

2011

Beyond Judicial Activism: When the Supreme Court is No Longer a Court.

Margaret L. Moses

Loyola University Chicago, mmoses1@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Courts Commons](#)

Recommended Citation

Moses, Margaret L., Beyond Judicial Activism: When the Supreme Court is No Longer a Court, 14 U.P.A. J. CONST. L. 161 (2011).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

BEYOND JUDICIAL ACTIVISM: WHEN THE SUPREME COURT IS NO LONGER A COURT

Margaret L. Moses*

The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.

—*Marbury v. Madison*¹

Our Supreme Court, in recent decisions, has reached out beyond the cases that were put before it by litigants to decide issues that were not in dispute between the parties. The four Supreme Court decisions discussed in this Article, Citizens United v. Federal Election Commission, Ashcroft v. Iqbal, Montejo v. Louisiana, and Gross v. FBL Financial Services, have frequently been criticized because of the changes in law they effected; this Article, however, focuses on the process. When the Court decides its own questions, rather than those presented by the parties, it does so without the benefit of a record created below on the question, without the opinions of lower court judges, and sometimes without the briefing of the issue by the parties or amici. In the cases discussed, the Court has also ignored traditional prudential practices, such as the avoidance canon for constitutional issues, the refusal to consider issues neither pressed nor passed upon below, and the rejection of issues raised for the first time in respondents' merits brief. It has also failed to follow its own Court Rules. In effect, the Supreme Court has acted without boundaries of any kind. In so doing, it is not acting as a court. This Article proposes that there should be boundaries that the Court is required to meet, and that those boundaries should be imposed by Congress, under the Exceptions Clause of Article III. The purpose would be to make judicial conduct consistent with the structure that the Constitution sets forth for the role of the judiciary. To the extent that no boundaries exist, the Justices become simply politicians in robes.

* Professor of Law, Loyola University Chicago School of Law. I wish to thank participants in the Constitutional Law Colloquium at Loyola Chicago where I presented an earlier version of this paper. I also wish to thank Professors George Anastaplo, Paul Carrington, Robert Jones, Charles Murdock, John Nowak, Juan Perea, Barry Sullivan, Spencer Waller, and Michael Zimmer, as well as Loyola Chicago faculty members at a Works in Progress Workshop for their insights and helpful comments.

¹ 5 U.S. 137, 176 (1803). See David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1074–75 (2006) (“What . . . receives inadequate attention in commentaries, is [Marshall’s] belief that the courts must keep to their proper sphere. Neither jurors nor judges should roam at will. Marshall was painfully clear about the existence of outer boundaries to the judiciary’s powers. He understood the theory and utility of separated and divided powers . . . Marshall’s defense of a limited power of judicial review has virtually disappeared from accounts of his jurisprudence.”).

TABLE OF CONTENTS

INTRODUCTION.....	162
I. WHAT IS THE PROPER ROLE OF A COURT?.....	167
A. Constitutional and Historical Perspective	167
B. Some Current Perspectives.....	170
II. REACHING OUT IN THE CASES	174
A. <i>Citizens United v. Federal Election Commission</i>	175
1. Background.....	177
2. Supreme Court Decision	179
B. <i>Ashcroft v. Iqbal</i>	182
1. Background.....	183
2. Supreme Court Decision	184
C. <i>Montejo v. Louisiana</i>	188
1. Background.....	189
2. Supreme Court Decision	190
D. <i>Gross v. FBL Financial</i>	194
1. Background.....	195
2. Supreme Court Decision	197
E. Advisory Opinions.....	201
F. Summary.....	202
III. CAN THE SUPREME COURT'S CONDUCT BE LIMITED?	203
A. The Problem	204
B. Judging the Judges.....	205
C. What Congress Could Do	211
CONCLUSION.....	214

INTRODUCTION

The judicial branch of the government, sometimes referred to as the “least dangerous branch,”² has in recent times demonstrated that it may not warrant this description. In the cases discussed below, the Court has reached out to decide issues that were not presented by the litigants as part of cases or controversies they brought to the Court. In so doing, the Court has decided issues that were not based on a record below, had not been the subject of decisions by lower courts, and sometimes had not even been briefed by parties or amici. In making these decisions, the Court appears to have seen the cases

² THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1986).

simply as vehicles for changing the law in a way that a majority of the Court felt was desirable. When the Court decides issues in this way, it no longer acts as a court.

The role of courts is to decide real disputes between parties and honestly tell them, and us, why they decided the case the way they did. Courts must also act with regularity and consistency. They must support the rule of law. They develop and must follow traditional, prudential guidelines for organizing and accomplishing their work. They must follow precedent or explain why they have decided not to, and must act with integrity and fairness, and with a recognition of the awesome power they hold. They cannot be just politicians in robes.

As H. Jefferson Powell has noted:

The Court plays its part in the system only when its members make it clear through their words that they are genuinely engaged with the hard issues before them, and that they are being honest with themselves and with us about the considerations that drive them. Only when their opinions seek to persuade our judgments, not just coerce our wills, can the decisions of the court truly be called authoritative.³

The Court no longer acts as a court when it changes the nature of the case the parties brought in order to create an opportunity to change the law, when it reaches out to decide issues not properly before it and not based on a record or decisions below, and when it is less than candid about its reasoning.

The Framers of the Constitution, particularly Alexander Hamilton, argued that the judiciary was the least dangerous of the three branches because its power was the most limited.⁴ The primary limitation was the constitutional requirement that judges could only decide cases and controversies brought to them by others.⁵ Judges were not free simply to opine on legislation or policy unless a specific case was put before them by particular litigants. Judges were also limited by existing law and judicial practice, including principles of *stare decisis*. Although the Framers recognized that judges would have some leeway of interpretation, they argued that the judiciary was too weak to exercise that leeway to usurp legislative authority.⁶

³ H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 108–09 (2008).

⁴ THE FEDERALIST NO. 78, *supra* note 2.

⁵ U.S. CONST. art. III, § 2.

⁶ Hamilton believed that the judiciary would be limited by “the general nature of the judicial power, . . . the objects to which it relates, . . . the manner in which it is exercised, . . . [and] its total incapacity to support its usurpations by force.” THE FEDERALIST NO. 81, *supra* note 2, at 484.

While much has been written on the subject of whether and when the Supreme Court usurps legislative power, with many different perspectives voiced, this Article argues that in at least one instance, there is a rather clear line beyond which it is improper for the Court to go. The Court should not reach out for issues that are not properly before it in order either to overturn prior cases it dislikes or to create new law serving the Court's policy preferences. The Court is no longer engaged in appellate review when it decides issues that have not come before the Court by means of the adversarial process. Yet, in the last few years, the Court's current conservative majority has done exactly that. This Court does not, of course, represent the only examples of the Supreme Court reaching out to decide issues that were not squarely put before it by the parties. Prior Courts, both liberal and conservative, have also on occasion reached out for issues that became a basis for circumventing the doctrine of stare decisis and overturning precedent.⁷ The purpose in each case appeared to be achieving a particular change in the law sought by the majority of Justices. This Article argues that regardless of the political persuasion of the majority, it is improper for Justices to change the case before them in order to change the law.

As the cases discussed below will demonstrate, the current Court not only appears to have a strong disregard for precedent or any limitation on the scope of its power, it also reaches out for issues not properly before it specifically to overturn precedent it does not like.⁸

7 For example, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Warren Court reached out to overrule *Wolf v. Colorado*, 338 U.S. 25 (1949), which had validated the well-settled state court procedure of admitting illegally seized evidence. Ms. Mapp had appealed the constitutionality of a statute pertaining to possession of obscene materials. The parties had not raised the issue of excluding evidence because of a lack of a warrant. *Mapp*, 367 U.S. at 645. Yet the Court reached out beyond the issues the parties had put before it and overruled *Wolf* on the ground that the exclusionary rule applied to the states through the Fourteenth Amendment. *Id.* at 672. For further discussion of this case, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS 195-99* (2000). *Mapp*, however, came up on an appeal, rather than by the certiorari process. An example from the Rehnquist Court is *Missouri v. Jenkins*, 515 U.S. 70 (1995), a school desegregation case. Justice Souter criticized the majority as follows:

No one on the Court has had the benefit of briefing and argument informed by an appreciation of the potential breadth of the ruling. The deficiencies from which we suffer have led the Court effectively to overrule a unanimous constitutional precedent of 20 years' standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way.

Id. at 139.

8 Criticism has come from both liberals and conservatives. See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 3 nn.2 &

The Court's reach beyond the scope of issues fairly presented to it cannot be justified by the end result, whether sought by liberal Justices or conservative ones. When the Court engages in such conduct, it is overstepping its judicial role and acting more like a legislative body. Although a court may make policy as well as law, it needs to do so within the confines of an adversarial system, involving particular cases and controversies put before it by litigants. The Court's conduct with respect to the cases discussed in this Article raises serious questions about its adherence to the structure of the Constitution. That structure was meant to impose a system of controls by way of checks and balances and separation of powers.⁹ When the Court ignores the constitutional structure, it is acting without any controls.

It is probably not surprising that the Court appears to have so little concern about boundaries imposed by Article III on the proper role of the judiciary in light of Congress's cooperation over the years in giving the Court authority over its docket and rules of procedure.¹⁰ To the extent that the Court views its power as unlimited, however, it risks becoming the most dangerous, rather than the least dangerous branch.¹¹ This Article proposes that Congress should better define the scope of the Court's appellate jurisdiction by adopting legislation under the Exceptions Clause of Article III.¹² Such legislation would give force to the case or controversy requirement. It would prevent the Supreme Court from deciding issues that have not been presented to it by litigants through an adversary process.

The Article looks at recent Supreme Court conduct from a structural approach that is consistent with a recent turn in constitutional

3 (2010) (citing criticism of the Court's lack of respect for precedent by Robert Bork, Richard Posner, Bruce Fein, Ronald Dworkin, and Geoffrey Stone).

9 See Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 466 (1991) ("[W]hatever its faults, separation of powers provides the optimum methodology for attaining the goal of assuring the maintenance of popular sovereignty and individual liberty.").

10 See, e.g., Judiciary Act of 1988, 102 Stat. 662 (virtually eliminating the Court's mandatory jurisdiction); Rules Enabling Act of 1934, 28 U.S.C. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure."); Judiciary Act of 1925, 43 Stat. 936 (giving the Court control over most of its work).

