to grapple with and resolve the First Amendment issues presented by the judgment.”).

is absolutely necessary, as it is the sole appropriate means for disposing of this appeal.<sup>174</sup>

Surely, as it was conceived of by Hughes and Brandeis, *Ashwander* was not a rule disposable by litigants; it was, as they said, an ordinance concerning the manner in which the Court governs itself.<sup>175</sup>

In the supreme Court, the concession went unchallenged.<sup>176</sup> In a footnote, the Court simply noted that the majority below had found that the evidence point had been waived, and it then said: “Like the court below, we proceed on the unexamined premise that respondents’ speech was tortious.”<sup>177</sup> Moreover, when Justice Alito sought to inject into the case the relevance of a subsequent church website broadcast concerning the plaintiffs, it was rejected because the petition had raised only the picketing issue.<sup>178</sup> (This was a quite fortunate escape route. The protected nature of the website broadcast presented an independently difficult issue, as the Chief Justice recognized.)<sup>179</sup> Thus, at the end of the day, the Court was presented with a rather narrow constitutional issue. And it held that the picketing itself was protected activity because it had occurred on a public way where respondents had every right to be; was concerned with an issue of public importance; and, in the Court’s view, was not directed at the petitioner.<sup>180</sup> Had the Court been faced with a differently framed petition, issues brushed aside could not have been avoided—unless, that is, the Court was willing to do what Judge Shield did: invoke *Ashwander* and examine the sufficiency of the evidence under state law.

The important role played by forfeiture doctrine in enlarging the Court’s issue selection prerogative arises in many contexts. Three further examples are both illustrative and instructive.

a. *Concessions*. — Chief Justice Roberts’s concurrence in *Salazar v. Buono*<sup>181</sup> (the *Case of the Cross in the Desert*) raises the question of what role

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174. Id. at 217 n.9 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

175. This Essay does not consider the relevance of state law construction rules on this issue. See *supra* note 78 (discussing literature examining impact of state law construction rules on federal courts).

176. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Indeed, Justice Alito’s dissenting opinion made much of the concession to establish the outrageous nature of respondents’ conduct. See id. at 1223 (Alito, J., dissenting).

177. Id. at 1215 n.2 (majority opinion).

178. Id. at 1214 n.1.

179. Id. (“[A]n Internet posting may raise distinct issues in this context . . .”).

180. Id. at 1218–19.

181. 130 S. Ct. 1803 (2010). Very briefly, the facts are these: In 1934 members of the Veterans of Foreign Wars (VFW), acting without permission, placed a Latin cross intended to honor American soldiers who had died during World War I on a rock outcropping on federal land in the remote Mojave National Preserve. The 1.6 million acre Preserve itself is nestled within the vast (25,000 square miles) Mojave Desert, and over ninety percent of Preserve land is owned by the federal government. Finding an impermissible governmental endorsement of religion, the district court enjoined the government “from permitting the

concessions (a litigant's unilateral forfeiture of a contention of law or fact) should play in constitutional adjudication. Long story short, the question before the Court was whether an act of Congress governing disposition of government property had cured an Establishment Clause violation.<sup>182</sup> Four justices said yes,<sup>183</sup> four said no.<sup>184</sup> A three-person plurality ordered a remand.<sup>185</sup> Chief Roberts's concurring opinion runs but a single paragraph:

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display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." *Id.* at 1812. That decision was affirmed on appeal, and the government did not seek further review. Ever vigilant in matters of this nature, Congress repeatedly sought to interfere with the elimination of the memorial, *inter alia*, by designating it and its adjoining land as a national war memorial, and then directing that so long as the land remained a war memorial, the land should be conveyed to the VFW in exchange for nearby land owned by a sympathetic private party. *Id.* at 1813. "The land-transfer statute provided that the property would revert to the Government if not maintained 'as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.'" *Id.* (quoting Department of Defense Appropriations Act of 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2278).

182. The Court of Appeals had declined to consider the new legislation. *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004) ("We express no view as to whether a transfer completed under [the new law] would pass constitutional muster, but leave this question for another day."). In an opinion announcing the judgment of the Court, Justice Kennedy, joined by the Chief Justice and Justice Alito, said: "The statute presents a central issue in this case." *Salazar*, 130 S. Ct. at 1813. It is interesting to note the emphasis placed on the existence of the statute. Analytically, for constitutional purposes it should make no difference under the Establishment Clause whether what the government had done was pursuant to the statute or as by way of the federal defendants' executive response to the finding of unconstitutionality. The only question would be the general statutory authority of the federal defendant, an issue adverted to only by Justice Alito. But, of course, the statute has psychological impact since it clearly put the district court and the Ninth Circuit in conflict with the will of Congress.

183. Justice Scalia, joined by Justice Thomas, thought that the injunction had not been violated, and that the plaintiff, on his own allegations, lacked standing to complain about the impact of the subsequent act of Congress. *Salazar*, 130 S. Ct. at 1824-28 (Scalia, J., concurring). Justice Alito thought no remand was necessary because the congressional legislation represented a good faith effort both to comply with the Establishment Clause and to honor the site as a war memorial. *Id.* at 1821-24 (Alito, J., concurring).

184. Justice Breyer's brief opinion said that the district court's finding of a violation was an allowable one. *Id.* at 1842-45 (Breyer, J., dissenting). In a lengthy opinion, Justice Stevens argued the act contravened the literal terms of the injunction, and in any event, went on to say at length that it contravened the purpose of the injunction. *Id.* at 1828-30 (Stevens, J., dissenting). The final part of his opinion is given over to challenging the reasons given by Justice Kennedy for remand. *Id.* at 1830-42.

185. In fact, however, only Justice Kennedy believed a remand was necessary, and then only as a formal matter. His opinion all but directed the district court to vacate its injunction. Justice Kennedy's opinion concluded that the act of Congress rested on a secular purpose; and while he left open the question of whether the act created the "effect" of governmental endorsement, he was overtly skeptical and thought that any such difficulty could be cured with the addition of an appropriate plaque. *Id.* at 1820 (Kennedy, J.) ("[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.").

At oral argument, respondent's counsel stated that it "likely would be consistent with the injunction" for the Government to tear down the cross, sell the land to the Veterans of Foreign Wars, and return the cross to them, with the VFW immediately raising the cross again. . . . I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do—sell the land with the cross on it. "The Constitution deals with substance, not shadows."<sup>186</sup>

Quite arguably, this concession should not have been made.<sup>187</sup> For our purposes, however, the question is whether Chief Justice Roberts should have relied on the concession. One might say, "but, of course, this is done *all* the time." Yes, of course, and that practice may be unproblematic when the matter before a court—even the supreme Court—is only that of a straightforward dispute resolution.<sup>188</sup> But should the validity of an act of Congress turn upon a litigant's concession?<sup>189</sup> To be sure, in theory, that concession would not bind other litigants; the key words here are "in theory." The practice sanctioned by the act of Congress would in all probability remain in place until (if ever) a future litigant sought the Court's intervention (probably unsuccessfully).<sup>190</sup>

On the last day of the same Term, two highly visible constitutional decisions, each decided 5-4, rested upon litigant stipulations (i.e., joint concessions): the first, as to the facts;<sup>191</sup> the second, statutory meaning.<sup>192</sup> In both cases, the stipulations perhaps allowed the Court to address substantive issues that a majority was very eager to reach.<sup>193</sup>

186. *Id.* at 1821 (Roberts, C.J., concurring) (citation omitted) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). The Chief Justice also concurred in Justice Kennedy's opinion. *Id.* at 1811 (Kennedy, J.).

187. Plaintiff could have insisted that remedying the constitutional violation required fully rectifying all the consequences of the violation and that the act of Congress did not do so. In dissent, Justice Stevens believed that the Chief Justice had mischaracterized the scope of the concession. *Id.* at 1833 n.3 (Stevens, J., dissenting).

188. As noted, the Court continues to get its share of such cases, where the only issue—of no great importance—is that the law be settled. See *supra* note 85 and accompanying text (defining and discussing dispute resolution cases).

189. In this particular case, the concession would not have been important to Chief Justice Roberts because he also joined Justice Kennedy's opinion, which did not rely upon the concession.

190. See, e.g., Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 Wisc. L. Rev. 771, 800–05 (describing impact of precedent on third parties and other courts). Compare *Salazar*, 130 S. Ct. at 1821 (Roberts, C.J., concurring), with *Washington v. Davis*, 426 U.S. 229, 238 n.8 (1976), discussed *infra* notes 309–315 and accompanying text, where the Court refused to accept the litigants' concession that conduct having a disparate impact triggered higher scrutiny under the Due Process Clause of the Fifth Amendment.

191. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

192. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

193. The decisions remind us that, if the Court is an "it" (which the current Chief Justice works very hard to achieve), it is also a "they," composed of nine separate individuals.

b. *Stipulations of Fact.* — *Christian Legal Society* sustained against a First Amendment challenge a state law school's "all-comers policy"—under which student organizations must make available all offices to all students in order to gain official recognition.<sup>194</sup> The Court rejected newly appointed appellate counsel's effort to redirect its focus to the *written* nondiscrimination policy in existence when recognition was denied, which, counsel argued, was the policy that had been actually applied by the law school. That policy would have raised significant viewpoint-based constitutional objections, as four dissenting justices made clear.<sup>195</sup> Justice Ginsburg responded: "CLS's assertion runs headlong into *the stipulation of facts* it jointly submitted . . . at the summary-judgment stage."<sup>196</sup> "Litigants, we have long recognized, '[a]re entitled to have [their] case tried upon the . . . facts[] stipulated . . . .'"<sup>197</sup> The dissenting justices struggled with the stipulation, believing that it was contradicted by the record.<sup>198</sup> Freed from the stipulation, however, they too had a welcome issue, a written policy that was in all likelihood invalid. Oral argument created the impression that the Court as a whole was concerned enough with what was the actual issue properly before it,<sup>199</sup> and that a remand for clarification, the stipulation notwithstanding, was clearly well within imagination.<sup>200</sup>

Although Justice Ginsburg stressed (as she usually does) the rights of the litigants, not the Court's prerogatives,<sup>201</sup> binding litigants to their stipulations surely has a strong institutional dimension. Understandably, appellate courts do not like litigants changing positions during the course of litigation, and doctrines of waiver and judicial estoppel are designed to protect them from such manipulation.<sup>202</sup> Nonetheless, while this is an important policy, it is only one among others, such as the

194. *Christian Legal Soc'y*, 130 S. Ct. at 2971. The Court concluded that the policy constituted a reasonable, viewpoint-neutral condition on access to the school's student-organization limited public forum. As such, this policy had been constitutionally applied to a student Christian organization that excluded individuals who engaged in "unrepentant homosexual conduct," or who held religious convictions different from those outlined in the organization's statement of faith. *Id.* at 2980.

195. *Id.* at 3001–02, 3010–12 (Alito, J., dissenting).

196. *Id.* at 2982 (majority opinion).

197. *Id.* at 2983 (quoting *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447 (1905)).

198. *Id.* at 3004–06 (Alito, J., dissenting).

199. See generally Transcript of Oral Argument, *Christian Legal Soc'y*, 130 S. Ct. 2971 (2010) (No. 08-1371) (raising problem of stipulation but focusing on merits).

200. *Id.* at 37–39 ("So I have an absolute void in this record, which in turn I think would be important to fill that void, because . . . with that great unclarity, [we are] asked to decide a constitutional issue where I feel I'd need more facts . . . .").

201. *Christian Legal Soc'y*, 130 S. Ct. at 2982–83 (stressing litigants are "'entitled to have their case tried upon the assumption'" that stipulated facts are established to ensure "parties will not be permitted to deny the truth of the facts stated" (quoting *H. Hackfeld & Co.*, 197 U.S. at 447; 83 C.J.S., *Stipulations* § 93 (2000))).