11 See Redish & Cisar, *supra* note 9, at 453 ("[T]he separation of powers provisions of the Constitution are tremendously important, . . . because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them.").

12 "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

scholarship.¹³ For example, Bruce Ackerman has lately shifted his scholarship from what he now characterizes as American “triumphalism”—that our structure of government is exceptional, in need only of tweaking—toward a critique of the dangers associated with the structure of presidential power.¹⁴ In his view, the structure of separation of powers in the Constitution no longer works to constrain the three branches of government. The President’s power has become essentially unbounded.¹⁵ Somewhat earlier, Sandy Levinson turned his scholarly focus to the many failures of all three of our constitutional institutions, which, in his view, undermine democracy.¹⁶ The point of this Article is that the structure of the Constitution has had no restraining effect on the present Supreme Court majority, which appears to be conducting itself without boundaries or accountability. Part I of the Article will focus on the role of the Court as envisioned by the Framers, and as disputed in modern times. Part II will consider four recent cases in which the Supreme Court reached out to decide issues that were not presented to it for decision by the litigants, and in the process ignored basic prudential practices and its own Court Rules. Finally, Part III will discuss new normative legal theories that provide support for critiquing the Court’s conduct as failing to comply with its obligations. It will also propose that Congress use the Exceptions Clause of Article III¹⁷ to limit the Court’s jurisdiction, and help remedy the Court’s present tendency to overstep the boundaries established in the constitutional structure.

13 See, e.g., Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 928–29 (2011) (arguing that structural safeguards of Article I provide effective limits on Congress’s authority under Article III to make exceptions to the appellate jurisdiction of the Supreme Court).

14 See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 1–7 (2010).

15 See *id.* at 184–88.

16 See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); see also, Redish & Cisar, *supra* note 9, at 452 (“[T]he Court’s enforcement of . . . [separation of powers] needs to become considerably more vigorous than it has been in the recent past.”). Current analysis tends to draw upon the practice of making inferences from constitutional structure, as discussed in CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7–32 (1969). See, e.g., Grove, *supra* note 13, at 880 n.45.

17 See *supra* note 12.

I. WHAT IS THE PROPER ROLE OF A COURT?

A. *Constitutional and Historical Perspective*

To understand when the Supreme Court's actions may go beyond its proper powers, one must consider the source of its powers. The United States Constitution, in Article III, section 2, provides that the judicial power extends to cases and controversies.¹⁸ This section thus provides both for judicial power and for a limitation on that power. The Supreme Court has power to decide cases and controversies, but such power is limited solely to those questions that are presented to it by the parties to an actual case or controversy.¹⁹ The Court itself has recently recognized that:

[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies

. . . .

. . . This is because "[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit "solely, to decide on the rights of individuals," and "must 'refrain from passing upon the constitutionality of an act. . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.'"²⁰

The requirement that an actual case or controversy must be at issue before the Court has the power to act is closely tied to separation of powers under the Constitution. The Court itself has explained that the "words [cases and controversies] define the role assigned to the judiciary in a tripartite allocation of powers to assure that the federal courts will not intrude into areas committed to the other branches of government."²¹ The case or controversy rule "limit[s] the business of federal courts to questions presented in an adversary context and in a

18 "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; . . . to Controversies to which the United States shall be a party; to Controversies between two or more States . . ." U.S. CONST. art. III, § 2.

19 The Court has developed justiciability doctrines that further limit judicial power, such as standing, ripeness, mootness, the political question doctrine, and a prohibition on advisory opinions. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 49-53 (3d ed. 2006).

20 *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007) (citations omitted).

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

form historically viewed as capable of resolution through the judicial process.²²

The case or controversy requirement makes clear that the Court's function is to decide and remedy violations of laws, and enjoin and redress constitutional violations.²³ Limitations on the Court's powers were intended to prevent the unelected judiciary from intruding upon the power of the legislative branch to create laws or the power of the executive to enforce them. According to the Framers, the inability of the Court to exercise power beyond justiciable controversies brought to it for decision would prevent abuses and judicial overreaching.²⁴ The Framers wanted to ensure that the Court had no involvement in the legislative act of creating laws. Their fear of judicial overreaching into the legislature's prerogatives is readily seen in the repeated rejection by the Constitutional Convention of 1787 of a proposed Council of Revision, which would have been composed of the President and members of the judiciary.²⁵ As proposed, the Council's task would have been to review and possibly veto federal laws before they would go into effect.²⁶ The Constitutional Convention rejected the Council in order to ensure complete separation of the courts from the legislature.²⁷ The insistence on separation

22 *Id.*

23 See CHEMERINSKY, *supra* note 19.

24 The argument ultimately won over the Anti-Federalists, who had feared that judges—with power to interpret the Constitution—would substitute their will for that of the people, create law, and undermine state interests by interpretations favoring the federal government. See *Essays of Brutus*, No. XI, N.Y.J., Jan 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 358, 420 (Herbert J. Storing ed., 1981).

25 See, e.g., Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1762 (2004) (“[T]he Founders embraced this ‘case and controversy’ restriction on judicial power not only by including the ‘case and controversy’ language in Article III, but also by repeatedly rejecting proposals for a ‘Council of Revision,’ which would have empowered select judges, working with the executive, to review pending legislation at will without waiting for injured parties to file a lawsuit upon being subjected to the new law. By rejecting the Council of Revision and by including the ‘case and controversy’ restriction, the Founders helped to ensure that judicial intrusions into the political realm would be limited.”).

26 See JAMES MADISON, NOTES OF THE CONSTITUTIONAL CONVENTION (W.W. Norton & Co., Inc., 1987 (1787)).

27 See James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 235 (1989) (“The history of [the Council of Revision] proposal illustrates how the Framers, faced with a model of judicial involvement in the lawmaking process, chose instead a judiciary that took no part in the creation of laws. In so doing, the Framers effectively chose to preclude the courts from deciding matters of public policy and to create a special place for the courts in the separation of powers scheme.”). Moreover, the Framers believed that the limitation of judicial power to cases and controversies also incorporated other restraints on judicial power, particularly by means of the doctrine of *stare decisis*. In deciding cases and controversies, courts were expected to be

stemmed from fear that any participation by the judiciary in any way in the legislative process would give it too much power.²⁸

Thus, the requirement that the Court can only resolve cases and controversies properly brought before it by litigants was expected to keep judicial powers separate from those of the other two branches of government. This requirement provides the most basic structural parameter for the proper role of the Court.

One might argue that the “case or controversy” requirement refers to cases, and not to issues within those cases, and that the Justices can raise related issues not presented by the parties.²⁹ While this may be reasonable in certain instances, it should be limited to exceptional circumstances. The Supreme Court Rules themselves limit the possibility of raising issues not included within the questions presented by the parties, requiring that “[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.”³⁰ It would thus appear contrary to the Court Rules for the Court to consider a question not fairly included within the petition for a writ of certiorari.³¹ The reasons for this rule are to enable the Court to know what is involved in the case, to have the questions that are raised in the case tested by the adversary process before certiorari is granted,

guided by precedent. As Hamilton noted, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” THE FEDERALIST NO. 78, *supra* note 2, at 470.

28 *See id.* Moreover, when then Secretary of State Thomas Jefferson asked the Supreme Court for an advisory opinion interpreting the country’s obligation under its separate treaty obligations with England and France, when those two countries were at war with each other, the Court declined to provide it. *See* CHEMERINSKY, *supra* note 19, at 54–55. The Justices explained they could not do so without violating the separation of powers and thus their limited power to decide only cases and controversies. *See id.*

29 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 246 n.12 (1981) (“An order limiting the grant of *certiorari* does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case.”).

30 SUP. CT. R. 14.1(a).

31 *See* Yee v. City of Escondido, 503 U.S. 519, 535 (1992) (“[W]e ordinarily do not consider questions outside those presented in the petition for *certiorari*. This rule [Court Rule 14.1(a)] is prudential in nature but we disregard it only in the most exceptional cases” (internal quotations and citations omitted)). Although one might argue that the Rule is meant to bind litigants but not the Court itself, there is nothing in the text of Rule 14.1(a) that would suggest this. Rule 14.1(a) of the Supreme Court Rules provides in pertinent part, “The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition or fairly included therein, will be considered by the Court.” SUP. CT. R. 14(a). The pertinent policy reasons behind the rule, that the parties and *amici* should be adequately informed in advance of the issues that are to be decided, would support having the rule apply both to the Court as well as to the parties.

and to ensure that an adequate record was made in the lower courts with respect to the questions presented. As the Court has noted:

Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) (“Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s discretion”).³²

A violation of the Court Rules does not necessarily mean that the constitutional requirement of a case or controversy has been violated. However, the rule itself indicates that the scope of the case before the Court should be limited to issues fairly presented by the parties, consistent with the case or controversy requirement. To the extent that the Court reaches out for different issues, not fairly included in the questions presented, it appears to be going beyond the judicial role set forth by the Constitution’s separation of powers. And, as will be seen in the cases discussed below in Part II, each time the Court does so, it violates other prudential practices, and sometimes its own Court Rules. The majority’s recent decision-making process and rationales contravene the way a court should act in a constitutional democracy with an adversary system.

B. Some Current Perspectives

Views of the Court’s proper role have of course evolved over time, shaped and reshaped by various legal theories developed by proponents of legal realism, the legal process school, critical legal studies, originalism, intentionalism, pragmatism, minimalism, principled minimalism, and other schools of thought. Among these different approaches to understanding the Court, its role, and its obligations, one common thread is a concern for curbing judicial discretion. While many commentators and some judges are deeply committed to one or the other of these various theories, there are increasing numbers of scholars and judges who do not believe any theory can limit a court’s discretion in judicial decision-making. Dean Erwin Cheme-

³² *Yee*, 503 U.S. at 538; *see also* *Illinois v. Gates*, 459 U.S. 1028, 1029 (1982) (Stevens, J., dissenting) (“As a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court’s judgment on a ground that the lower court had no opportunity to consider. It is especially poor practice to do so when the basis for reversal involves a factual issue on which neither party adduced any evidence.” (footnote omitted)); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (“Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.”).

rinsky, for example, states that “[n]o theory can offer determinacy in constitutional decision-making or avoid the reality that results depend on value choices made by judges in determining the meaning of the Constitution.”³³ This Article suggests, however, that the structure of the Constitution should serve as a source for limiting the Supreme Court’s discretion in law-making.