202. "Sandbagging" the Court is thereby averted. *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009); see also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662 (2011) ("It

Ashwander-based policy of avoiding difficult constitutional issues. *Christian Legal Society* presented such an issue. The Court was faced with a question of the extent to which the state could refuse to subsidize conduct that it could not compel.<sup>203</sup> The stipulation gave the majority the freedom it wanted to weigh in on that issue.<sup>204</sup> There was no mention of *Ashwander*.

c. *Stipulations of Law*. — *Free Enterprise* involved a stipulation of law, not fact.<sup>205</sup> There, the Court held that a provision of the 2002 Sarbanes-Oxley Act (SOX) making members of the Public Company Accounting Oversight Board (PCAOB) removable by the Securities and Exchange Commission (SEC) only for cause<sup>206</sup> unconstitutionally impaired the President's duty to see that the laws are faithfully executed.<sup>207</sup> The 5-4 majority reasoned that because, as the litigants had stipulated, SEC members are themselves removable only for good cause, SOX imposed an impermissible second layer of good-cause protection between the President and PCAOB members that prevented him, or anyone directly responsible to him, from holding these members fully accountable for their conduct.<sup>208</sup>

The linchpin for this holding is, of course, the Court's starting premise: SEC commissioners can be removed only "for cause." The statute is silent,<sup>209</sup> but the Court of Appeals had previously so held.<sup>210</sup> In the supreme Court, however, no litigant made any effort to defend merits of the circuit court's holding. Why? Because neither party *wanted* to make

might be argued that the State's newfound [statutory] interpretation comes too late in the day.").

203. *Christian Legal Soc'y*, 130 S. Ct. at 2978.

204. Justice Ginsburg in particular is deeply committed to sustaining the validity of "inclusion" statutes and policies. *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) ("[A]s I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion."). This view of equal protection has stout support among legal scholars. See, e.g., Kenneth L. Karst, *Through Streets Broad and Narrow: Six "Centrist" Justices on the Paths to Inclusion*, 2010 Sup. Ct. Rev. 1, 10 ("The central guarantee of the Fourteenth Amendment, after all, is equal citizenship."). For approving commentary of Justice Ginsburg's opinion, see Pamela Karlan, *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 Sup. Ct. Rev. 159, 201–11. Karlan acutely notes the relationship of Justice Alito's dissent in *Christian Legal Society* with his concurrence in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). Karlan, *supra*, at 208.

205. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148–49 (2010).

206. That is, willful violation of SOX, board rules, or securities laws; willful abuse of authority; or unreasonable failure to enforce compliance with SOX or board rules. 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006).

207. *Free Enter.*, 130 S. Ct. at 3163.

208. *Id.* at 3154.

209. 15 U.S.C. §§ 7211(e)(6), 7217(d)(3); see also *Free Enter.*, 130 S. Ct. at 3182–83 (Breyer, J., dissenting) ("It is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection.").

210. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008).

the contrary argument. Rather, the litigants simply stipulated that for cause removal existed.<sup>211</sup>

Be that as it may, the Chief Justice proceeded by summarily relying upon the stipulation:

The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," and we decide the case with that understanding.<sup>212</sup>

That's all! This summary treatment is especially striking because Justice Breyer's dissent devotes an entire section to this very issue. He begins, "One last question: How could the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only 'for cause?'"<sup>213</sup> He adds that the Court's premise is "certainly not obvious."<sup>214</sup> Justice Breyer points to *Ashwander's* second (not "the" avoidance canon) canon.<sup>215</sup> Surely, the reader would not have been taken back if the italicized portion of the majority opinion, citing *Ashwander* canons 2 and 7, had instead said: "But further briefing is necessary. We reject stipulations of law, especially so where the result would bring to the forefront an important constitutional question." Oddly, in rejecting this route, the Court's opinion wound up, much to the disappointment of unitary executive theorists—technically dicta, in view of the stipulation and the litigants' further concession that the Court's prior precedents were not drawn to issue<sup>216</sup>—seeming completely to accept the constitutional validity of the modern administrative state.<sup>217</sup>

Chief Justice Robert's reliance on the stipulation was not out of concern for adversary system premises concerning the rights of the litigants. Rather, one senses that his majority very much wanted to reach the issue it decided.<sup>218</sup> Nonetheless, the Chief Justice seems to have some explain-

211. *Free Enter.*, 130 S. Ct. at 3148–49. On the litigant's strategy, see Peter L. Strauss, On The Difficulties of Generalization—PCAOB In the Footsteps of *Myers*, *Humphrey's Executor*, *Morrison* and *Freytag*, 32 *Cardozo L. Rev.* 2255, 2277 (2011) [hereinafter Strauss, The Difficulties of Generalization] (quoting email from Richard Pierce on Adminlaw listserv received June 30, 2010).

212. *Free Enter.*, 130 S. Ct. at 3148–49 (emphasis added) (citations omitted).

213. *Id.* at 3182 (Breyer, J., dissenting).

214. *Id.* As Peter Strauss points out, that issue is surely a substantial one. Strauss, The Difficulties of Generalization, *supra* note 211, at 2275–77.

215. *Free Enter.*, 130 S. Ct. at 3184 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1938) (Brandeis, J., concurring)).

216. *Id.* at 3147.

217. *Stern v. Marshall*, 131 S. Ct. 2594 (2011), points to the same result. The majority opinion, once again authored by Chief Justice Roberts, also strongly suggests that the structure of the modern administrative state, which has always heavily depended upon administrative adjudication, is not in peril. See *id.* at 2620.

218. Compare Justice Ginsburg's opinion in *Christian Legal Society*, which spoke of the litigants' rights vis-à-vis the stipulation. *Christian Legal Soc'y Chapter of the Univ. of Cal.*, *Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2982–83 (2010); see also *supra* notes 196–204 and accompanying text (discussing Justice Ginsburg's opinion in *Christian Legal Society*).

ing to do. I say this as an admirer; his general consensus-focused approach to judging is close to my heart. He is strongly committed to presenting the Court as an “it,” not a “they” composed of nine individual law offices.<sup>219</sup> But consider two other recent decisions in which he wrote.

i. In *Massachusetts v. EPA*, the Chief Justice sharply criticized the five-person majority for relying on a standing argument never raised by any litigant or addressed by any court throughout the litigation, namely, that state standing might stand on a footing different from the standing of environmental groups.<sup>220</sup> (In fact, just as in *Free Enterprise*, no litigant had a sufficient incentive to raise the issue.)<sup>221</sup>

ii. In *NAMUDNO*,<sup>222</sup> as noted, the Chief Justice invoked *Ashwander* to endorse a (strained) construction of section 5 that would afford the petitioner all the relief it sought, and thus avoided addressing the constitutionality of section 5 of the Voting Rights Act.<sup>223</sup>

What, then, unites the three opinions? Given the intensely case-specific variables in these cases, I surely cannot say with any confidence, and perhaps neither could the Chief Justice. But one does detect a strong measure of pragmatism. Even though the Court’s opinion in *NAMUDNO* badly wounded the statute on the ground, an announcement, for example, that section 5 was invalid would have created considerable public outcry. And *Free Enterprise*? Considering the apparent gravity of the constitutional issue before the Court, surely something more seemed called for, given the traditional doctrine that courts generally refuse to be bound by stipulations of law.<sup>224</sup> Especially so, when the result is to bring to the front an “important” and difficult constitutional issue.

Something more could have been said. Pragmatism may have triumphed yet again. While the Court technically awarded the President a

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219. “After six full Terms on the Court, Chief Justice Roberts still has never been a solo dissenter in a merits decision.” Statistics for the Supreme Court’s October Term, 80 U.S. L. Wk. Sup. Ct. Today 3045 (2011). While highly charged 5-4 splits draw the most public attention, last year there was “on average, 1.34 dissenters per decision.” *Id.*

220. 549 U.S. 497, 539–40 (2007) (Roberts, C.J., dissenting) (“[I]t is ironic that the Court today adopts a new theory of Article III standing for States without the benefit of briefing or argument on the point.”).

221. See *supra* notes 205–219 and accompanying text (discussing *Free Enterprise* and litigant’s disinterest in raising issue decided).

222. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504 (2009).

223. *Id.* at 2518; see also *supra* notes 64–66 and accompanying text (discussing *NAMUDNO*).

224. *E.g., Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”); *Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 46 (1944) (litigants “can not stipulate away” what “the legislation declares”); *Estate of Sanford v. Comm’r*, 308 U.S. 39, 51 (1939) (“We are not bound to accept, as controlling, stipulations as to questions of law.”).



victory, it seems to have no practical significance, at least not yet.<sup>225</sup> Moreover, in sort of a twist on *Ashwander*, the Court's constitutional ruling avoided a perhaps more unsettling holding: Had it ultimately held that the President could remove SEC members at will, that holding would have destabilized a good deal of existing understanding about so-called independent agencies.

Of more general importance here, the standard "not-bound" by legal stipulations doctrine is far less absolute than might appear at first glance; the Court, in fact, quite regularly proceeds on an assumed state of legal affairs. In *Borough of Duryea v. Guarnieri*, for example, Justice Scalia objected to the Court's reliance on the fact that the parties had litigated the case on the premise that plaintiff's grievance and subsequent lawsuit fell within the Petition Clause.<sup>226</sup> Similarly, and again over the vigorous dissent of Justice Scalia, in *NASA v. Nelson* the Court assumed the existence of a due process right of informational privacy while rejecting the specific claims on the merits;<sup>227</sup> it did so in part because the litigants had not put the matter in issue.<sup>228</sup> Moreover, if a litigant consciously waives or otherwise forfeits a legal argument on statutory meaning, or the sufficiency of the evidence, the legal effect is pretty much the same as a (at least partial) "stipulation" as to the statute's meaning.<sup>229</sup> And in *Free Enterprise* itself, the Court acted on an assumed state of legal affairs when it refused to reexamine the authoritativeness of its precedents on presidential control of the administrative state, simply saying "[t]he parties do not ask us to reexamine any of these precedents, and we do not do so."<sup>230</sup>

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225. See *supra* note 216 and accompanying text (noting practical emptiness of Court's opinion in *Free Enterprise*). But cf. Neomi Rao, A Modest Proposal: Abolishing Agency Independence in *Free Enterprise Fund v. PCAOB*, 79 Fordham L. Rev. 2541, 2569–75 (2011) (discussing implications for future).

226. 131 S. Ct. 2488, 2503 (2011). Interestingly, however, he did not frame his objection on legitimacy grounds, but only on assertion that the premise was quite doubtful.

227. 131 S. Ct. 746, 756 (2011) ("[W]e will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance."); see also *Whalen v. Roe*, 429 U.S. 589, 605–06 (1977) (assuming right to privacy while rejecting specific claim on merits).

228. *Nelson*, 131 S. Ct. at 757 n.10 (observing Court was faced with inadequate briefing on important constitutional question). And, of course, the Court has now abandoned any inflexible requirement that courts must invariably first determine whether a constitutional right exists before determining whether official immunity nonetheless barred an action for damages. See *supra* notes 95–109 and accompanying text (discussing developments in *Saucier* jurisprudence).

229. Cf. *United States v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944))).

230. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010). Similarly, in *Stern v. Marshall* the Court declined to consider whether restructuring the debtor-creditor relationship in bankruptcy "'is in fact a public right' . . . [b]ecause neither party asks us to reconsider the public rights framework for bankruptcy." 131 S. Ct.

The Court's actual practice is that the Court can (but need not) act on an assumed legal state of affairs.<sup>231</sup> The matter seems to be wholly one of judicial discretion. What seems decisive are institutional concerns, with any litigant "rights" simply a subordinate factor in that overall judicial calculus. But what are those concerns, and how are they to be articulated? Should the Court have acted on the basis of the stipulation in *Free Enterprise*, when four Justices (enough to grant certiorari) raised the issue? If so, what would the justification have looked like? I am not sure. I am sure, however, that, unwilling to overthrow the modern administrative state, the majority nonetheless saw an occasion to emphasize the (theoretical) importance of the President's constitutional role in the administration of government.

5. *Agenda Control Through Choice of Decision Grounds.* — Finally, of course, the Court's issue discretion extends to the content of the opinion itself. It is common knowledge that the opinion drafting process often involves much bargaining—quite often of the "we don't need to decide X in order to resolve this case" variety. These discussions reflect pragmatic, not *Ashwander* quasilegitimacy, concerns.<sup>232</sup>

In this process, yet another doctrine has now been converted into one of judicial prerogative rather than of litigant right. Traditional doctrine had it that a respondent could defend a judgment on any ground consistent with the record.<sup>233</sup> Well, perhaps not quite. The Court said that it was ordinarily reluctant to go outside the questions that triggered

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2594, 2614 n.7 (2011) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 n.11 (1989)).

231. See, e.g., *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323–24 (2011) ("Because [petitioner] does not challenge the Court of Appeals' holding [on statutory meaning] . . . we assume, without deciding, that the standard applied by the Court of Appeals is sufficient . . ."); see also *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) ("Both parties agree [on state law]. That question of state law is not at issue here."); *Stern*, 131 S. Ct. at 2608 ("If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly."). But see *Citizens United v. FEC*, 130 S. Ct. 876 (2010). There plaintiff had challenged the statute only "as applied" to its case. But, over dissent, the Court held the provision invalid on its face, saying, *inter alia*, that a party's pleading could not "prevent[] the Court from considering [the necessity of] certain remedies . . ." *Id.* at 893. Most importantly here, the Court added "we cannot easily address [the issue of whether the statute would be unconstitutional as applied] without assuming a premise—the permissibility of restricting corporate political speech—that is itself in doubt." *Id.*

232. The evidence here is largely anecdotal, drawn from reading many judicial biographies, such as *Stern & Wermiel*, *supra* note 122 (describing negotiations leading to *Baker v. Carr* opinion). For a nice discussion and selection of materials focusing mainly but by no means exclusively on Justice Brandeis, see Sanford Levinson, *Compromise and Constitutionalism*, 38 *Pepp. L. Rev.* 821, 836–42 (2011) (examining "intra-court compromise").

233. See, e.g., *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

the grant of review;<sup>234</sup> that it is one of last, not first, review; and that it ordinarily does not decide alternative grounds not addressed below.<sup>235</sup> But the doctrine has now become entirely one of judicial discretion. This was made very clear in the last Term in *United States v. Tinklenberg*, where Justice Breyer wrote:

As the Solicitor General notes, we may consider, or “decline to entertain,” alternative grounds for affirmance. In this case, we believe it treats Tinklenberg, who has already served his sentence, more fairly to consider the alternative ground and thereby more fully to dispose of the case.<sup>236</sup>

And in *Brown v. Entertainment Merchants Ass’n*, the decision concerning minors and violent video games, Justice Alito, joined by Chief Justice Roberts, would have held the state law void for vagueness.<sup>237</sup> Justice Thomas, in dissent, chided the concurrence for reaching an issue not considered by the courts below; but, again, there was no suggestion that doing so was other than a matter of discretion.<sup>238</sup>

Finally, of course, there is always the Court itself acting *sua sponte*. Justice Brandeis’s opinion in *Erie Railroad Co. v. Tompkins*,<sup>239</sup> overturning *Swift v. Tyson*<sup>240</sup> is a well-known example.<sup>241</sup> So too is *Mapp v. Ohio*;<sup>242</sup> the question of overruling *Wolf v. Colorado* was not presented, and the Justices initially viewed *Mapp* as a First Amendment case.<sup>243</sup> Other examples could be proffered, of course.<sup>244</sup> And notice should also be taken here of a related practice: basing decisions on legislative facts, often advanced in

234. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.6 (1996). This poor soul got battered in the oral argument.

235. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.”).

236. 131 S. Ct. 2007, 2017 (2011) (citations omitted).

237. 131 S. Ct. 2729, 2742–43 (2011) (Alito, J., concurring).

238. *Id.* at 2751 & n.1 (Thomas, J., dissenting).

239. 304 U.S. 64 (1938).

240. 41 U.S. (16 Pet.) 1 (1842).

241. See Melvin Urofsky, *Louis D. Brandeis: A Life* 745 (2009); see also, Frost, *supra* note 132, at 467 (listing *Erie* among “significant cases in which the Supreme Court has raised an issue that went unmentioned by the parties”).

242. 367 U.S. 643 (1961).

243. Mimi Clark Gronlund, *Supreme Court Justice Tom C. Clark: A Life of Service 201–04* (chronicling development of *Mapp* decision); Polly J. Price, *Mapp v. Ohio Revisited: A Law Clerk’s Diary*, 35 J. Sup. Ct. Hist. 54, 60–62 (2010) (describing evolution of *Mapp* decision based on notes of Justice Brennan’s then clerk, the late, great Judge Richard Arnold).

244. Frost, *supra* note 132, at 468–69 (collecting cases). One of the best known and most controversial decisions in this respect is, of course, *Redrup v. New York*, 386 U.S. 767 (1967), where the Court based its decision on a ground that its limited grants of review (in three cases) had excluded from consideration. Hart & Wechsler, *supra* note 18, at 1460 (discussing *Redrup* controversy); see also *infra* notes 307–315, and accompanying text (discussing Frost’s view that “issue injection” is appropriate in limited circumstances).

amici briefs, that have not been subject to challenge in the adversarial process.<sup>245</sup>

My sense of the situation, based on the case law as well as various judicial biographies, is that *Ashwander* itself exerts little real pull on the Court's decisional process. When issues are avoided, they are generally avoided for reasons unrelated to any quasi legitimacy concerns.

### C. Agenda Control and Article III

Finally, a word should be said about the developments just described and Article III (and Due Process). For purposes of this Essay, Article III must be understood against two deeply embedded propositions that are in some tension with one another. *First*, our jurisprudence generally denies that litigants have a right to any particular substantive rule of decision.<sup>246</sup> This supports, if it does not compel, the proposition that litigants do not possess an unconditional right to eliminate issues from the Court's consideration of a case, and the Court does not violate Article III (or Due Process) by refusing to be so shackled. Injecting issues does nonetheless present additional Article III problems, since the Court is now fashioning rules concerning matters beyond those provided by the litigants. Appointing additional litigants—amici to “support or defend the judgment below”—certainly takes yet another step beyond, at least in the cases when no actual litigant wants to support the judgment, as opposed to instances in which the litigant cannot proceed. But the practice is now too deeply ingrained to be overthrown.

*Second*, decades after Wechsler wrote, the Court still disclaims any freestanding authority to pronounce on issues of constitutional law. Generalized claims of governmental maladministration cannot be maintained.<sup>247</sup> “In requiring a particular injury,” Justice Kennedy recently wrote, “the Court meant ‘that the injury must affect the plaintiff in a per-

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245. See Gorod, *supra* note 132, at 4 (“[A]ppellate courts often look outside the record . . . turning instead . . . to amicus briefs, even though the resulting factual findings will not have been thoroughly tested by the adversarial process.”). Gorod also provides an extensive collection of sources on the role of amici in shaping litigation. *Id.* at 8 n.27.

246. If a case could be decided on any of several substantive grounds, the Court infringes no right of the litigant in making its choice, even if that is ground not argued by the parties. *Redrup* is one outstanding example where “the Court reversed three obscenity cases on constitutional grounds not briefed or argued by the parties.” Eugene Gressman et al., *Supreme Court Practice* § 5.10, at 340 (9th ed. 2007); see also *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 510–11 (1988) (rejecting proposals advocated by litigants and fashioning its own); *supra* note 243 and accompanying text.

247. *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 599 (2007) (“We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional.” (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923))).

sonal and individual way.’”<sup>248</sup> Current doctrine shows hostility to citizen and taxpayers suits.<sup>249</sup> But the category of acceptable plaintiffs has been vastly enlarged, a point law school students often miss when their instructors focus upon litigants who cannot sue.<sup>250</sup> This expansion has caused the Court, on occasion, to cast the case or controversy standing doctrine in functional terms rather than as ensuring that there is an ongoing claim of right involved.<sup>251</sup>

These developments are fully consistent with a law declaration model. But that model has not and could not completely push out the dispute resolution model. Standing, for example, is not a “best litigant” rule. As then Professor Scalia wrote in 1983:

Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no “concrete injury in fact” whatever. Yet the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake.<sup>252</sup>

That proposition is still formally true and too much history precludes now rejecting it. A live controversy of some kind must still exist. Simply put, the litigation ordinarily must involve a claim of right; that is, a potential transfer, enlargement, or diminution of life, liberty, or property (all three terms generously conceived) affecting a litigant.<sup>253</sup>

248. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

249. Exclusion of a purely ideological plaintiff is a major premise in the cases denying citizen and taxpayer standing. See *supra* note 31 and accompanying text (discussing Court’s decision in *Winn*); see also Hart & Wechsler, *supra* note 18, at 114–22 (discussing standing issues).

250. Insistence upon a Hohfeldian plaintiff asserting interests comparable to those protected by the common law is long gone. Monaghan, *The Who and When*, *supra* note 20, at 1379–80. The Court fully accepts the reality that a wide range of nontraditional litigants can sue. See *infra* notes 251–256 and accompanying text.

251. See *Baker v. Carr*, 369 U.S. 186, 206–08 (1962); see also *Camreta v. Greene*, 131 S. Ct. 2020, 2028–29 (2011) (holding Article III does not bar Court from adjudicating challenges brought by government officials who received immunity below); *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 399–400 (1980) (“*Gerstein*, *McDonald*, and *Roper* are all examples of cases found not to be moot, despite the loss of a ‘personal stake’ in the merits of the litigation by the proposed class representative.”).

252. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881, 891–92 (1983).

253. Cf. *Tutun v. United States*, 270 U.S. 568, 578 (1925) (“In passing upon the application [for naturalization] the court exercises judicial judgment. It does not confer or withhold a favor.”). This is not a requirement that a coercive order be entered; an unopposed declaratory judgment will, for example, result in legally defining and thus in constraining or enlarging one person’s liberty even if the litigants do not seriously dispute the issue underlying the court’s order. I put to the side the special problems presented when the government is the plaintiff, see generally Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for*

*Camreta v. Greene* is intriguing in this respect.<sup>254</sup> The suit was a damage action against a state child protective services officer, and as noted, the court of appeals had held that the conduct was unconstitutional for lack of parental consent or a warrant, but that official immunity shielded the defendant from damages.<sup>255</sup> The Court found that the official retained a personal interest in the litigation. With respect to immunized parties, Justice Kagan wrote:

*This Article III standard often will be met . . . because the judgment may have prospective effect on the parties.* The court in such a case says: “Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable.” If the official regularly engages in that conduct as part of his job (as *Camreta* does), he suffers injury [because] . . . he must either change the way he performs his duties or risk a meritorious damages action. Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future.<sup>256</sup>

This analysis is, at first blush, puzzling, suggesting something like preclusion or stare decisis. As to issue preclusion, it is surely doubtful that an issue that is arguably unnecessary to the judgment would be given offensive collateral effect in a damage action by a different litigant.<sup>257</sup> And the stare decisis effect of a ruling has never been understood to preserve a case from mootness.<sup>258</sup> Similarly, the fact that the official felt “chilled” by the ruling has not been held to create a case or controversy, even

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Answers in All the Wrong Places, 97 Mich. L. Rev. 2239 (1999), or when one government agency sues another, or there is an intrabranched dispute.

254. 131 S. Ct. 2020 (2011).

255. There were two defendants in the court below, but only one had an interest when the case reached the Court. *Id.* at 2034 n.9 (noting “[b]ecause Alford will not again participate in a child abuse investigation, he has lost his interest in the Fourth Amendment ruling”).