Like Dean Chemerinsky, Judge Richard Posner does not believe legal theories curb judicial discretion.³⁴ But if they are right, and the much-discussed traditional legal theories of constitutional interpretation do not curb judicial discretion or limit judicial power, then what guidelines or standards can be looked to for evaluating judicial conduct?³⁵ Among the many different perspectives on the scope and substance of proper judicial conduct, one that has provoked considerable response is Posner’s book, *How Judges Think*.³⁶ Judge Posner’s view of the role of judges and of the Supreme Court contrasts sharply with that of the Framers but in some ways does not appear to be too far out of step with certain perspectives of the current Supreme Court majority. Posner asserts that the Supreme Court is a political court, particularly when it is deciding issues of constitutional law.³⁷ From his perspective, the Court is necessarily political because it makes constitutional decisions that are fundamentally political.³⁸ Moreover, it frequently must decide political issues for which there is no obvious answer based on applicable legal doctrine.³⁹ In this “open area,”⁴⁰ where the law is unclear or underdeveloped, the Court must inevitably make the law and therefore function in a legislative manner.⁴¹ In addition, according to Posner, the fact that the Court now hears so few cases

33 Erwin Chemerinsky, *Constitutional Interpretation for the Twenty-first Century*, 1 ADVANCE: J. ACS, ISSUE GROUPS 25, 26 (2007); see also POWELL, *supra* note 3, at 46 (“As a practical matter, the theory enterprise, to be blunt, hasn’t worked, in the sense that no one, not even Ely, has come even remotely close to persuading the politicians, judges, or lawyers—much less the American public—to adopt any particular theory [of the proper role of the judiciary in exercising judicial review]. The theories all remain academic, in the most negative sense.”).

34 See RICHARD A. POSNER, *HOW JUDGES THINK* 373 (2008). Posner thinks such theories are shaped around controversial ideologies and do not command a consensus among judges or academics. See *id.*

35 Recent theories focus on moral philosophy and virtue jurisprudence. See *infra* Part III.

36 See *supra* note 34.

37 See *id.* at 8, 269, 271.

38 See *id.* at 272. Posner noted that constitutional issues “are *political* issues: issues about political governance, political values, political rights and political power.” *Id.*

39 See *id.* at 15.

40 *Id.*

41 See *id.* Posner views this open area as one where the Court has decisional discretion, and can write on a blank slate. See *id.* at 9.

means that it is “out of the error correction business,”⁴² and that therefore it does not follow a conventional model of appellate review.⁴³ Rather, it has a basically legislative character.⁴⁴

Posner acknowledges that if a judge is merely “a politician in robes,”⁴⁵ that raises the following question: “[W]hat prevents the descent of the judiciary into an abyss of unchanneled discretionary justice that would render law so uncertain and unpredictable that it would no longer be law but instead would be the exercise of raw political power by politicians called judges?”⁴⁶ He thinks the answer is not that judges must undertake a commitment to a distinct legal theory, such as economics, originalism, moral theory, or Justice Breyer’s “active liberty.”⁴⁷ Rather, he asserts that there is a “stabilizing force of consensus”—both a field-specific consensus in certain fields of law,⁴⁸ and a social consensus.⁴⁹ He acknowledges, however, that “the stabilizing force of consensus is weaker in the Supreme Court than in the lower courts, especially in constitutional cases.”⁵⁰ In one discussion of constraints on federal courts of appeals and the Supreme Court, Posner pays lip service to the case or controversy requirement, but does not in any way examine how in practice the re-

42 *Id.* at 270.

43 *See id.* In contrast, the lower courts decide most cases following a traditional formalist approach with only an occasional case that requires the court to make law in deciding cases.

44 *See id.* at 270 (“[T]he Court tries to use the few cases that it agrees to hear as occasions for laying down rules or standard that will control a large number of future cases.”).

45 *Id.* at 91.

46 *Id.* at 372.

47 *Id.* For Justice Breyer’s view, see generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

48 *See POSNER, supra* note 34, at 373. For example, in contracts, commercial law, much of torts, property, bankruptcy, and antitrust law, and some intellectual property law, Posner posits the existence of a “limited, ideological consensus.” *Id.*

49 *See id.* Posner provides as an example of social consensus, “the current consensus of American elites, and much of the general public as well, in favor of free markets.” *Id.*; cf. John E. Nowak, *Realism, Nihilism and the Supreme Court: Do the Emperors Have Nothing but Robes*, 22 WASHBURN L.J. 246, 257 (1983) (“[J]ustices cannot base rulings on a societal consensus concerning specific fundamental rights and values since none exists.”). “There is simply no evidence the Supreme Court has protected a set of values throughout its history which can be understood in terms of an identifiable system of moral philosophy or societal consensus.” *Id.* at 262.

50 POSNER, *supra* note 34, at 374. Posner also acknowledged in a chapter referring to “External Constraints on Judging,” that constraints on Supreme Court Justices include precedent, Court-curbing legislation, the possibility of a constitutional amendment, nullification by Congress of statutory interpretations, possibility of harassment by budget committees of Congress, and the possibility of appointing new Justices with different views. *Id.* at 150.

quirement works, or should work, or has not worked.⁵¹ Similarly, he mentions precedent as a constraint⁵² but later writes, “[A] sponge is not constraining, nor, in the Supreme Court, is precedent.”⁵³

Posner’s ultimate view of the proper role for the judge in making law is “constrained pragmatism,”⁵⁴ by which he means that a judge should “assess[] the consequences of judicial decisions for their bearing on sound public policy as he conceives it.”⁵⁵ The constrained pragmatist is Posner’s answer to the “legalist” judges, whom he defines as judges who “apply[] preexisting rules . . . have no truck with policy, and do not look outside conventional legal texts . . . in deciding new cases.”⁵⁶

Posner’s position as to the political nature of the Court and its legislative character is provocative, and in some ways quite realistic, but certainly a far cry from the Framers’ vision that the legislative function should be completely separate from the judicial one. His book has been criticized on a number of grounds, for example, for its ahistorical methodology,⁵⁷ for overstating his case with respect to the influence of politics on judicial decisions,⁵⁸ for poorly defining both legalism and pragmatism,⁵⁹ and for providing no empirical support for

51 *See id.* at 156 (“[T]hey can decide only cases that someone chooses to file, because Article III of the Constitution limits the judicial power of the United States to cases or controversies.”).

52 *See id.* at 150 (“[T]here are still constraints—from precedent . . .”).

53 *Id.* at 275. Posner also notes that the process of gradually extinguishing disliked precedents is known as “boiling the frog.” *Id.* at 277. The Court extinguishes the precedent gradually, just as one would start to boil a frog with warm water that heats up slowly, killing the frog before he realizes he is in trouble and jumps out. *Id.*

54 *Id.* at 13.

55 *Id.*

56 *Id.* at 8–9. At other points in the book, Posner describes legalism more sympathetically, e.g., he writes: “[M]any, indeed most, judicial decisions really are the product of a neutral application of rules not made up for the occasion to facts fairly found. Such decisions exemplify what is commonly called ‘legal formalism,’ though the word I prefer is ‘legalism.’” *Id.* at 370.

57 *See* Craig Green, *What Does Richard Posner Know About How Judges Think?*, 98 CALIF. L. REV. 625, 642 n.82 (2010) (“My target in this Review is Posner’s extreme anti-historicism; thus, I have identified three areas where there exists at least *some history* of vital importance to law and legal study.”).

58 *See* Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 862 (2010) (book review) (“To the extent he means to say that politics regularly make a difference in judicial decisions, he is wrong—and, as Dean Levi (formerly Judge Levi) suggests, he is engaging in “armchair empiricism.”).

59 *See* Chad Flanders, *A Review of “How Judges Think” by Richard A. Posner*, 3 L. & HUMAN. 118, 120 (2009) (book review) (“If legalism is itself poorly defined in *How Judges Think*, can the same be said of pragmatism? Sadly, the answer to this appears to be ‘yes.’”).

his conclusions.⁶⁰ A particularly trenchant criticism was made by David F. Levi, a former district court judge and Dean of Duke University School of Law:

[O]ne detects not just Judge Posner's well-known disdain for legal formalism, but something else more troubling and fundamental: a resistance to the limitations on a judge that are basic to our system, *particularly that judges sit to decide the issues actually presented within the confines of a particular case and record* . . . [For Posner], such matters as precedent, the procedural posture of a case, the strategic decisions of the lawyers to advance certain positions and forgo others, and the actual facts in the record simply get in the way.⁶¹

Although the criticism above is directed to Posner's position, it could appropriately be applied as well to recent Supreme Court decisions. The Court has repeatedly resisted the fundamental limitation of deciding within the confines of a particular case and record, and has shown a lack of respect for precedent, for actual facts in the record, and for the decisions of lawyers to advance certain positions and forgo others.⁶² Instead, it has directed parties to refocus on issues the Court wanted to decide and has ignored actual facts in order to decide cases according to its policy preference. Thus, while one can take issue with Posner's methodology and focus, his approach, at least as to the issues raised by Dean Levi, may be consistent with that of a number of Justices of the Supreme Court.

II. REACHING OUT IN THE CASES

Before considering other perspectives on the scope and substance of proper judicial conduct and possible limitations on judicial conduct, this Article will focus on four cases where the Supreme Court majority disregarded the confines of a particular case and record. In these cases, the Court reached out to decide issues that were not in dispute between the litigants in order to overturn precedent it did not like. As will be shown below, in one case, the issue the Court chose to decide had been abandoned below. In another, the issue had been conceded below, and in none of the cases was the issue the Court decided based on a record in the lower courts. The cases come from different areas of law: *Citizens United v. Federal Elections Commis-*

60 See David F. Levi, *Autocrat of the Armchair* (Reviewing Richard A. Posner, *How Judges Think*), 58 DUKE L.J. 1791, 1792–93 (2009) (“His generalizations about the ways of judge and the world are ex cathedra pronouncements that generally lack any identified objective support outside his own experience and belief. For many of his assertions, it would appear his dataset of judges is a set of one—himself.”).

61 *Id.* at 1793–94 (emphasis added) (footnotes omitted).

62 See *infra* Part II.

sion,⁶³ a campaign finance case; *Ashcroft v. Iqbal*,⁶⁴ a pleadings and *Bivens* supervisory responsibility case; *Montejo v. Louisiana*,⁶⁵ a Sixth Amendment right to counsel case; and *Gross v. FBL Financial Services*,⁶⁶ an age discrimination case.