256. *Id.* at 2029 (emphasis added) (citations omitted). She added, “And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court’s holding . . . . Only if the ruling remains good law will she have ongoing protection from the practice.” *Id.*

257. See, e.g., *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (Kagan, J.) (“A court’s judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions.”).

258. The Court has explained:

The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

*California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893); see also *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (holding “indirect benefit in a future lawsuit cannot save this case from mootness”).

where the chilling effect on private parties represents official governmental policy.<sup>259</sup> Unlike *ASARCO*, which she does not mention, the petitioner was not subject to an injunction.<sup>260</sup>

Justice Kagan appears to have focused solely on the litigants themselves.<sup>261</sup> This becomes apparent when she goes on to conclude that the case, while alive as to the official, was moot as to the plaintiff. As to her, Justice Kagan wrote, there was “not the slightest possibility” that the allegedly wrongful conduct would recur.<sup>262</sup> She thus ultimately brings her analysis within the line of cases that focuses on the likelihood of recurrence of the conduct between the litigants, not to third parties.<sup>263</sup> But, on the reasoning quoted, why should this matter? In terms of its effect on the petitioner, Justice Kagan treats the holding as the equivalent of the

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259. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . .”).

260. In *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), which arose in state court, plaintiffs obtained an injunction against state officials on federal grounds. The Court sustained its jurisdiction even though it assumed that the plaintiffs would have lacked standing to maintain such a suit in federal court. *Id.* at 618.

261. The holding raises several questions:

Isn’t the injury recognized in *Camreta* just a predictable byproduct of Pearson’s granting lower courts discretion to reach (unnecessarily) the merits of a constitutional claim in a case that could be resolved entirely on qualified immunity grounds? Is the injury identified by the Court in *Camreta* conceptually any different from the injury sustained by a regulated party seeking to bring a pre-enforcement challenge to a regulation with which that party must comply at the risk of incurring liability? From the injury suffered by a non-party when a lower court declares some conduct in which that non-party regularly engages to be unconstitutional?

Hart & Wechsler, *supra* note 18, at 7 (Supp. 2011) (citation omitted).

262. *Camreta v. Greene*, 131 S. Ct. 2010, 2034 (2011).

263. See *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (describing “capable of repetition, yet evading review” doctrine as limited to those situations in which both “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again”); see also *Juvenile Male*, 131 S. Ct. at 2865 (dismissing constitutional challenge to sentence served on ground that sentence had no future effect); *Turner v. Rogers*, 131 S. Ct. 2507, 2514–15 (2011) (rejecting mootness claim because case “falls within a special category of disputes that are ‘capable of repetition’ while ‘evading review’” (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911))). In a single footnote, Justice Kagan brushes aside the claim that the mootness holding should have ended the case, saying “this Court has never held that it may consider only one threshold issue per case.” *Camreta*, 131 S. Ct. at 2033 n.8. Justice Kagan cites no cases in support of this proposition. See *id.* And why the Court would address a difficult “threshold” question rather than an easy mootness one is never made clear. Needless to say, *Ashwander* is not mentioned.

injunction in *ASARCO*.<sup>264</sup> And, notably, her holding wiped away the ruling of the Ninth Circuit with respect to warrantless school searches!<sup>265</sup>

### III. ISSUE CONTROL AND THE COURT'S ROLE IN THE CONSTITUTIONAL ORDER

Justiciability doctrines (e.g., standing, ripeness, and mootness) structure, limit, and inform the judicial law declaration duty.<sup>266</sup> For most judges, lawyers, and academics, these doctrines are not understood as simply masks used to advance political or ideological goals. They recognize, of course, that the precise content of these doctrines has significantly evolved over time<sup>267</sup> and is the subject of constant debate.<sup>268</sup> But, like decisions on the merits, these doctrines must have principled content binding both the litigants and the courts themselves.<sup>269</sup>

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264. And if that is true, an amicus could properly be appointed to defend the judgment below. For discussion of the supreme Court's exercise of agenda control through the use of amicus briefs, see *supra* Part II.B.3 and, in particular, the example of *Bond v. United States*, *supra* notes 142–143 and accompanying text.

265. *Camreta*, 131 S. Ct. at 2035–36. Professor Pfander's intriguing recent essay would reshape thinking in this area, essentially allowing officer suits for damages to proceed to judgment if the plaintiff sought only nominal damages. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 *Colum. L. Rev.* 1601, 1607 (2011).

266. Their propositional form readily satisfies *Marbury*, of course: In the circumstances alleged, the court declares the law to be that the litigant cannot raise the substantive constitutional claim.

267. See, e.g., Monaghan, *The Who and When*, *supra* note 20, at 1364 (“[L]ike the substantive constitutional standards, the nature and form of judicial review were slowly shaped over time.”). The Court's current three-part standing test (injury, causation, and redressability), see *Ariz. Christian Sch. Tuition v. Winn*, 131 S. Ct. 1436, 1444 (2011) (laying out test), has no direct antecedents in nineteenth-century case law so far as I am aware. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689, 691–92 (2004) (concluding nineteenth-century Court saw standing in constitutional terms, though less clearly than twentieth-century Court); see also Elizabeth Magill, *Standing for the Public: A Lost History*, 95 *Va. L. Rev.* 1131, 1139–40 (2009) (suggesting early competitor standing cases reflected view that Congress could authorize private attorney general suits even if no private interest of litigant was involved).

268. For a recent article decrying recent expansions of standing doctrine as allowing excessive judicial policy making, see Robert J. Pushaw Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Cases*, 45 *Ga. L. Rev.* 1, 8–14 (2010).

269. See, for an example, Chapter Two of any edition of Hart & Wechsler. E.g., Hart & Wechsler, *supra* note 18, at 49. For some, these doctrines are simply political and ideological masks. For an unabashed subscription to this view, see Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 *N.C. L. Rev.* 1741, 1742–43 (1999) (“[J]udges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.”). Others see these doctrines as insulated from judicial policy agendas. See Daniel E. Ho & Erica L. Ross, *Did Liberal Judges Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 *Stan. L. Rev.* 591, 647–54 (2010) (discussing political valence of standing decisions and concluding “our evidence shows that standing preferences are distinguishable from merits preferences”).



*A. Professor Bickel*

For present purposes, suffice it to say that current doctrine (particularly in such areas as ripeness, prudential standing, and political questions) acknowledges some room for the exercise of judgment or discretion. But that discretion is, in principle, a legal one, a choice within certain legal bounds.<sup>270</sup> When Alexander Bickel published *The Least Dangerous Branch* in 1962, he proffered a far different conception of the nature of that discretion: The Court should be understood to possess an apparently uncontrolled prerogative to refuse decision on the merits if the result would uphold a law that ran against the grain of the polity's "durable principles."<sup>271</sup> Bickel's argument drew a firestorm of criticism,<sup>272</sup> and I believe that it is important to identify just where he may have gone wrong.

Beginning with a rather laboriously argued claim that *Marbury's* textual case for judicial review was quite wobbly,<sup>273</sup> Bickel summarily concluded that the Framers nonetheless had assumed its existence.<sup>274</sup> (Bickel's lack of any serious interest in the actual historical foundations of judicial review is striking.) Nonetheless, Bickel claimed that such an authority remained problematic in our democracy (the famous "counter-majoritarian difficulty"),<sup>275</sup> and could be legitimately justified only if the

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270. See, e.g., *Wall v. Kholi*, 131 S. Ct. 1278, 1288 (2011) (describing, in context of sentencing decisions, how law constrains exercise of discretion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) ("[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.))). It is, of course, old learning that whether or not one believes a case is ripe for decision will often turn on what one believes about the clarity of the applicable substantive rule. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517, 532 (1966) (discussing opinions in *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952), wherein justices disagreed about clarity of New York's *Feinberg Law*).

271. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 127–33 (2d ed. 1986) [hereinafter *Bickel, Least Dangerous Branch*] (describing importance of Court's ability to refuse decision as stemming from influence on societal principles its decisions have).

272. See *infra* note 275 (discussing opposition to counter-majoritarian difficulty).

273. Bickel, *Least Dangerous Branch*, *supra* note 271, at 1–14 ("I have tried to show the purpose around which Marshall organized his argument does not necessarily emerge from the text.").

274. *Id.* at 15 ("[T]he Framers of the Constitution specifically, if tacitly, expected the federal courts would assume a power . . . to pass on the constitutionality of the actions of Congress and the President, as well as of the several states.").

275. *Id.* at 16–23 ("The root of difficulty is that judicial review is a counter-majoritarian force in our system."). A large body of literature discounts the countermajoritarian difficulty. See generally Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 *Colum. L. Rev.* 356, 415–16 & n.205 (2011) (collecting sources). This is not the occasion to engage in a discussion of that issue, but this body of work seems to underestimate it both empirically and normatively. For a splendid examination of the issue, see generally Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 *Sup. Ct. Rev.* 103, 158 (tracing lineage of

Court discharged a role for which it is uniquely suited. Happily, such a role did exist: the Court's special capacity to ascertain, declare, and enforce the polity's fundamental enduring principles.<sup>276</sup> Here, he followed his famous teacher, Henry Hart:

Thus, as Professor Henry M. Hart, Jr., has written, and as surely most of the profession and of informed laity believe . . . the Court appears "predestined in the long run, not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions, *to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles* . . . ."<sup>277</sup>

While, like Hart (and Wechsler), Bickel fully agreed that decisions on the merits must be adequately principled,<sup>278</sup> he departed from the apostolic faith when he argued that justiciability doctrine need not be. Why not? Because judicial review had an important byproduct: a "legitimizing" function. Bickel understood "legitimizing," however, not as lawyers generally understand the term; that is, as judicial confirmation that the statute, ordinance, or rule falls within authority validly conferred.<sup>279</sup> Rather, he meant it as Charles Black had employed it—legitimizing in a popular sense,<sup>280</sup> legitimizing as in some sense "good" or "desirable."

[T]he Supreme Court as a legitimating force in society also casts a less palpable yet larger spell.

. . . .

Quite aside from the Court's mystic spell, how could it not make a difference in a society committed to principle as well as to

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countermajoritarian and majoritarian literature and concluding, "despite the best efforts of modern majoritarian theorists, Bickel's countermajoritarian difficulty endures").

276. Bickel was strangely silent about the implications of his view for judicial review in the separation of powers and the federalism contexts.

277. Bickel, *Least Dangerous Branch*, *supra* note 271, at 27 (emphasis added) (quoting Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84, 99 (1959)).

278. Cf. Wechsler, *Neutral Principles*, *supra* note 27, at 15 ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

279. This is an indispensable function of judicial review even (perhaps even more so) outside the area of constitutional law. "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid." Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (1965).

280. Charles L. Black, Jr., *The People and the Court* 34–47 (1960). Black and Bickel were concerned with popular reaction to supreme Court decisions. Hart and Wechsler were concerned with the reaction of first-class lawyers. E.g., Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84, 101 (1959) [hereinafter *Hart, Time Chart*] ("[T]hese failures are threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court . . .").

electoral responsibility that a measure is authoritatively said not to conflict with principle?<sup>281</sup>

For Bickel, if the Court were to defend adequately the polity's enduring principles, it must be slow to accord its *nihil obstat* to "technically" constitutional but principle-infringing governmental conduct.

How, then, should the Court proceed? Invoking *Ashwander*, by being alert to the "passive virtues" of *not* deciding: "For Brandeis . . . the mediating techniques of 'not doing' were 'the most important thing we do.'"<sup>282</sup> Accordingly, Bickel argued, the Court could (and must) employ denial of review and the justiciability doctrines in a discretionary, prudential, strategic manner.

It follows that the techniques and allied devices for staying the Court's hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled. *They mark the point at which the Court gives the electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here is where the Court is most a political animal.*<sup>283</sup>

Bickel's claim of a judicial prerogative to manipulate jurisdictional doctrine so as to deny the assertion of jurisdiction which is given drew intense fire.<sup>284</sup> It amounted to a claim that the Court could act lawlessly with respect to the Court's jurisdictional doctrines (for example, case or controversy, adequate state ground, etc.).<sup>285</sup> This conclusion was anathema to the People of the Book, who, after all, had themselves spent many hard seminary hours at Harvard, Columbia, and other such institutions mastering these doctrines.<sup>286</sup> (Hart taught federal courts at noon on Fridays and Saturdays; it was affectionately known as Darkness at Noon when I was there.) Bickel's thesis meant, said the late Professor Gunther, "the 100% insistence on principle, 20% of the time."<sup>287</sup>

Bickel's argument never gained formal traction. The standard treatments still remain efforts to domesticate the various doctrines in a principled manner.<sup>288</sup> What then can we learn from Bickel? One need not sub-

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281. Bickel, *Least Dangerous Branch*, *supra* note 271, at 29–33, 130.

282. *Id.* at 112.

283. *Id.* at 132 (emphasis added).

284. *Id.* at 127–33.

285. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 13 (1964) ("Bickel's prescription for the ultimate disposition of the case after the grant of certiorari is not merely bad but lawless judgment.").

286. But not at Yale, I can assure the reader.

287. Gunther, *supra* note 285, at 3. When Bickel wrote, the Court had considerably more jurisdiction of a mandatory nature than now exists. See *supra* notes 89–91 and accompanying text (discussing reactions to passage of Judges' Bill in 1925).

288. See Chapter Two of any edition of Hart & Wechsler, and Chapter Five of the first four editions. E.g., Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 650–55 (4th ed. 1996). To be sure,

scribe to the mindset of the denizens who occupy political science departments to recognize, as law professors always have, that the Court has an inescapably “political”—political in the large sense—dimension.<sup>289</sup> How could it be otherwise? Constitutional law operates at the intersection of law and the political order, and this necessarily means that the supreme Court is an important instrument of government.

Bickel understood this. His own efforts to deal with that fact present two difficulties. The first is one of substantive constitutional theory, and it centers on Bickel’s claim that the Court’s special mandate is to discern and articulate the republic’s fundamental enduring values. Arguably, that search inevitably results only in a voyage of judicial self-discovery, not constitutional interpretation.<sup>290</sup> This objection, to my mind, is persuasive;<sup>291</sup> nonetheless, I recognize that this strain of thinking likely can never be exorcised from our constitutional jurisprudence. Many, including members of the Court, essentially espouse that view. Justice Brennan, for example, believed that the Court was charged with “keep[ing] the community true to its own fundamental principles.”<sup>292</sup> Interestingly, Wechsler said much the same thing:

I cannot find it in my heart to regret that interpretation did not ground itself in ancient history but rather has perceived in these provisions a compendious affirmation of the basic values of a free society, values that must be given weight in legislation and administration at the risk of courting trouble in the courts.<sup>293</sup>

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observers can point to instances where principle seems to have been ignored. A frequently cited example is *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956), appeal dismissed, 350 U.S. 985 (1956), of which Bickel approved. See Bickel, *Least Dangerous Branch*, *supra* note 271, at 174 n.103. Wechsler strongly disagreed. Wechsler, *Neutral Principles*, *supra* note 27, at 34. I believe, however, that one cannot be blind to the Court’s desire to avoid “hot potatoes.” But perhaps attention is better focused upon how well those doctrines constrain generally, not on the occasions when they fail to do so.

289. But see Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus and the War on Terror: An Essay on Law and Political Science*, 110 *Colum. L. Rev.* 352, 359–77 (2010) (approving review of political science literature). Bickel, of course, does not use the term as meaning partisan political.

290. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* ch. 3 (1980). Bickel himself seems to have moved away from that position at the end of his all too short life. See Alexander Bickel, *The Morality of Consent* 25–30 (1977); Ely, *supra*, at 220 nn.130–133.

291. Other difficulties such as indefiniteness to the side, our “perfect” constitution does not mention such a value even though other constitutions place a high premium on it. See, e.g., *Islamic Unity Convention v. The Indep. Broad. Auth.* 2002 (4) SA 294 (CC) at 308 para. 30 (S. Afr.) (holding this constitutional value serves as limit on South African constitution’s guarantee of free speech).

292. Stern & Wermiel, *supra* note 122, at 234.

293. Wechsler, *Neutral Principles*, *supra* note 27, at 19; see also Henry Paul Monaghan, *A Legal Giant Is Dead*, 100 *Colum. L. Rev.* 1370, 1372 n.17 (2000) (discussing Wechsler’s position).

And, of course, such conceptions resonate well with those who believe in a “living constitution,” or those who insist that the judicial role is to enforce natural law.<sup>294</sup>

But the second aspect of Bickel’s analysis must be rejected: his claim that in “defense” of fundamental values, the Court may act in a lawless manner with respect to its own jurisdiction. (For Bickel, this was a prerogative of the supreme Court alone; inferior courts must “resolve all controversies within their jurisdiction, because the alternative is chaos.”)<sup>295</sup> This position infuriated the People of the Book, and their bishops responded: “It is simply inadmissible,” Herbert Wechsler (albeit not referring to Bickel by name) proclaimed, “that the highest court of law should be lawless in relation to its own jurisdiction.”<sup>296</sup> He categorically denied that the Court possessed any open-ended authority to refuse to decide the merits of cases properly before it.<sup>297</sup> Similarly, Gerald Gunther insisted that the *Ashwander* canons were “sound and of principled content . . . not an assertion of a vague Court discretion to deny a decision on the merits

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294. E.g., Hadley Arkes, *Constitutional Illusions and Anchoring Truths* 43–78 (2010) (arguing Constitution instantiates natural law); David Strauss, *The Living Constitution* (2010) (arguing Constitution can sensibly evolve, without falling into anything-goes flexibility caricatured by opponents). Justice Brennan ultimately came to believe that the various constitutional guarantees relating to civil liberties could be reduced to a search for the meaning of human dignity—a mantle Justice Kennedy now seems to have taken up. Stern & Wermiel, *supra* note 122, at 342, 418–19, 422–23, 545 (“By the end of his tenure, Brennan would cite human dignity as ‘the basic premise on which I build everything under the Constitution.’”); see also, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (Kennedy, J.) (“Prisoners retain the essence of human dignity inherent in all persons.”). This view also finds ready acceptance outside the profession. Professor Amartya Sen writes: “But behind the framers’ intentions there was, surely, a social vision of constitutional appropriateness, which would make room for people with divergent interests and values to live together (protecting in particular ‘the individual’s integrity and inherent dignity, as Bernard Bailyn, the leading historian of the American Revolution, puts it.’” Amartya Sen, *Rights, Laws and Language*, 31 *Oxford J. Legal Stud.* 437, 445 (2011). “This enabling vision may be called ‘the constitutional motivation,’ and it could even be seen, without straining our imagination a great deal, as . . . the ‘intention’ of the Constitution.” *Id.* at 445–46. For a comprehensive summary of the role of human dignity in modern constitutional law, see generally Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 *Notre Dame L. Rev.* 183 (2011).

295. Bickel, *Least Dangerous Branch*, *supra* note 271, at 173.

296. Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 *Wash. & Lee L. Rev.* 1043, 1061 (1977) [hereinafter Wechsler, *Appellate Jurisdiction*].

297. *Id.* (discussing Court’s “statutory duty to decide appealed cases on the merits”); see also Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts*, 63 *Colum. L. Rev.* 688, 707 (1963) (concluding there is no justification for exercise of such freestanding authority). This discussion does not exhaust the areas in which judicial authority to decline given jurisdiction may exist; for an argument that a principled discretion exists because conferral of jurisdiction is not mandatory, see David L. Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543, 562–66 (1985). For a review of the controversy that Professor Shapiro’s article created, see generally Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 *Notre Dame L. Rev.* 1891 (2004).

in a [c]ase within the statutory and constitutional bounds of jurisdiction.”<sup>298</sup>

There is a sad irony in the transformation of the Brandeis passage into a veritable *carte blanche* for Court discretion as to jurisdiction; and there is sad irony too in the invocation of Brandeis’ principled concern with threshold questions by members and appraisers of the Court who would assert a virtually unlimited choice in deciding whether to decide. The neo-Brandeisian fallacy has fortunately not yet gained a firm, persistent foothold on the Court . . . .<sup>299</sup>

Gunther adds: “The Brandeis rules are a far cry from the neo-Brandeisian fallacy that there is a general ‘Power To Decline the Exercise of Jurisdiction Which Is Given,’ that there is a general discretion not to adjudicate though statute, Constitution, and remedial law present a ‘case’ for decision and confer no discretion.”<sup>300</sup>

The general tenor of the objections is well taken. Our tradition is that jurisdictional doctrines are governed by law and must be formulated and applied in an adequately reasoned, principled manner. And the Court’s discretionary practices must yield to valid statutory constraints on its authority.<sup>301</sup> That said, however, there is, as this Essay argues, much more unconstrained discretion than appears in the standard accounts of the judicial duty. Quixotically, the discretion now exercised by the Court may be even more open-ended than Bickel’s: It is a discretion largely designed to allow the Court to avoid or to reach any constitutional ques-

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298. Gunther, *supra* note 285, at 16. He added that the Court often may and should avoid “‘passing upon a large part of all the constitutional questions pressed upon it for decision,’” and “[f]our of the seven Brandeis rules involve well-known instances of such avoidance—avoidance only of some or all of the constitutional questions argued, not avoidance of all decision on the merits of the case.” *Id.* (footnote omitted) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1938) (Brandeis, J., concurring)). He further observed:

The remaining rules given by Brandeis deal with situations in which there is no “case” or “controversy” in terms of the jurisdictional content of Article III . . . . In these Brandeis categories, decision on the merits is precluded because the jurisdictional requirements of Article III are not met; in the earlier ones, the jurisdiction to decide the merits is in fact exercised and all that is avoided is decision on some or all of the constitutional issues presented. The only possible Brandeis contribution to the fallacy lies in his reference to all of the categories as “cases confessedly within” the Court’s jurisdiction. But that referred to the fact that all of the jurisdictional requirements added by the statute had been met; and adjudication on the merits did in fact result in all of his categories, except where a jurisdictional requirement originating in the Constitution had not been satisfied.

*Id.* at 17 (footnote omitted).

299. *Id.*

300. *Id.* at 16 (footnote omitted) (quoting Bickel, *Least Dangerous Branch*, *supra* note 271, at 127).

301. This issue presses most sharply when Congress attempts to limit the Court’s authority to decide cases. For a splendid recent contribution to this topic, see generally James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw. U. L. Rev.* 191 (2007).

tions, and a discretion to be exercised not just in the service of defending fundamental principles.

### B. *Current Commentators*

Several recent articles discuss at least some of the developments this Essay describes.<sup>302</sup> This section focuses on two: Amanda Frost, who addresses the question of issue injection, including the appointment of amici to defend judgments;<sup>303</sup> and Gary Lawson, who defends the efficacy of litigant stipulations and, in the process, criticizes Professor Frost.<sup>304</sup> Both writers share a common starting point: They begin their analysis by drawing heavily upon understandings of our adversary system and dispute resolution models. While not identical, each model supposes a world in which litigants control the litigation: Lawyers present their case to a neutral, passive judge who decides the case as it is presented.<sup>305</sup> As Lon Fuller put it, adjudication works best when the judge “rests his decision *wholly* on the proofs . . . actually presented to him by the parties.”<sup>306</sup>

In *The Limits of Advocacy*, Professor Frost begins with a lucid and thorough discussion of the premises and limitations of the adversary system, which she lays out comprehensively and admirably.<sup>307</sup> She avows her own strong commitment to litigant autonomy in framing and presenting cases, as well as a fear of judicial agenda setting. But, she says, if courts are to also discharge their duty to say what the law is, she believes that issue injection is appropriate in limited circumstances: “when the parties, either intentionally or by mistake, misrepresent the law and ask the court to decide the case on those grounds,” or when the litigants purport to disre-

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302. See, e.g., Frost, *supra* note 132, at 452–53 (arguing judicial issue creation is necessary to allow judges to make complete pronouncements of law); see also Goldman, *supra* note 137, at 940–41 (criticizing Court’s appointment of amici to defend judgments).