A. Citizens United v. Federal Election Commission

Citizens United is the campaign finance case in which the Court decided that corporations could spend unlimited amounts of money from their own treasuries to influence candidate elections in all ways except by direct contributions to the candidates themselves.⁶⁷ Although corporations could already make such expenditures through Political Action Committees, this was found by the Court to be too burdensome.⁶⁸ The Court held that the limitations on using corporate treasury funds for express advocacy imposed by the Bipartisan Campaign Reform Act of 2002 (“BCRA” or “McCain-Feingold”)⁶⁹ were unconstitutional because they violated a corporation’s free speech rights under the First Amendment.⁷⁰

The decision needs to be considered in the context of Congress’s efforts over the years to achieve some kind of balance of various interests in the electoral process in order to maintain the confidence of citizens that they are part of a participatory democracy. In *Citizens United*, the Court rejected the balance that Congress had tried to strike.⁷¹ The reasons the Court gave, and whether they are persuasive,

63 130 S. Ct. 876 (2010).

64 129 S. Ct. 1937 (2009).

65 129 S. Ct. 2079 (2009).

66 129 S. Ct. 2343 (2009).

67 130 S. Ct. at 876.

68 *Id.* at 897.

69 Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.). The statute is also known by its popular name, McCain-Feingold.

70 130 S. Ct. at 898–99 (“Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech. As a ‘restriction on the amount of money a person or group can spend on political communication during a campaign,’ that statute ‘necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam))).

71 The decision was unpopular with the American public, 80% of whom opposed the ruling. Opposition was unusually bipartisan, and included 76% of Republicans polled and 73% of conservatives. See Gary Langer, *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC NEWS BLOG (Feb. 17, 2010, 7:00 AM), <http://blogs.abcnews.com/thenumbers/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents.html>. For other polls with similar, though not quite as strong results, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1644384>.

as well as the policies advanced or overridden, have been dealt with by other scholars, and are not the focus of this Article.⁷² The focus here is whether the issues the Court decided were properly before it.

In *Citizens United*, the Supreme Court reached out to decide the facial constitutional validity of provisions of BCRA, a question not in dispute between the parties and not necessary to decide the case before it. The only questions petitioner *Citizens United* had asked the Court to resolve⁷³ were whether the particular provisions of BCRA

72 See, e.g., Carol R. Goforth, "A Corporation Has No Soul"—*Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617 (2010); Hasen, *supra* note 71; Michael R. Siebecker, *A New Discourse Theory of the Firm after Citizens United*, 79 GEO. WASH. L. REV. 161 (2010); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United*, 42 LOY. U. CHI. L.J. 295 (2011); Samuel Issacharoff, Comment, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Michael Curtis Kent, *Citizens United and Davis v. FEC: Lochner on Steroids and Democracy on Life Support* (Wake Forest Univ. Legal Studies, Working Paper Paper No. 1685459, 2010), available at <http://ssrn.com/abstract=1685459> (discussing how the case "threatens to undermine the fiduciary duty of elected officials to the people").

73 There were two sets of Questions Presented, one in the Jurisdictional Statement, and one in the appellant's merits brief. In the Jurisdictional Statement at i, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), the Questions Presented were as follows:

1. Whether all as-applied challenges to the disclosure requirements (reporting and disclaimers) imposed on "electioneering communications" by the Bipartisan Campaign Reform Act of 2002 ("BCRA") were resolved by McConnell's statement that it was upholding the disclosure requirements against facial challenge "for the entire range of electioneering communications" set forth in the statute." Mem. Op. I, App. 15a (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003)).
2. Whether BCRA's disclosure requirements impose an unconstitutional burden when applied to electioneering communications protected from prohibition by the appeal-to-vote test, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("WRTL II"), because such communications are protected "political speech," not regulable "campaign speech," *id.* at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), or because the disclosure requirements fail strict scrutiny when so applied.
3. Whether WRTL II's appeal-to-vote test requires a clear plea for action to vote for or against a candidate, so that a communication lacking such a clear plea for action is not subject to the electioneering communication prohibition. 2 U.S.C. § 441b.
4. Whether a broadcast feature-length documentary movie that is sold on DVD, shown in theaters, and accompanied by a compendium book is to be treated as the broadcast "ads" at issue in *McConnell*, 540 U.S. at 126, or whether the movie is not subject to regulation as an electioneering communication.

In Brief for Appellant, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), the Questions Presented were only two, both focused on an as-applied challenge:

1. Whether the prohibition on corporate electioneering communications in the Bipartisan Campaign Reform Act of 2002 ("BCRA") can constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video On Demand.
2. Whether BCRA's disclaimer, disclosure, and reporting requirements can constitutionally be applied to advertisements for that documentary film that the Federal Election Commission concedes are beyond its constitutional authority to prohibit.

were invalid *as applied* to video-on-demand showings of its documentary movie about Hillary Clinton and to advertisements for the movie.⁷⁴ If the Court had found the provisions invalid as applied, there would have been no need to declare the statute unconstitutional on its face or to overrule precedent. Instead, however, the Court, after hearing oral argument, asked for supplemental briefing and argument, instructing the parties to address whether the Court should overrule two prior cases, *Austin v. Michigan Chamber of Commerce*,⁷⁵ and *McConnell v. Federal Election Commission*,⁷⁶ which had upheld the issue of *facial* validity of Section 203 of BCRA.⁷⁷

1. Background

Citizens United is a non-profit, ideological organization that makes documentary films.⁷⁸ During the 2008 primary season, it released a film entitled *Hillary, the Movie*. The film, which was critical of Hillary Clinton, was distributed to a few theaters and was available on DVD. Citizens United wanted the film to be more broadly available through video-on-demand, including availability during a period within thirty days of the 2008 presidential primary elections.⁷⁹

The problem was that federal law limited certain corporate-funded independent expenditures. The Federal Election Campaign Act (“FECA”) prohibited corporations not only from making direct contributions to candidates, but also from making independent expenditures that expressly advocated for or against a candidate (for example, “issue ads” on TV).⁸⁰ Until 2002, “express advocacy” had been interpreted as meaning that the restrictions essentially applied only if the language specifically said, “Vote for Jones,” or “Don’t vote for Jones.”⁸¹ Many issue ads and films had thus escaped the FECA restrictions by not urging such specific action. However, in 2002, Con-

74 The movie casts then-Senator Clinton in a very negative light. According to the Court, “The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.” 130 S. Ct. at 890.

75 494 U.S. 653 (1990).

76 540 U.S. 93 (2003).

77 *Supreme Court Order List*, SUPREME COURT OF THE UNITED STATES, June 29, 2009, <http://www.Supremecourt.gov/orders/ordersofthecourt.aspx?Term=08>.

78 Jurisdictional Statement at 6, *Citizens United v. FEC* at i, 130 S. Ct. 876 (2010) (No. 08-205).

79 To promote the film, *Citizens United* also wanted to show three short ads with statements about Senator Clinton, followed by the name of the movie and the website address. 130 S. Ct. at 887.

80 2 U.S.C. § 441b (2000).

81 *Buckley v. Valeo*, 424 U.S. 1, 44 n.51 (1976) (per curiam).

gress closed that loophole when it enacted BCRA. BCRA prohibited direct corporate funding of any “election communications.”⁸² Election communications consisted of any television or radio communications pertaining to a candidate for federal election, if the election communications could reach 50,000 people in the relevant area thirty days before a primary election or sixty days before a general election.⁸³ There are also disclosure requirements for anyone spending over a certain amount.⁸⁴ So under BCRA, corporations could not spend their funds for any election communication, although they could support such broadcasts with money from their Political Action Committees (“PACs”).⁸⁵

Citizens United brought a lawsuit based on First Amendment rights, seeking to enjoin the Federal Election Commission (“FEC”) from enforcing certain provisions of BCRA. Without the injunction, BCRA would prevent corporate funding of the distribution and advertisement of the movie, *Hillary*, during the thirty days before the Democratic National Committee Convention, and, if then Senator Clinton became the Democratic presidential nominee, within sixty days before the November general election.⁸⁶

A three-judge district court in D.C. unanimously rejected the arguments of Citizens United, denying its request for a preliminary injunction.⁸⁷ However, when Citizens United attempted to appeal the preliminary injunction decision, the Supreme Court dismissed for want of jurisdiction.⁸⁸ Going back before the district court, the parties cross-moved for summary judgment, and the court granted judgment to the FEC.⁸⁹ This time, in response to Citizen United’s appeal, the Supreme Court noted probable jurisdiction.⁹⁰

82 Bipartisan Campaign Reform Act of 2002, §§ 201, 203.

83 *Id.* at § 201.

84 *Id.* The disclosure requirements were ultimately upheld by the Court. *Citizens United*, 130 S. Ct. at 917.

85 Political Action Committees are separate organizations that a corporation is permitted to form in order to solicit funds for political activities. However, under FECA there are limitations on who could be solicited, and the amounts that could be contributed. These limitations were considered to be unduly burdensome by the Court. *Citizens United*, 130 S. Ct. at 897–98. Justice Stevens noted in his dissent that “Citizens United is a wealthy non-profit corporation that runs a political action committee (PAC) with millions of dollars in assets.” *Id.* at 929 (Stevens, J., dissenting).

86 *Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 (D.D.C. 2008).

87 With respect to a constitutional challenge, a section of BCRA provides for review by a three-judge district court. BCRA § 403(a), 2 U.S.C. 437(h); 28 U.S.C. § 2284.

88 *Citizens United v. FEC*, 128 S. Ct. 1732 (2008). BCRA also provides for direct appeal to the Supreme Court from the three-judge district court. *See id.*

89 *Citizens United v. FEC*, No. 07-2240, 2008 WL 2788753 (D.D.C. July 18, 2008) (mem.).

90 *Citizens United v. FEC*, 129 S. Ct. 594 (2008) (mem.).