303. Frost, *supra* note 132, at 466.

304. Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191, 1227–33 (2011).

305. See *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (“[O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment))).

306. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 388 (1978) (emphasis added); see also David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harv. L. Rev. 1634, 1670 (2009) (discussing adversarial system and truth finding).

307. Professor Frost begins her essay thus:

Party control over case presentation is a central tenet of the American adversarial legal system. An adversarial system is typically defined as one in which the parties present the facts and legal arguments to an impartial and passive decisionmaker, who then decides cases on their terms. . . . American judges are strongly discouraged from engaging in so-called “issue creation”—that is, raising legal claims and arguments that the parties have overlooked or ignored—on the ground that doing so is antithetical to a legal culture that values litigant autonomy and prohibits agenda setting by judges.

Frost, *supra* note 132, at 449; see also Goldman, *supra* note 137, at 939–50 (describing goals of adversary system).

gard a statute that, if valid, would be controlling.<sup>308</sup> Accordingly, she believes that *Washington v. Davis*<sup>309</sup> properly rejected the litigants' submission that the Equal Protection Clause reached conduct having a disparate racial impact; and similarly, that in *Dickerson v. United States*<sup>310</sup> the Fourth Circuit and the supreme Court correctly raised sua sponte the applicability of a federal statute on the admissibility of confessions.<sup>311</sup> (Indeed, in *Dickerson*, the Court appointed an amicus to defend the statute's constitutionality.)<sup>312</sup> More importantly here, she insists that the Court must insist on preserving its own "interpretive methods."<sup>313</sup> These are not subject to the litigants' control, and thus she submits that it is proper for the Court to prevent parties from avoiding the avoidance canon.<sup>314</sup> She concludes by arguing that because the supreme Court sits at the top of judicial hierarchy, it must retain freedom along the dimensions she suggests.<sup>315</sup>

Professor Lawson's recent essay is a lengthy defense of *Free Enterprise's* reliance upon the stipulation and a general critique of Frost's *The Limits of Advocacy*.<sup>316</sup> He acknowledges that considerable authority stands against the binding quality of legal stipulations on courts.<sup>317</sup> But for Lawson (though he recognizes that others disagree) the sole function of the judiciary is that of dispute resolution, a principle fully applicable whatever the Court's place in the judicial hierarchy. Courts (at least if possessed with jurisdiction) should resolve the case solely on the facts and the law submitted to them.<sup>318</sup> Professor Lawson's considerable gifts notwithstanding, his inflexible insistence upon an unyielding dispute resolution model is far too idiosyncratic to serve as a vehicle for thinking sensibly about our constitutional order, let alone about the supreme Court's

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308. Frost, *supra* note 132, at 509–10.

309. 426 U.S. 229, 239 (1976).

310. *Dickerson v. United States*, 530 U.S. 428, 437, 441 n.7 (2000); *United States v. Dickerson*, 166 F.3d 667, 682 (4th Cir. 1999).

311. Frost, *supra* note 132, at 516. The Court's amicus appointment in *Dickerson* met with criticism. 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, 292 (2000) ("[T]he courts exceeded the appropriate judicial role in raising a major constitutional issue not presented by the parties . . .").

312. 530 U.S. at 441 n.7. The government insisted that the statute was unconstitutional. In *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993), litigants assumed that the disputed statute was in effect, but the court of appeals concluded the statute had been repealed. The supreme Court determined that the court of appeals had not abused its discretion in considering the issue of repeal. *Id.* at 447–48. However, the Court then conducted its own investigation, concluding that the statute had in fact not been repealed. *Id.* at 462–63.

313. Frost, *supra* note 132, at 510.

314. *Id.*

315. *Id.* at 514.

316. Lawson, *supra* note 304, at 1191.

317. *Id.* at 1209 & n.84.

318. *Id.* at 1218–19.



place in that order.<sup>319</sup> His argument, *inter alia*, is fully consistent with his well-known rejection of our hierarchical court system based upon binding precedent.<sup>320</sup> More importantly, there is no recognition—none—that the Court is and always has been an important instrument of government; it is not akin to a traffic court, or a small claims court. Writing in 1977 on the Court's appellate jurisdiction, Wechsler, echoing de Tocqueville,<sup>321</sup> remarked:

My subject, as you know, concerns the jurisdiction of our highest court, the tribunal that is certainly without an analogue throughout the world in the magnitude of its responsibilities, measured by the difficulty and importance of the issues it confronts, the finality of many of its most transforming judgments short of constitutional amendment, the number of judicial systems from which cases on its docket may derive and the complexity of the mixed legal system in the ordering of which it has the final voice.<sup>322</sup>

This was true when de Tocqueville wrote, when Wechsler wrote, and it remains no less true today.

When all is said and done, the dispute resolution and adversary system models capture a vital aspect of litigation in the United States—but only partially. In our legal tradition courts are organs of government with duties and responsibilities that these heuristic models cannot be allowed to compromise. This seems to me particularly true in the domain of public law and constitutional adjudication, and especially so in the supreme Court. There are, of course, fairness concerns. Suppose, for example, in *M.B.Z. ex rel. Zivotofsky v. Clinton*,<sup>323</sup> a litigant would have received a favorable judgment had the Court addressed only the questions presented, but instead lost because the Court resolved the Court-injected issue against it. One can understand the appeal of fairness claims here.<sup>324</sup> Nonetheless, in according wide latitude to the supreme Court in deciding what to decide, these concerns are properly subordinated to other con-

319. Indeed, even at the trial court level he cannot account for the practice of the court, *sua sponte*, appointing experts or inviting amici.

320. Lawson, *supra* note 304, at 1228–30.

321. de Tocqueville, *supra* note 87, at 130 (“The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls.”).

322. Wechsler, Appellate Jurisdiction, *supra* note 296, at 1043. There is a “clear distinction between the obligation of a trial court to decide all the issues fairly presented and the ability of an appellate court to limit its review to issues of particular importance.” Hart & Wechsler, *supra* note 18, at 1462 (citing Daniel J. Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1, 15–17 (1994)). This observation is especially true of the supreme Court, which was the focus of Hart, Wechsler, and Meltzer's writing.

323. 131 S. Ct. 2897 (2011).

324. Of course, it is more complicated than that. The Court might not have granted certiorari, in which case the petitioner would have lost. And, of course, there is the often invoked, mostly unsuccessfully, argument that the respondent could defend the judgment on any basis consistent with the record. See *supra* note 233 and accompanying text for a discussion of this doctrine.

siderations in order to allow the Court to discharge its important function as an instrument of governance. So too are concerns over judicial agenda setting.

C. *Hart v. Wechsler*

In the end, thinking about the issues I have described brings me all the way back to what for me was the beginning: the important differences between Hart and Wechsler. They are, of course usually grouped together—and for very good reason. Wechsler famously insisted that opinions must be adequately principled—his so-called “neutral principles” demand;<sup>325</sup> and he criticized important supreme Court decisions, including *Brown* itself, as failing that requirement.<sup>326</sup> Hart’s Foreword: The Time Chart of the Justices, published in the very same issue of the *Harvard Law Review*, echoed the same theme.<sup>327</sup> The poor quality of many Warren Court opinions, Hart insisted, had eroded the confidence in the Court among first-class lawyers.<sup>328</sup>

But this general point of agreement concealed an important difference about the role of the supreme Court. Hart believed that the Court’s essential function was to elucidate constitutional meaning,<sup>329</sup> and he denied that Congress could compromise this function.<sup>330</sup> He chided the Court for wasting its time on trivial, fact-dependent cases.<sup>331</sup> His position

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325. Wechsler, *Neutral Principles*, supra note 27, at 19. For him, the principles must be applicable not only to the litigants before the Court, but general enough to be applicable to similarly situated parties. From the beginning, the demand for “neutral” principles has drawn skepticism. See Dan M. Kahan, *The Supreme Court 2010 Term—Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv. L. Rev. 1, 16 n.87 (2011) (collecting sources). Much of the criticism seems based on the erroneous premise that a demand for “neutral” principles presupposed a value-free constitution. That was not Wechsler’s view, *id.* at 16, and is plainly wrong. Professor Kahan provides a nice summary of the subsequent history of “neutral principles” theory. *Id.* at 9–19.

326. Wechsler, *Neutral Principles*, supra note 27, at 22, 26–27, 32.

327. See generally Hart, *Time Chart*, supra note 280.

328. *Id.* at 101.

329. *Id.* at 99 (describing illumination of “large areas of the law” as the “function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law”); see also Hart, *Exercise in Dialectic*, supra note 77, at 1363–66.

330. See Hart, *Exercise in Dialectic*, supra note 77, at 1365 (arguing congressionally defined exceptions to supreme Court’s appellate jurisdiction “must not be such as will destroy the essential role of the Supreme Court in the constitutional plan”).

331. Hart, *Time Chart*, supra note 280, at 96–99. Hart referred in particular to the Court’s review of the Federal Employers Liability Act (FELA) cases, in which the court below had taken away jury verdicts in favor of the plaintiffs. *Id.* (Justice Frankfurter had made a similar attack earlier on hearing FELA cases in his dissent in the “Rogers cases.” *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 524 (1957) (Frankfurter, J. dissenting).) Hart was sharply criticized on that score by Judge Thurman Arnold. Thurman Arnold, *Professor Hart’s Theology*, 73 Harv. L. Rev. 1298, 1301–02 (1960) (“When . . . the Supreme Court reviews a negligence case in order to compel courts of appeals to respect jury verdicts, the Justices are doing far more than merely deciding an isolated evidentiary fact. They are

pushes strongly towards the law declaration model. Wechsler's inclination ran very much in the opposite direction. For him, the Court was in important ways no different from other courts. As noted, he emphasized that the Court could pronounce on constitutional issues only insofar as necessary for the adjudication of the dispute before it,<sup>332</sup> a dispute which involved claims of right. The Court was not entrusted with general law declaration/judicial superintendence authority,<sup>333</sup> and in that vein Wechsler believed that nothing in Article III precluded complete congressional control over the Court's jurisdiction.<sup>334</sup> One cannot, however, say much more about the differences between these great scholars because neither developed his views in any real detail, and the potential difference between the two models were not perceived to be as sharp then as we now understand them to be.

In the end, however, what we see in the developments this Essay describes is the triumph of Hart; that is, in the supreme Court at least, the triumph of the law declaration model, albeit circumscribed by premises thinly carried from the dispute resolution model. The Court displays a strong appetite for (1) the final say on any constitutional issue appropriate for judicial resolution by any other court; and (2) maximum freedom in agenda setting, quite irrespective of the litigants' wishes.

#### IV. AGENDA CONTROL AND LEGAL REASONING

I do not wish to overclaim the results of the cases discussed. But to the extent that this Essay is correct, what must one conclude about the appropriate role of the Court in our current constitutional order? *Ashwander*, and its underlying jurisprudence, still have an agreeable resonance in our legal culture however much it lacks grounding in the Court's actual on-the-ground practice. But what of the new, jurisprudential-less constitutional order, one in which the Court asserts a rather free standing agenda control? The unease the emerging order creates can be examined along many dimensions, including separation of

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laying down a principle vital to the security of lowly litigants."). The criticism was right. I can remember to this day Simon Sobeloff, a man I revered and who was then Chief Judge of the Fourth Circuit, telling me that the Court's FELA decisions made clear to him that jury verdicts in favor of the plaintiff were not to be set aside by judges. For another round in this battle, with the jury verdict upheld, see the Court's 5-4 opinion in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011).