2. *Supreme Court Decision*

What did Citizens United want from the Supreme Court? In both its jurisdictional statement and its merits brief, Citizens United asked the Court to decide whether BCRA was constitutional *as applied* to Citizens United's specific situation.⁹¹ Originally, Citizens United had asserted a facial challenge—that is, that BCRA on its face violated the First Amendment—but that challenge had been rejected by the district court in determining the motion for a preliminary injunction.⁹² However, by the time the cross-motions for summary judgment were heard, the parties had stipulated to the withdrawal of Count 5 of Citizens United's complaint—the count dealing with a facial challenge.⁹³ Thus, before the district court heard the summary judgment motion, the facial challenge had been expressly abandoned and was no longer part of the case.⁹⁴ As a result, the appeal that went to the Supreme Court was based on an as-applied case without a facial challenge to the constitutionality of BCRA. Thus, a facial attack on BCRA was simply not a part of the final decision of the three-judge district court that was appealed to the Supreme Court.

Because the facial challenge had been expressly abandoned below, it is not surprising that Citizens United did not include any reference to a facial challenge in its jurisdictional statement to the Supreme Court. Nor did it even mention in the jurisdictional statement the *Austin* or *McConnell* cases, much less ask that either case be overruled.

If the Supreme Court were acting as a court, it would have decided the issues in *Citizens United* that had actually been presented within the confines of the particular case and record and would not have disregarded the strategic decisions of the lawyers to forgo the facial challenge. By reinstating the abandoned claim, the Supreme Court failed to follow its own rules, which require a subsidiary question to be fairly included in the question presented for review.⁹⁵ Here, the facial challenge had been expressly abandoned and was not

91 See *supra* note 73, questions presented by Citizens United in both the Jurisdictional Statement and in Brief for Appellant.

92 *Citizens United*, 530 F. Supp. 2d at 281.

93 See Joint Appendix at 6a, *Citizens United v. FEC*, 130 S. Ct. 186 (2010), (No. 08-205) (“Order dismissing Count 5 of the Amended Complaint pursuant to the stipulation of the parties. Signed by United State Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lambeth and Richard W. Roberts, on May 23, 2008.”).

94 See *Citizens United v. FEC*, No. 07-2240, 2008 WL 2788753 (D.D.C. July 18, 2008) (mem.).

95 See *supra* note 31 for pertinent text and discussion of Rule 14.1(a) of the Supreme Court Rules.

included in the Questions Presented, thereby leaving no basis for the Court to reach that issue.⁹⁶

Moreover, even if an argument could be made that the issue somehow remained in the case,⁹⁷ the Court had previously stated, “It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.”⁹⁸ The district court, in its summary judgment decision—the final decision that was appealed to the Supreme Court—had no basis to consider a claim that had been expressly abandoned, so the issue was clearly not pressed or passed upon below. If precedent had been followed, the only basis for the Court to consider a claim not pressed or passed on below was if the nature of the claim was exceptional. Yet no suggestion was made by either Citizens United or the Court that there was anything exceptional about this claim that would permit the Court to decide an issue not put before it by the parties.

The fact that Citizens United briefly and belatedly asked in its merits brief for *Austin*⁹⁹ to be overruled does not change the fact that the issue of a facial challenge to the constitutionality of § 203 was expressly abandoned below and not raised in the jurisdictional statement. Moreover, the brief reference to *Austin* was in the context of its argument that § 203 should not be applied to Citizens United because it received almost no corporate funding.¹⁰⁰ Repeatedly, throughout its brief, Citizens United emphasized the “as-applied” nature of its challenge.¹⁰¹ The only time it mentioned a facial challenge was for the purpose of distinguishing the as-applied challenge in its case from the facial challenge that had been upheld in *McConnell* a few years earlier.¹⁰² An important argument to Citizens United was that the facial challenge to BCRA that had failed in *McConnell* did not fo-

96 Citizens United v. FEC, No. 07-2240, 2008 WL 2788753 (D.D.C. July 18, 2008) (mem.).

97 See *infra* notes 278–84 and accompanying text for arguments made by the Court.

98 *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (citations omitted) (internal quotation marks omitted).

99 See Brief for Appellant, *supra* note 73, at 30–32.

100 See *id.* at 32 (“The question here is whether Citizens United’s documentary is more like the speech in *MCFL* [*FEC v. Mass. Citizens for Life*]—funded entirely by individuals—or the speech in *Austin*—funded by a membership that was ‘more than three-quarters’ for-profit corporations.”).

101 See references to “as-applied” challenge in appellant’s merits brief in each of the two Questions Presented and on pages 2, 4 (three times), 10, 11, 12 (two times), 16 (three times), 18, 19, 21, 26 n.2, 28, 42 (five times), 43, 44, 45, 48, 51, 54, 57 (three times, including note 5), for a total of thirty-two references. Brief for Appellant, *supra* note 73.

102 *Id.* at 4, 42.

reclose an as-applied challenge. There was no suggestion by Citizens United that the Court should overrule *McConnell*.¹⁰³

Thus, the Court's order directing the parties to file supplemental briefs addressing the question of whether the Court should overrule *Austin* and *McConnell* came as a surprise.¹⁰⁴ Moreover, the surprise brought a certain unfairness. Justice Stevens noted in his dissent that shortly before Citizens United agreed to abandon its facial challenge, the FEC had advised the district court that it required time to develop a factual record regarding the facial challenge. No such record was developed because of the express withdrawal of the facial challenge. The record before the district court as well as before the Supreme Court was thus bereft of evidence relevant to the issue of the unconstitutionality of the statute. By reinstating a claim that Citizens United had abandoned, the Court gave Citizens United "a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal."¹⁰⁵ Moreover, although the Court decided in favor of Citizens United on the grounds that the statute on its face chilled the free speech rights of corporations,¹⁰⁶ there was, according to Justice Stevens, a "gaping empirical hole" with respect to any evidence in support of this conclusion¹⁰⁷: "Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than Citizens United."¹⁰⁸

In response to protests by the majority that the case could not possibly be decided on narrower grounds than finding BCRA § 203 unconstitutional on its face, Justice Stevens pointed out in dissent that the parties "advanced numerous ways to resolve the case . . . without toppling statutes and precedents."¹⁰⁹ Instead, howev-

¹⁰³ See *id.*

¹⁰⁴ See Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, at A1 ("When the case was first argued last March, it seemed a curiosity likely to be decided on narrow grounds. The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law [BCRA] was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law . . . Instead, it addressed the questions it proposed to the parties in June when it set down the case for an unusual second argument in September, those of whether *Austin* and *McConnell* should be overruled.").

¹⁰⁵ 130 S. Ct. 876 at 933 n.4 (2010) (Stevens, J., dissenting).

¹⁰⁶ See *id.* at 913.

¹⁰⁷ *Id.* at 933 (Stevens, J., dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 936-37.

er, the Court gutted Congress's campaign finance laws, despite having affirmed the facial constitutionality of § 203 only six years before in *McConnell*. The difference from six years before can only be understood by the change in the personnel of the Supreme Court.¹¹⁰ The Court's failure to respect the most important principles of judicial process, such as *stare decisis*, the avoidance canon (only deciding constitutional issues when necessary), and the case or controversy requirement (only deciding issues presented within the confines of a particular case and record), demonstrate that this judicial body did not conduct itself as a court. Had it acted as a court, it would have decided the question *Citizens United* presented: Whether certain BCRA provisions, as applied to *Citizens United*, were unconstitutional. A true court would have awaited the next case, for a party that presented a facial challenge to BCRA, and for a record developed in the lower court on that question, before deciding whether corporate speech had been chilled by the BCRA provisions. If the Court had concluded that the question of the facial unconstitutionality of BCRA was antecedent to the question presented, an appropriate judicial response would be to send the case back to the lower courts to allow the parties to litigate that question, including the development of a full record on the issue.¹¹¹

B. *Ashcroft v. Iqbal*

In *Citizens United*, the Court reached out and decided an issue that was not before it because it had been abandoned below. Similarly, in *Ashcroft v. Iqbal*, the Court reached out for an issue that had been conceded below and that was not in dispute between the parties. Nonetheless, the Court decided the previously conceded issue without having the benefit of briefing or argument, much less a record.¹¹² The petitioners, John Ashcroft, former Attorney General, and Robert Mueller, the Director of the FBI (hereinafter, "Ashcroft" or "the petitioners") had conceded that they could be liable to *Iqbal* if they had

110 Chief Justice Rehnquist died and was replaced by Chief Justice Roberts, and Justice O'Connor retired and was replaced by Justice Alito.

111 Deciding that the facial constitutionality of a statute must be determined prior to an as-applied challenge is completely at odds with longstanding judicial practice. The avoidance canon supports not reaching constitutional questions unnecessarily. See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945 (1997) ("[A] central tenet[] of federal statutory construction . . . is the canon of avoidance, which in its modern form directs courts to avoid substantial constitutional questions."). In accordance with this canon, an as-applied challenge should be resolved without determining facial constitutionality, particular when no facial constitutional challenge has been asserted by the parties.

112 129 S. Ct. 1937, 1954–55 (2009) (Souter, J., dissenting).

actual knowledge of unconstitutional conduct by subordinates and exhibited deliberate indifference to it.¹¹³ Their concession was not surprising, given that this was the existing standard for liability under *Bivens v. Six Unknown Federal Narcotics Agents*,¹¹⁴ which had been made clear in decisions of the Supreme Court and of the circuit courts.¹¹⁵ The Court, however, changed the law by sua sponte eliminating supervisory liability of any kind under *Bivens*.¹¹⁶

1. Background

Iqbal was a Muslim citizen of Pakistan arrested in the United States after the attacks of September 11, 2001.¹¹⁷ He was one of 184 detainees listed as persons of “high interest” to the September 11th investigation and held in a maximum security facility under restrictive conditions.¹¹⁸ He brought suit for damages based on constitutional violations while in federal custody, including being kicked, punched and otherwise mistreated.¹¹⁹ He also alleged that the federal officials Ashcroft and Mueller had adopted an unconstitutional policy as to his confinement and treatment, and that they “‘knew of, condoned, and willfully and maliciously agreed to subject’ respondent to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race and/or national origin and for no legitimate penological interest.’”¹²⁰ The district court denied Ashcroft’s motion to dismiss Iqbal’s complaint for insufficiency to show unconstitutional conduct by Ashcroft and Mueller, and the Second Circuit affirmed.¹²¹ The Supreme Court granted certiorari and reversed.¹²²

113 See Petition for Writ of Certiorari at 27–28, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 336225; Brief for Petitioners at 50, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4063957.

114 403 U.S. 388 (1971).