332. See *supra* note 83 and accompanying text. For Wechsler, this fact cured any countermajoritarian difficulty. See Wechsler, *Courts and Constitution*, *supra* note 83, at 1003, 1008 (listing this restriction as "practical, political limit[] on the power of the Court to bind the other branches and the States").

333. See Wechsler, *Neutral Principles*, *supra* note 27, at 5-6 ("The [Court's] duty . . . is not that of policing or advising legislatures or executives, nor even . . . of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support.").

334. See Wechsler, *Appellate Jurisdiction*, *supra* note 296, at 1047 ("[T]he constitutional position . . . permitted the scope of federal judicial jurisdiction—both initial and appellate—to be shaped by Congress . . .").

powers, federalism, and due process. This Part, however, focuses on a different question: Assuming, as I do, that the process of constitutional adjudication is not simply politics carried out in another forum, to what extent does the Court's expanded agenda control freedom involve an exercise of *legal* reasoning? Or is the discretion so untethered, so polycentric, that it cannot bear such a characterization?<sup>335</sup> Can such questions be addressed categorically, or only on a topic-by-topic basis?

That judicial tribunals must act in a reasoned manner is now deeply ingrained in our culture.<sup>336</sup> On important matters, these reasons are expected to be made publically available, and in written form.<sup>337</sup> In a way, the latter demands are odd. Neither the Constitution nor the First Judiciary Act imposes such requirements<sup>338</sup>—especially the now common demand for *written* reasons. And no due process right to reasons exists, as opposed to fair procedures. Yet, as the considerable and rich literature on the topic shows, our legal culture demands them for (most?) important judicial rulings. (The usual justifications are cast in terms of judicial

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335. Put differently, do its exercises entail too many interdependent variables to be resolved in a systematic, rational, and orderly manner? This, of course, draws upon Fuller, *supra* note 306, at 394–98 (defining and giving examples of polycentric tasks).

336. This paragraph draws on excellent and informative analysis, citations, and literature review in Mathilde Cohen, *Because I Said So: Federal Courts' Ipse Dixit Problem* (Sept. 23, 2011) (unpublished manuscript) (on file with the *Columbia Law Review*). Another valuable contribution is Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 *Geo. L.J.* 121 (2005).

337. Describing the views of Eisenberg and Fuller, Professor Oldfather adds, “opinions are valuable because they help to ensure the parties that their presentation of proofs and arguments was not in vain, and because the requirement of issuing an opinion also disciplines the court to consider those proofs and arguments.” Oldfather, *supra* note 336, at 176. And, of course, the Court itself expects to issue written opinions. Supreme Court Rule 41 provides that “[o]pinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs.” Sup. Ct. R. 41. Kathryn Watts reminds us that Justice Field wrote an opinion for the California Supreme Court invalidating a legislative demand for reasoned judicial decision. Watts, *supra* note 91, at 50 (referring to *Houston v. Williams*, 13 Cal. 24 (1859) and citing to *People v. Kelly*, 146 P.3d 547, 550–53 (Cal. 2006) for discussion of issue’s subsequent history).

338. The Judiciary Act of 1789 required the clerks of all federal courts to maintain accurate records concerning orders, decrees, judgments, etc., but said nothing about opinions. Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76; see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 *U. Chi. L. Rev.* 203, 230 (1997) (“Neither the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions, let alone their public distribution.”). Indeed, the current Federal Rules of Civil Procedure require publically available reasons in only limited circumstances. Fed. R. Civ. P. 52(a) (bench trials); Fed. R. Civ. P. 65(d)(1)(a) (injunctions). The district court must, of course, enter a judgment, Fed. R. Civ. P. 58, but not an opinion. See also Fed. R. App. P. 36 (describing method of entering judgment with or without opinion). But the increased volume of cases has compromised the reason-giving function of courts, particularly in the courts of appeals. Hart & Wechsler, *supra* note 18, at 44–45 nn.171–172.

transparency and accountability as well as citizen participation.)<sup>339</sup> Indeed, political theorists point to supreme courts, especially our supreme Court, as the paradigmatic examples of reason-giving institutions.<sup>340</sup>

Perhaps more to the point here, principled, adequately reasoned, professionally crafted decisionmaking is seen as an indispensable hallmark of *legitimate* judicial decisionmaking, especially by the supreme Court. As James Boyd White wrote:

One can have law of a certain kind without the judicial opinion, then, perhaps of a good kind. But with the opinion, a wholly different dimension of legal life and thought becomes possible—the systematic and reasoned invocation of the past as precedent. With this practice, in turn, there can emerge an institution that simultaneously explains and limits itself over time. It is here, in the creation of legal authority, rather than in the facilitation of prediction, that the opinion performs its peculiar and most important task.<sup>341</sup>

There are dissenters, of course. Consider, for example, Professor Segal's interview with Judge Posner in which Segal said:

So in my perfect world, Justice Kennedy would have said in *Roper*: "I think it is wrong to execute people under seventeen, the text is ambiguous, and the precedent goes both ways. We have a degree of discretion in deciding the case and I can't help but bring my personal values to that. *I am in power and I get to say and I think it is wrong to execute juveniles.*"<sup>342</sup>

No one doubts that this in fact happens, and Professor Segal's example strikes me as well chosen. But how long would the Court's claim to legitimacy last on this view, one in which the justices claimed a sweeping

339. "A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power." David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 737 (1987). Moreover, opinions and adjudication are linked: "Writing affects how judges judge. The opinion form also affects what questions judges believe they may decide and how they may decide them." David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509, 513 (2001).

340. E.g., Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* 156 (2006) (identifying courts as "prime forums" for societal debates); John Rawls, *The Idea of Public Reason, in Deliberative Democracy: Essays on Reason and Politics* 93, 108–14 (James Bohman & William Rehg eds., 1997) (describing supreme Court as "exemplar" of public reason that should govern public affairs). Judicial opinions are all about reasons, as every law school professor or student knows. But it goes without saying that the philosophers are mistaken: law professors, not supreme courts, are the real paradigm for legal reasoning.

341. James Boyd White, *What's an Opinion For?*, 62 U. Chi. L. Rev. 1363, 1367 (1995).

342. Eric J. Segal, *The Court: A Talk with Judge Richard Posner*, N.Y. Rev. Books, Sept. 29, 2011, at 48 (emphasis added). Recall here, the brouhaha created when the courts of appeals sought to discount the precedential effect of their "unpublished" opinions. For a discussion, see generally William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 Duq. L. Rev. 35 (2011) (arguing practice of issuing nonprecedential opinions undermines justice itself).

right to reject legislation on the basis of personal reasons, rather than on the basis of justifications that purport to be public-regarding and publically acceptable? (I cannot imagine the structure of the argument before the Court,<sup>343</sup> or the form of the opinion.)<sup>344</sup> When Hart and Wechsler each claimed that the reasons advanced in the Warren Court's constitutional decisions were often shoddily reasoned, they created a very considerable stir.

But what counts as a good *legal* reason in constitutional interpretation as opposed to a simply *good* reason? This is a thicket too dense to enter here, but the general idea seems to be that legal reasoning generally and constitutional interpretation in particular limit the sources from which reasons can be properly fashioned, and that rational, publically acceptable reasons must be proffered.<sup>345</sup> Unsurprisingly, controversies large and small appear after this point. Writing about substantive constitutional principles, commentators such as Jeff Powell, Charles Fried, Philip Bobbitt, Suzanna Sherry, and Richard Fallon place emphasis on different substantive factors.<sup>346</sup> For Jeff Powell, this tradition rules out any "‘all-things-considered’" discretion in the courts.<sup>347</sup> Fuller would agree;

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343. Counsel: Based on the Court's precedents, I believe that the appropriate rule is . . . .

Court: Counsel, we got the power.

Counsel: You got the power?

Court: Yes, we got the power.

Counsel: You got the power!!

344. Imagine the following newspaper report: "The Supreme Court handed down six decisions today. Two involved standard legal reasoning. Four highly controversial and divided rulings were rendered in the newly announced 'we got the power' mode."

345. The dissenting opinion in *Garcia v. Texas*, after the Court had finally recessed for summer, seems to go beyond the pale of legal reasoning. 131 S. Ct. 2866, 2868–71 (2011) (Breyer, J., dissenting). The Court, citing its prior decisions in *Medellín v. Texas*, 552 U.S. 491 (2008) and *Medellín v. Texas*, 554 U.S. 759, 760 (2008) (per curiam), denied a stay of execution based upon a violation of the Vienna Convention. *Garcia*, 131 S. Ct. at 2867. The Court had previously held the Convention did not operate as internal law and the President had no authority to change that. *Id.* at 2869. The petitioner advanced the "meritless"—I would call preposterous—claim that it violated due process to execute him "while [potentially helpful] legislation is under consideration." *Id.* at 2867. Moreover, the petitioner made no claim of prejudice from the Convention violation, so that any violation was harmless error. The United States supported a stay to let Congress consider the legislation. *Id.* This would assist the President in managing foreign relations and prevent the United States from breaching its treaty obligations. But no claim of right was asserted, or could be after *Medellín*. In other words, the United States asked the Court to do the President a favor. No substantial jurisdiction-conferring claim of right was alleged by the petitioner or the United States, and thus no case or controversy existed on the theory of the amicus. See *Tutun v. United States*, 270 U.S. 568, 576–78 (1926).

346. See *infra* notes 347–349 and accompanying text (examining the works of these scholars).

347. H. Jefferson Powell, *Further Reflections on Not Being "Not an Originalist,"* 7 U. St. Thomas L.J. 288, 292 (2010) (quoting Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 67 (2009)); cf. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 12 (2005) (urging judges interpreting the

for him, such a standard would be an example of managerial discretion.<sup>348</sup>

In the end, these writers do come to center ground on the common law mode of adjudication, with its emphasis on reasoning from precedent and by analogy.<sup>349</sup> Explicitly or implicitly, they reject this generation's version of original understanding theory, with its endless, mindnumbing, hairsplitting linguistic refinements and its microscopic examination of each word and punctuation mark in the constitutional text.<sup>350</sup> With this criticism, I am in full sympathy. Constitutions are not forged in seminar rooms. While unrelenting focus on history can yield only partial guidance,<sup>351</sup> the common law mode accurately describes the process of con-

Constitution and statutes to consider "the Constitution's democratic objective" and place "considerable importance upon consequences").

348. Fuller, *supra* note 306, at 398–404. I believe that the phenomena I am describing exceeds the range of discretion inherent in the disputes between judges who prefer rules and judges amenable to more open-ended standards. For recent discussion, see Jamal Greene, *The Rule of Law as a Law of Standards*, 99 *Geo. L.J.* 1289, 1289–90 (2011).

349. Philip Bobbitt, *Constitutional Interpretation* 5 (1991) [hereinafter Bobbitt, *Constitutional Interpretation*]; Charles Fried, *Order and Law: Arguing the Reagan Revolution—A First Hand Account* 66 (1991); Powell, *supra* note 347, at 291–92; Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 *Const. Comment.* 461, 461 & n.2 (2009). Fried and Bobbitt draw more explicitly on 1789, emphasizing the modes of common law argument; Fried emphasizes reliance upon analogy and precedent, to which Sherry adds "institutional structure and context, and . . . professional norms." Bobbitt, *Constitutional Interpretation*, *supra*, at 5; Fried, *supra*, at 66; Sherry, *supra*, at 461. Bobbitt points to the common law mode of reasoning: "The ways in which Americans interpret the Constitution could have been different . . . For Americans, however, these ways have taken the forms of common law argument, those forms prevailing at the time of the drafting and ratification of the US Constitution." Bobbitt, *Constitutional Interpretation*, *supra*, at 5. Fallon draws heavily upon conventional understanding of our practice. See generally Richard H. Fallon, *Implementing the Constitution* (2001) (analyzing "prominent theories" of supreme Court constitutional interpretation to suggest "a good theory . . . must come to terms with accepted practice"). Bobbitt's well-known "modalities" are far more open-ended: text, history, structure, prudence, and the values peculiar to the Constitution (ethos), none of which has any claim to priority. See Philip Bobbitt, *Constitutional Fate* 3–8 (1982). But these references are to current practice, not early constitutional history. *Id.* at 9–24. For a recent, elaborate description of the various interpretive techniques that have actually been used by the Court, see generally Lackland H. Bloom, Jr., *Methods of Interpretation: How the Supreme Court Reads the Constitution* (2009).