115 See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Blyden v. Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999); *Johnson v. Martin* 195 F.3d 1208, 1219-20 (10th Cir. 1999); *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994); *Manarite v. Springfield*, 957 F.2d 953, 957 (1st Cir. 1992); *Andrews v. Philadelphia*, 895 F.2d 1469, 1479-80 (3d Cir. 1990).

116 See *Iqbal*, 129 S. Ct. at 1955 (Souter, J., dissenting).

117 See *id.* at 1942 (majority opinion).

118 *Id.* at 1943.

119 *Id.* at 1942, 1944.

120 *Id.* at 1944.

121 *Id.* at 1942–43.

122 *Id.* at 1954.

2. Supreme Court Decision

Although most of the focus on *Iqbal* has been on the new pleading standard created by the Court,¹²³ the decision made another major change in the law. The Court eliminated supervisory liability under *Bivens*. *Bivens* established that there could be suits for damages against federal officials for violations of certain constitutional rights.¹²⁴ It is well-established in case law that under *Bivens* there can be no liability of a supervising official on a theory of respondeat superior.¹²⁵ Rather, there must be culpable conduct directly attributable to the supervisor. At the very least, according to Supreme Court precedent prior to *Iqbal*, liability will not attach unless the supervisor “knows of and disregards an excessive risk” of harm.¹²⁶ In other words, the supervisor can be liable under *Bivens* if he is deliberately

123 In *Iqbal*, the Supreme Court substantially changed existing pleading rules. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 850 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010). A prior decision by the Court, *Bell Atlantic Corp. v. Twombly*, had earlier modified the traditional notice pleading requirement of Federal Rule of Civil Procedure 8(a)(2) by holding that pleadings should not just give notice, but should function to screen for meritless suits. 550 U.S. 544, 558 (2007). *Twombly* interpreted Rule 8(a)(2) as requiring a statement of claim that was plausible, not just possible. *Id.* at 555–56. In *Iqbal*, however, the Court went further by developing a two pronged analysis of pleading sufficiency. 129 S. Ct. at 1950. First, the Court separated out allegations it considered to be legal conclusions, which it said could not be accepted as true because they were conclusory. Second, looking only at the factual allegations, the Court found them to be insufficient. *Id.* at 1951. Justice Souter, who wrote the *Twombly* decision, was quite critical of the Court’s new approach in *Iqbal* because it found allegations conclusory by looking at them in isolation, and did not consider the complaint as a whole. 129 S. Ct. at 1960–61 (Souter, J., dissenting). The Court’s decision as to the pleading rules has been quite controversial and widely discussed by commentators. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Martin H. Redish & Lee Epstein, *Bell Atlantic v. Twombly and the Future of Pleading in the Federal Courts: A Normative and Empirical Analysis*, (Northwestern Public Law Research, Working Paper No. 10–13), available at <http://ssrn.com/abstract=1581481>.

124 Its counterpart against state officials is 42 U.S.C. § 1983. In *Iqbal*, violations of the First and Fifth Amendments were alleged. See generally James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

125 See, e.g., *Bonner v. Outlaw*, 552 F.3d 673, 678–79 (8th Cir. 2009) (“In a *Bivens* action, there is no respondeat superior liability.”); *Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006) (“[T]he doctrine of respondeat superior does not apply in *Bivens* actions.”); *Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003) (“[S]upervisory officials are not liable under [*Bivens*] for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability.” (internal quotation marks omitted) (citations omitted)). Respondeat superior is the doctrine under which “[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment.” See RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

126 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

indifferent to the harm from constitutional violations being caused by individuals under his supervision.¹²⁷

In attempting to obtain dismissal of Iqbal's case, Ashcroft focused on two arguments, both raised in the two Questions Presented in the Petition for Certiorari.¹²⁸ First, he argued that the pleadings were insufficient because they contained only conclusory allegations that high-level government officials had knowledge of alleged wrongdoing of their subordinates.¹²⁹ Second, he argued that high-level officials who did not have actual knowledge could not be held liable on a theory of constructive knowledge.¹³⁰ He conceded, both in the Petition for Writ of Certiorari and in the Merits Brief, that if the petitioners had actual knowledge of a substantial risk of wrongdoing, and were deliberately indifferent, they would be liable.¹³¹ This concession was based on the law as declared by the Supreme Court in *Farmer v. Brennan*,¹³² and as consistently expressed by circuit courts. Neither party challenged the applicability of that standard of liability to the conduct at issue in the *Iqbal* case. Ashcroft's aim throughout the brief was to distinguish the actual knowledge standard from a constructive knowledge standard. He argued that although some circuit courts, including the Second Circuit, appeared to accept a constructive knowledge standard,¹³³ in fact, any standard *other than* actual knowledge should preclude liability.¹³⁴

Iqbal conceded that he could not recover under a theory of respondeat superior, and never claimed Ashcroft was liable under a constructive notice theory.¹³⁵ So the parties appeared to agree that liability

127 See *id.* at 841.

128 See Petition for Writ of Certiorari, *supra* note 113, at i. The two Questions Presented were as follows:

1. Whether a conclusory allegation that a Cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those official under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

129 See Brief for the Petitioners, *supra* note 113, at 15-42.

130 See *id.* at 42-52.

131 See Petition for a Writ of Certiorari, *supra* note 113, at 14, 27 (citing *Farmer*, 511 U.S. at 841-42); Brief for the Petitioners, *supra* note 113, at 50.

132 See *supra* note 126.

133 See Petition for Writ of Certiorari, *supra* note 113, at 26-28.

134 See *id.* at 29 ("As applied to the allegations in this case, the standard articulated in *Farmer* for 'deliberate indifference,' would preclude liability unless petitioners had actual knowledge of the discriminatory selection of suspects as 'of high interest . . .').")

135 See 129 S. Ct. at 1956 (Souter, J., dissenting).

ty turned on petitioners' actual knowledge and deliberate indifference, and on whether Iqbal had properly pleaded under Rule 8(a)(2).¹³⁶ Despite the parties' apparent agreement as to the actual knowledge standard, and despite neither party having requested the Court to revisit that standard, the Court, without requesting additional briefs or argument, sua sponte eliminated actual knowledge as a basis for liability under *Bivens*, as well as any other standard that would be based on supervisory responsibility.¹³⁷

In order to abolish any concept of liability based on supervisory responsibility under *Bivens*, the Supreme Court equated the supervisory responsibility standard with respondeat superior, and then asserted that a supervisor is never liable for the acts of subordinates, but only "for his or her own misconduct."¹³⁸ This was a new statement of the law, which was contrary to established precedent, both at the Supreme Court level and in circuit decisions.¹³⁹ Supervisory liability, as the dissent pointed out, is not like respondeat superior, where liability for the principal or the employer is based solely on acts of subordinates because they are within the scope of employment or responsibility.¹⁴⁰ Rather, with supervisory responsibility, there is a spectrum of fault by a supervisor that could lead to liability.¹⁴¹ It could be actual knowledge coupled with deliberate indifference, as the Supreme Court had found in *Farmer*.¹⁴² Liability could attach, as Chief Justice Roberts stated when he was on the D.C. Circuit, where supervisors "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see."¹⁴³ Liability has also been imposed on a supervisor who was reckless or grossly negligent in supervising.¹⁴⁴

So the Supreme Court changed the law in a fundamental way, in disregard of precedent, and did so even though the issue had not been put before it by the parties. It determined sua sponte a matter

136 See *id.*

137 See *id.* at 1949.

138 *Id.* (majority opinion).

139 See *supra* notes 126–27 and accompanying text.

140 See 129 S. Ct. at 1958 (Souter, J., dissenting) ("The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.")

141 See *id.* ("[T]here is quite a spectrum of possible tests for supervisory liability . . .").

142 511 U.S. 825, 837, 841 (1994).

143 *Int'l Action Ctr. v. United States*, 365 F.3d 20, 28 (D.D.C. 2004) (quoting *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (Posner, J.)).

144 See, e.g., *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 911, 914 (1st Cir. 1988).

that was conceded below, that was not in controversy between the parties, and that the parties had not asked the Court to decide. The new law that the Court created was unsupported by a factual record below and had not been briefed or argued by the parties. There were no lower court opinions which the Court could consider in reaching its decision. The decision represents a flagrant departure from the Court's traditional prudential practices, and raises serious concerns about how it manages its certiorari jurisdiction.

The dissent pointed out the unfairness of the Court's deciding a question that had been neither briefed nor argued.¹⁴⁵ As a result of the petitioners' concession below that supervisory liability could be based on actual knowledge and deliberate indifference to risk of harm, Iqbal could not have foreseen the need to argue the point, and thus had no chance to be heard on the question.¹⁴⁶ Moreover, the dissent suggested that had the issue been briefed and argued, a reasonable middle ground between respondeat superior and no supervisory responsibility at all could have been found, particularly in light of the consensus of the circuits.¹⁴⁷ The dissent stated further that the Court's elimination of supervisory responsibility as a basis for liability was not necessary to the Court's decision, but if it were necessary, then that would make the decision even more unfair.¹⁴⁸ If the standard for supervisory liability were a dispositive issue, then it was even more inappropriate for Iqbal to be given no opportunity to brief and argue the point.¹⁴⁹

That the Court made it even more difficult to establish liability under *Bivens* is not surprising in light of a rather long line of decisions over the last quarter century that have increasingly limited *Bivens*'s liability.¹⁵⁰ But what is surprising and disturbing is the Su-

¹⁴⁵ 129 S. Ct. at 1957–58 (Souter, J., dissenting).

¹⁴⁶ *See id.* at 1957 (“[T]he Court’s approach is most unfair to Iqbal. He was entitled to rely on Ashcroft and Mueller’s concession . . . that they could be held liable on a theory of knowledge and deliberate indifference. By overriding that concession, the Court denies Iqbal a fair chance to be heard on the question.”).

¹⁴⁷ *See id.* at 1958.

¹⁴⁸ *See id.* (“What is most remarkable about [the Court’s] foray into supervisory liability is that its conclusion has no bearing on its resolution of the case.”).

¹⁴⁹ *See id.* at 1958 n.2 (“[T]he majority’s rejection of the concession is somehow outcome determinative . . . for Iqbal had no reason to argue the (apparently dispositive) supervisory liability standard in light of the concession.”).

¹⁵⁰ *See* Alexander A Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010); *see also* Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 259 (2010) (“[T]he unbroken pattern of the Court’s decision since the early 1980’s has been to limit Bivens dramatically, even in cases where no other obvious legal remedy seemed available.” (citations omitted)).

preme Court did not act like a court in doing so. Even commentators who agreed with the Supreme Court's result of eliminating supervisory liability were "surprised" and "troubled" that the Court did so without briefing or argument.¹⁵¹ A Court conducting itself properly would not have ignored the concession below and would not have decided an issue unnecessary to resolve the matter before it. At the very least, if the issue was necessary to resolve the matter before the Court (which did not appear to be the case), the Court should have remanded the question to permit it to be considered below, and then would have had the benefit of a record below on the issue, lower court decisions, as well as briefs and arguments, when it came before the Court. By not acting properly as a court, the conservative majority shortchanged the parties and the judicial process.

C. *Montejo v. Louisiana*

In *Montejo*, the issue involved the scope of the Sixth Amendment right to counsel. Just as it had done in *Citizens United*, the Court reached out beyond the questions presented to overrule a case—in this instance, *Michigan v. Jackson*.¹⁵² In so doing, the Court disregarded *stare decisis* and acted "on its own initiative and without any evidence that the longstanding Sixth Amendment protections established in *Jackson* [had] caused any harm to the workings of the criminal justice system."¹⁵³

1. *Background*

During a preliminary hearing, a Louisiana court ordered counsel to be appointed for Jesse Jay Montejo, who was charged with first degree murder.¹⁵⁴ Montejo said nothing at the hearing to indicate that he accepted the appointment; nor was he asked if he accepted the appointment.¹⁵⁵ Later, after he was read his rights under *Miranda v. Arizona*,¹⁵⁶ but before any contact with counsel, he was questioned by police and asked if he would accompany them to hunt for the mur-

¹⁵¹ See, e.g., Sheldon Nahmod, *Constitutional Torts, Overdeterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 280, 292–93 (2010) (“[I]t is surprising from a process perspective that the Court announced that it was adopting the [new] approach to supervisory liability under circumstances of no briefing and no argument. This is particularly troubling because the circuits for the most part adopted the [prior] approach.”).

¹⁵² 475 U.S. 625 (1986).

¹⁵³ *Montejo v. Louisiana*, 129 S. Ct. 2079, 2094 (2009) (Stevens, J., dissenting).

¹⁵⁴ See *id.* at 2082 (majority opinion).

¹⁵⁵ See *id.* at 2083.

¹⁵⁶ 384 U.S. 436 (1966).

der weapon.¹⁵⁷ During the trip, at the suggestion of the police, he wrote a letter of apology to the widow of the murdered man, apologizing for the murder.¹⁵⁸ Despite defense objection at trial, the letter was admitted into evidence, and Montejo was convicted and sentenced to death.¹⁵⁹

The rule of *Jackson* was that “if the police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of defendant’s right to counsel for that police-initiated interrogation is invalid.”¹⁶⁰ Thus, it would appear that under *Jackson*, any waiver by Montejo of his right to have counsel present with respect to any police-initiated questioning was invalid. *Jackson* made clear that a defendant cannot be subject to questioning outside the presence of counsel unless he initiates “exchanges or conversations with the police.”¹⁶¹ However, in affirming Montejo’s conviction and sentence, the Louisiana Supreme Court held that the rule of *Jackson* was not triggered unless the defendant actually requested a lawyer or in some way asserted his right to counsel.¹⁶² Because Montejo had said nothing at the time the court ordered counsel to be appointed, the court found he had not triggered the rule.¹⁶³ According to the court, the waiver of his right not to be questioned unless his lawyer was present was thus not automatically invalid.¹⁶⁴ Nonetheless, the question remained whether the waiver was made knowingly, intelligently, and voluntarily.¹⁶⁵ The Louisiana court then held that the waiver was properly made because the police had read Montejo his *Miranda* rights, which sufficiently informed him of his right to counsel and of the consequences of proceeding without counsel.¹⁶⁶

2. Supreme Court Decision

Montejo asked the Court to reverse on the ground that the Louisiana rule was inconsistent with *Jackson*. Respondent Louisiana sought affirmance, claiming the decision was consistent with *Jackson*.

157 See *Montejo*, 129 S. Ct. at 2082.

158 See *id.*

159 See *id.*

160 *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

161 See *id.* at 626.

162 *State v. Montejo*, 974 So. 2d 1238, 1260–61 & 1261 n.68 (La. 2008).

163 See *id.* at 1261.

164 See *id.*

165 See *id.*

166 See *id.* at 1262.

Both parties sought clarification of a defendant's rights after counsel has been appointed.¹⁶⁷ The Supreme Court criticized the Louisiana court's application of the *Jackson* rule as "exceedingly hazy" because it treated differently defendants who requested counsel and defendants for whom counsel was appointed without a request.¹⁶⁸ The Court also noted that states followed different practices with respect to appointment of counsel, some requiring that a formal request be made and others appointing counsel automatically upon a finding of indigency.¹⁶⁹ Had the Court decided the case before it, it would have simply reversed the Louisiana court for improperly interpreting *Jackson*. It then could have declared a bright-line, easy-to-follow rule that whenever defendants requested counsel or when counsel was appointed without a request, then any alleged waiver by defendant of his right to counsel with respect to a police-initiated interrogation would be invalid. Instead, the Court reached out beyond the case for a resolution neither party had sought. It asked for supplementary briefs on whether *Jackson* should be overruled and then proceeded to overrule this 23-year-old case.¹⁷⁰

As justification for running roughshod over the doctrine of stare decisis, the Court offered several arguments. First, it asserted that the *Jackson* decision had proved unworkable.¹⁷¹ Second, it claimed that the *Jackson* rule had only marginal benefits that were outweighed by substantial costs to the truth-seeking process and the criminal justice system.¹⁷² Third, it declared that because the *Jackson* opinion was only two decades old, "eliminating it would not upset expectations."¹⁷³ Finally, the Court described the purpose of the *Jackson* rule narrowly, as simply protecting against police badgering, and found that this right

167 The question presented on behalf of petitioner Montejo was as follows: "When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to 'accept' the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?" Brief for the Petitioner at i, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2008 WL 4948399. In its initial brief, appellee-respondent Louisiana presented the following question: "Does the rule established by the Court in *Michigan v. Jackson* bar police interrogation when a defendant has not requested counsel or otherwise asserted his right to counsel and has validly waived his right to counsel, but a court has appointed the Indigent Defender Board to represent him?" *Id.* (citation omitted).

168 *Montejo v. Louisiana*, 129 S. Ct. 2079, 2084 (2009).

169 *See id.*

170 *See id.* at 2091.

171 *See id.* at 2088.

172 *See id.* at 2091.

173 *See id.* at 2089.

was already sufficiently protected by the rules of prior cases¹⁷⁴—*Miranda*,¹⁷⁵ *Edwards v. Arizona*,¹⁷⁶ and *Minnick v. Mississippi*.¹⁷⁷

Remarkably, in support of its first three arguments, the Court offered no evidence whatsoever.¹⁷⁸ Since the workability of the *Jackson* rule had not been raised below, there was no record bearing on this point. If the rule of *Jackson* as interpreted by the Louisiana Supreme Court was unworkable, that called for reversal of the Louisiana court's decision, but not doing away with the *Jackson* rule. Evidence that the rule worked just fine, that it did not pose major costs to the criminal justice system, and that overruling *Jackson* would indeed upset expectations, was put forth cogently and persuasively in an amicus brief filed on behalf of “numerous former federal and state law enforcement officers, prosecutors, and judges who believe that *Michigan v. Jackson* provides bright-line guidance for post-arraignment custodial interrogations, that the decision promotes fair, effective law enforcement, and that overturning it would sow confusion and undermine our criminal justice system.”¹⁷⁹

The views of these law enforcement officers, prosecutors and judges were apparently not at all persuasive to the Court, who simply declared by judicial fiat that *Jackson* was overruled.¹⁸⁰

174 See *id.* at 2090.

175 384 U.S. 436, 474 (1966); see also *Montejo*, 129 S. Ct. at 2089 (“[A]ny suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right.”).

176 452 U.S. 477, 484 (1981); see also *Montejo*, 129 U.S. at 2089–90 (“Once a defendant] has invoked his right to have counsel present, interrogation must stop.” (internal quotation marks omitted)).

177 498 U.S. 146 (1990); see *Montejo*, 129 U.S. at 2090 (“[Once defendant has invoked right to counsel] no subsequent interrogation may take place until counsel is present, whether or not the accused has consulted with his attorney.” (internal quotation marks omitted)).

178 The dissent noted that the majority did not cite “any empirical or even anecdotal support.” *Montejo*, 129 S. Ct. at 2097 n.3 (Stevens, J., dissenting).

179 See generally Amicus Brief of Larry D. Thompson, former Deputy Attorney General of the United State, and former United States Attorney, Northern District of Georgia, et al., *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1007118.

180 An opposing view was presented in another amicus brief filed by a number of states in support of respondent. That brief argued that the *Jackson* rule was unworkable. However, no specific evidence was presented to support that claim. Rather, the assertion was that the *Montejo* case demonstrated unworkability because “[u]nder [the Louisiana] rule, appointment is automatic and requires no request by the defendant. Other states employ different procedures, some requiring a request, others making appointment automatic.” Supplemental Brief for the States of New Mexico, Alabama, et al., at *17, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2008 WL 1007122. Amici further argued that these different procedures would result in different assumptions as to defendant’s intentions, making the rule unworkable. See *id.* at *17–18. Of course, this “unworkability” could be made workable simply by announcing a bright line rule, as *Montejo* requested—

The fourth and final reason the Court gave—that the *Jackson* rule was superfluous because individuals were already protected against police badgering under the Fifth Amendment¹⁸¹—is highly contestable in light of the core purposes of the Sixth Amendment. As stated in a recent Leading Cases note in the Harvard Law Review concerning *Montejo*,

[J]ust as the Fifth Amendment's key concern—the coercive pressures of custody—merits a rule protecting voluntariness in the Fifth Amendment context, the Sixth Amendment's key concerns—the coercive pressures and legal complexities of criminal adjudication—merit a rule protecting voluntariness and knowingness in the Sixth Amendment context. The Court should not be less attuned to the objects of concern under the Sixth Amendment than those under the Fifth Amendment, especially when the Sixth Amendment right to counsel is in the text of the Constitution.¹⁸²

Once adversarial proceedings begin between a defendant and the State, the Sixth Amendment should ensure that the defendant can rely upon counsel as a medium between himself and the power of the State.¹⁸³ A defendant is entitled to have counsel present in critical confrontations with the State, because these pre-trial proceedings “might well settle the accused's fate and reduce the trial itself to a mere formality.”¹⁸⁴ An uncounseled defendant will frequently have no idea of the consequences of statements he makes to the police. *Miranda* warnings do not spell this out.¹⁸⁵ As the dissent noted, warnings designed purely to safeguard the Fifth Amendment right against self-incrimination are not adequate to protect *Montejo*'s “more robust Sixth Amendment right to counsel.”¹⁸⁶

One may or may not agree with the Supreme Court majority's view that the Sixth Amendment is adequately protected by warnings related to the Fifth Amendment right against self-incrimination. In either case, however, it is troubling that the Court was so quick to overturn *Jackson* when the issue that the parties asked it to resolve did not require that *Jackson* be overruled, and the question of whether *Jackson* should be overruled did not appear to be fairly included in

that once counsel was appointed, whether requested by the defendant or not—there should be no police-initiated interrogations without counsel present.