350. See Powell, *supra* note 347, at 303 (describing shortcomings of originalism); Sherry, *supra* note 349, at 462 (arguing "grand theories" like originalism fail to impose meaningful discretion on judges). Bobbitt does not address these writers explicitly because they wrote after he had written the works on constitutional theory referred to here. But I suspect he would have little sympathy. Moving well beyond the common law of 1789, Bobbitt lists a well-known range of "modalities" of appropriate constitutional arguments—each equally valid and for him none hierarchically superior. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 *Colum. L. Rev.* 731, 792–93 (2010) [hereinafter Monaghan, *Supremacy Clause Textualism*] (noting "originalism is by no means the only . . . form of constitutional interpretation that is broadly accepted today").

351. This seems to me especially clear with respect to the common law's substantive interpretive principles (as opposed to its mode of adjudication). Professor Bobbitt writes: "Thus the methods hitherto used to construe deeds and wills and contracts and promissory

stitutional adjudication that appeared from the beginning and solidified after the Civil War: analogical, precedent-driven reasoning.<sup>352</sup> This was in a sense inevitable. The Court has always considered constitutional cases just as it considered common law, statutory, and admiralty cases. They sat side-by-side on its docket; briefs and oral arguments were taken; and the written opinions issued referred to prior cases and reasoned by analogy.

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notes, methods confined to the mundane subjects of the common law, became the methods of constitutional construction once the state itself was put under law." Bobbitt, *Constitutional Interpretation*, supra note 349, at 5. Reliance on the substantive interpretive practices of the English courts was certainly one aspect of the Constitution's background. But I doubt that the common law rules of interpretation governing written instruments could have provided a sufficient toolkit for construing a document such as the Constitution—a document that, in Farrand's words, was a "bundle of compromises." Max Farrand, *The Framing of the Constitution of the United States* 201 (1913). The Constitutional Convention was certainly "a cumulative process of bargaining and compromise," if not a "seminar in political theory." Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 *Wm. & Mary Q. Rev.* 424, 424, 456 (1987). One must be careful not to overstate the matter, however. Much was in fact settled by the Constitution, such as the unitary President, two senators from each state, and one "supreme Court." See U.S. Const. art. II, § 1; id. art. I, § 3; id. art. III, § 1. Common law rules of construction governing contracts, wills, and trusts could not possibly resolve the broad and significant interpretive conflicts that existed among both the Framers and the ratifiers. Professor Forrest McDonald, a leading historian, writes:

Because the United States had not one body of lawgivers but thirteen, and because the thirteen states had thirteen different histories, cultures, heritages—sometimes widely different . . . it follows that what those lawgivers understood they were doing varied from state to state. . . . All the states ratified the same Constitution, but each read it and understood it in its own way.

Forrest McDonald, Foreword to M.E. Bradford, *Original Intentions: On the Making and Ratification of the United States Constitution*, at ix, x (1993). See generally Monaghan, *Supremacy Clause Textualism*, supra note 350, for further discussion of originalism as a guide to constitutional adjudication. The indeterminacy problem is also readily apparent throughout the document, on issues both large and small. What, for example, was the original understanding of the meaning of a civil trial by jury? See U.S. Const. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved . . .").

In interpreting the Constitution, there was much concern (at least in the Congress) with the text, and "textualism." This emerges quite clearly from reading the late David Currie's wonderful volumes on the Constitution in Congress. See Monaghan, *Supremacy Clause Textualism*, supra note 350, at 783 (collecting sources). Moreover, in 1789 there was no settled tradition of precedent in the English legal system. See Henry Paul Monaghan, *Stare Decisis in Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 763 (1988) (discussing "widely divergent" interpretations of meaning of precedent in eighteenth-century English legal system). And in *McCulloch v. Maryland*, Justice Marshall went out of his way to emphasize that the Constitution lacked "the prolixity of a legal code;" rather, "only its great outlines [are] marked." 17 U.S. (4 Wheat.) 316, 407 (1819). Whether one would have thought that a legal system built around principles derived from the construction of deeds and wills was adequate for constructing the Constitution is not clear. But see Snowiss, supra note 20, at 3–4, 10–12 ("Modern constitutional law evolved over the course of the nineteenth century by merging political components of fundamental law, as originally understood, with ordinary law attributes and technique."). Marshall himself, as noted, preferred to reason from first principles, not by analogy or precedent.

352. The Constitution's "origin and the line of [its] growth," as Holmes put it, provide the basis for judicial reasoning. *Gompers v. United States*, 233 U.S. 604, 610 (1914).



The process in which interpretation occurred meant the common law mode would envelope the process of constitutional adjudication.<sup>353</sup>

History, however, is not the focus of this Essay. The central question remains what kind of reasons can be counted as acceptable *legal* ones in constitutional adjudication? Criticism of Bickel largely focused on his willingness to manipulate justiciability doctrine, which Bickel's critics believed effectively placed these doctrines beyond the pale of principled legal reasoning. But Bickel also urged use of certiorari denial as a mechanism to avoid validating principle-infringing legislation. While we certainly do not expect written explanations on certiorari denials,<sup>354</sup> Bickel presents an important challenge: Do *legal* standards nonetheless exist that properly structure the Court's decisions to take or not take a case, and what issues to decide? Or is this an area appropriate for the exercise of freestanding, unstructured, "all things considered," Bickelian-inspired prudential discretion? Wechsler himself believed that the certiorari process was one governed by law. He pointed to the standards contained in the Court's Rule 10, and he urged the development of further and more refined standards.<sup>355</sup>

I confess considerable doubt. Rule 10 seems to me largely directionless,<sup>356</sup> and it is of no help in the cases Bickel cared about. Suppose, for example, that a state court held that a ban on gay marriage violated the Fourteenth Amendment. Should the Court grant certiorari, even if a circuit conflict existed on the issue? If it did, should it seek an avoidance ground for decision? In either situation, could a member of the Court *legally* reason, "I realize that the petition presents a societally important constitutional question and there are arguments on both sides, but 'all things considered' I would prefer to leave the state court decision in place at this time because I believe it to be a socially, progressive position, a position consistent with the Court's evolving standards of equality and one which (with Justice X's retirement) we might ultimately adopt"?

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353. What I am less clear about is whether the common law rules of interpretation of written documents were also absorbed, as Snowiss and Bobbitt contend.

354. *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J.) ("Since there are . . . conflicting and, to the unformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude.").

355. Wechsler, *Appellate Jurisdiction*, *supra* note 296, at 1061-64 (noting "the importance of a viable procedure . . . applying principles and standards the Supreme Court has developed," and discussing multiple proposed refined standards). Professor Watts, by contrast, urges (in the interests of accountability, oversight, and public participation) greater amici participation at the certiorari stage as well as the recording of judicial votes in order to constrain the certiorari process. Watts, *supra* note 91, at 46-61. For additional discussion of proposed "reforms" of the Court's certiorari process, see Hart & Wechsler, *supra* note 18, at 1477-78.

356. Rule 10 does admonish the bar of an important point. The petition is not a merits brief. The point of the petition is to persuade the Court that what is involved is an important issue calling for the Court's resolution, and to cast doubt that the decision below was correctly decided.

Less charged, less visible, examples of the problem in fact exist. *Beer v. United States*, decided at the very end of the last Term, concerned the claim of eight former and current federal judges that their failure to receive cost-of-living increases unconstitutionally diminished their salaries.<sup>357</sup> The Federal Circuit held that claims were barred by a prior Federal Circuit decision, which in turn had relied upon a supreme Court precedent.<sup>358</sup> The Court granted certiorari and vacated the judgment

for consideration of the question of preclusion raised by the Acting Solicitor General . . . . The Court considers it important that there be a decision on the question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits. Further proceedings after decision of the preclusion question are for the Court of Appeals to determine in the first instance. Justice Breyer would grant the petition for writ of certiorari and set the case for argument.<sup>359</sup>

Justice Scalia dissented:

It has been my consistent view, not always shared by the Court, that “we have no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered.”<sup>360</sup>

*Beer* directs an inferior federal court to decide an issue in order to spare the Court (at least temporarily) the necessity of deciding a constitutional question. No such authority would be claimed (at least overtly) over a state supreme court. And what the Court in effect said was, “at this time (a substantial economic downturn accompanied by so much concern over the national debt) we really do not want to decide this constitutional question either on our own or by reaffirming a precedent.” One does not, however, detect any sense of *Ashwander* compulsion concerning rules fashioned “for its own governance,”<sup>361</sup> just a pragmatic assessment that it is better for now to let the constitutional question go.

#### CONCLUSION. WHAT ROUGH BEAST . . .

The discretion exercised by the Court in issue selection (as opposed to decision on the merits) often will run past the outer edges of what counts as legal reasoning in the interpretive context.<sup>362</sup> Too many inter-

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357. 131 S. Ct. 2865 (2011).

358. *Beer v. United States*, 592 F. App'x 150 (Fed. Cir. 2010), vacated, 131 S. Ct. 2865.

359. 131 S. Ct. at 2865–66.

360. *Id.* at 2866 (Scalia, J., dissenting) (quoting *Webster v. Cooper*, 130 Ct. 456, 457 (2009)).

361. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). Rather, the issue seems more tightly bound to the role of compromise in the process of constitutional adjudication. See Levinson, *supra* note 232, at 832–33 (noting possible compromises and factors weighed in certain decisions to deny certiorari).

362. Or perhaps one should rethink the nature of what counts as legal reasoning in the context of a “supreme Court.” In any event, to be clear, I do not claim that the Court can disregard controlling acts of Congress mandating decision on the merits.

dependent variables seem properly at play. But sustained exploration of that large topic is for another day, and for abler minds. So, too, is the question of how one would describe the role of the supreme Court in the current constitutional order, a court with a desire for the last word and extensive freedom in issue selection.

Insofar as the Court has expanded its ability to have the final say on any constitutional question capable of judicial resolution, the result seems to be consistent with its current place in our constitutional order, and with popular expectations, as well as what the "reasoning class" would expect.<sup>363</sup> The fundamental animating premise of this development rejects Wechsler's conception, still shared by others, that the supreme Court is there to be used only when Congress wishes to use it. Having the final say entrenches the Court's role of helping to ensure stability, coherence, and unity in the legal system, a role that the Court has claimed (sometimes unsuccessfully) from the beginning. In any event, if we were to design a constitutional system today, surely our conception of a supreme Court would at least start from a "final say" default position.

Problems occur at the second level, however. As the Court seeks to establish an unfettered prerogative over what issues to decide, particularly by adding questions and amici to defend judgments, I am less certain. The Court's newly acquired freedom allows it—not the litigants—to shape the disputes before it. How much such freedom should exist here seems highly contestable. And so with apologies to Mr. Yeats in *The Second Coming*, I am inclined to ask "What rough beast, its hour come round at last, Slouches towards [Washington] to be born?"<sup>364</sup>

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363. See Ely, *supra* note 290, at 56–60 (describing reason as one source of fundamental values).

364. William Butler Yeats, *The Second Coming*, in *Collected Poems of W.B. Yeats* 184, 184–85 (1953).