181 See *Montejo*, 129 S. Ct. at 2090.

182 *The Supreme Court, 2008 Term: Leading Cases*, 123 HARV. L. REV. 182, 192 (2009).

183 See *Montejo*, 129 S. Ct. at 2098 (Stevens, J., dissenting).

184 See *id.* at 2099 (citations omitted).

185 *Miranda* warnings do not make clear “the assistance a lawyer can render during post-indictment interrogation.” *Id.* at 2100.

186 See *id.*

the questions presented.¹⁸⁷ In reaching out beyond the case before it in order to change the law, the Court did not act like a court, but rather like a super-legislature—except that unlike a legislature, it did not hold hearings, gather data, listen to testimony, or take any steps to be well informed about the new law it was creating.¹⁸⁸ The Court simply chose to make new law according to its own hunches and policy preferences with respect to law enforcement, without the development of a record below on the actual workability of the rule.¹⁸⁹ It also ignored the contrary views of many participants in the field of criminal justice, such as those expressed in the Thompson amicus brief.¹⁹⁰ Overruling *Jackson* was not part of the case the parties put before the Court and was not necessary to decide the case. Rather, the majority disregarded important prudential practices, such as deciding a case within the confines of a well developed record, in order to impose its particular preference for cutting back defendants' fundamental rights under the Sixth Amendment. By reaching beyond the case put before it, the Court did not act like the "least dangerous branch" of the government.¹⁹¹ Rather, the majority's action could be considered dangerous to our representative democracy because it overstepped its boundaries as a court and acted without benefit of a record developed in the courts below in order to create *sua sponte* new law undervaluing and undermining a defendant's fundamental right to counsel.¹⁹²

187 See questions presented, *supra* note 167.

188 See, e.g., Neil Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323, 327 (2005) ("Unlike legislators, who can investigate and evaluate . . . by holding hearings, taking polls, studying their mail, and visiting constituents—judges are confined to "the record . . ."). When the Court has no record on which to base its decision, then it cannot act as a court.

189 "[T]he rule announced in *Jackson* protects a fundamental right that the Court now dishonors." *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting).

190 See Amicus Brief of Larry D. Thompson, *supra* note 179.

191 See *Illinois v. Gates*, 459 U.S. 1028, 1031 (1982) ("[N]either Article III of the Constitution nor the jurisdictional statutes enacted by Congress vest this Court with any roving authority to decide federal questions that have not been properly raised in adversary litigation.")

192 As the dissent noted, "[s]uch a decision can only diminish the public's confidence in the reliability and fairness of our system of justice." *Montejo*, 129 S. Ct. at 2099 (Stevens, J., dissenting). "[T]he dubious benefits [the Court] hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel." *Id.* at 2101.

D. Gross v. FBL Financial Services

In *Gross* yet again, in order to make new law, the Court decided a question not put before it by the parties.¹⁹³ The question actually presented was “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (“ADEA”).”¹⁹⁴ Instead of deciding this question, however, the Court reached out to change the standard for proving discrimination in non-Title VII cases. It rejected the standard adopted twenty years earlier in *Price Waterhouse v. Hopkins* that if a discriminatory reason was a motivating factor in the employer’s decision, the burden of proof would shift to the employer to prove it would have made the same decision absent discrimination.¹⁹⁵ Instead, it declared that because *Price Waterhouse* was a Title VII case,¹⁹⁶ it did not apply to age discrimination cases, and that for age discrimination, an employee must always prove that age was the “but-for” cause of the challenged employer decision.¹⁹⁷ Proving a “but-for” cause means the plaintiff must show that if he was not the age he was, the employer would not have treated him in the adverse manner that it did. Instead of proving that discrimination was “a motivating factor” in the employment decision, the plaintiff in an age discrimination case now must prove discrimination is “the determinative factor.” By changing this standard, the Court made it more difficult for plaintiffs to prove an age discrimination case.

193 The dissent stated that by resurrecting the “but-for” standard, which had been rejected twenty years earlier in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court was engaging in “an unabashed display of judicial lawmaking.” *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2358 (2009) (Stevens, J., dissenting).

194 *Gross*, 129 S. Ct. at 2346 (citing the ADEA, 81 Stat. 602 (1967), as amended, 29 U.S.C. §§ 621–34 (2006)).

195 *Price Waterhouse*, 490 U.S. at 232, 244–47.

196 Until *Gross*, ADEA standards were generally understood to conform to Title VII standards, because of the similarity of purpose in the two statutes, and the almost identical language. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (“[The] interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA ‘were derived *in haec verba* from Title VII.’” (quoting *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978) (citations omitted)); *see also McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995) (“The ADEA and Title VII share common substantive features and also a common purpose . . .”).

197 *See Gross*, 129 S. Ct. at 2349, 2351.

1. Background

Jack Gross began working for FBL Financial in 1971.¹⁹⁸ In 2003, at age fifty-four, he was moved from a position as claims administration director to claims project coordinator, and many of his former responsibilities were reassigned to a woman in her early forties whom he had previously supervised.¹⁹⁹ Gross considered his new position a demotion based on his age, and brought an age discrimination suit. The jury decided in his favor, but the Eighth Circuit reversed and remanded.²⁰⁰ At issue were the jury instructions. The district court had instructed the jury to return a verdict for Gross if he proved that his “age was a motivating factor” and that “age would qualify as ‘a motivating factor’ if [it] played a part or a role in [FBL]’s decision to demote [him].”²⁰¹ The district court also told the jury that it must decide in favor of FBL if FBL proved that it would have demoted Gross anyway for reasons other than age.²⁰²

This kind of instruction is known as a mixed-motives instruction, and, under *Price Waterhouse*, it was permitted when an employee had suffered an adverse employment action because of both discriminatory and non-discriminatory reasons.²⁰³ The plurality in *Price Waterhouse* held that once an employee showed that age was a motivating factor in the adverse employment action, then the burden of persuasion shifted to the employer to prove it would have made the same decision anyway. Absent such proof by the employer, the employee would prevail.²⁰⁴ However, because *Price Waterhouse* was a plurality decision with two concurrences—one by Justice White and one by Justice O’Connor—the rule of the case was not clear as to what kind of evidence was needed to obtain a mixed-motive instruction that would shift the burden to the employer. According to Justice White, the discriminatory factor had to be “substantial.”²⁰⁵ According to Justice O’Connor, there had to be “direct evidence” before the mixed-motive instruction could be given.²⁰⁶ Many lower courts tended to assume Justice O’Connor’s view was controlling, but there was substan-

198 See *id.* at 2346.

199 See *id.* at 2346–47.

200 See *id.* at 2347.

201 *Id.*

202 See *id.*

203 See *Price Waterhouse*, 490 U.S. at 232, 244–47.

204 See *Gross*, 129 S. Ct. at 2354.

205 *Price Waterhouse*, 490 U.S. at 279 (White, J., concurring).

206 See *id.* at 275 (O’Connor, J., concurring).

tial confusion over what “direct evidence” was.²⁰⁷ Gross argued, based on the Court’s decision in *Marks v. United States*,²⁰⁸ that Justice White’s concurrence was controlling rather than Justice O’Connor’s because his concurrence was based on a narrower ground. Justice White believed that direct evidence was not required, but rather that discrimination had to be shown to be a substantial factor.²⁰⁹ Gross also argued that for Justice White, there was no difference between “a substantial factor” and “a motivating factor.”²¹⁰

Congress had codified and to some extent modified the *Price Waterhouse* rule in the Civil Rights Act of 1991, clarifying that “a motivating factor” would shift the burden; no mention was made of a heightened standard of evidence, such as “direct evidence.”²¹¹ However, the Eighth Circuit in *Gross* concluded that this new section, which amended Title VII, did not make a corresponding change in the ADEA.²¹² It thus held that *Price Waterhouse* continued to govern ADEA cases and that Justice O’Connor’s view requiring direct evidence was controlling.²¹³ Consequently, because no direct evidence²¹⁴ of discrimination had been presented by Gross, the district court’s mixed motive instruction to the jury was improper.²¹⁵ According to the circuit court, the burden of persuasion should never have shifted to the employer. Gross should have been required to prove that age was more than a motivating factor. He needed to meet the more difficult stan-

207 See *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting).

208 430 U.S. 188, 193 (1977) (“[When] no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” (citations omitted) (internal quotation marks omitted)). Because Justice White believed that the mixed motive instruction could be given when discrimination was a substantial factor, but did not think direct evidence was required, arguably his concurrence made the fifth vote rather than Justice O’Connor’s.

209 See *Price Waterhouse*, 490 U.S. at 259.

210 See Reply Brief for Petitioner, at *5 n.3, *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 740767 (“Justice White’s concurring opinion cannot be read as treating ‘substantial factor’ as different (or more stringent than) ‘a motivating factor’; he regarded the two phrases as synonymous. [*Price Waterhouse*,] 490 U.S. at 259 (‘substantial factor’—or to put it in other words . . . a ‘motivating factor’)” (quoting *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977))).

211 See § 107 of the 1991 Act, amending Title VII by adding § 2000e-2(m).

212 *Gross v. FBL Fin. Servs.*, 526 F.3d 356, 360 (8th Cir. 2007).

213 See *id.* at 362, 359.

214 The Eighth Circuit defined “direct evidence” as evidence “showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.” *Id.* at 359 (citations omitted) (internal quotation marks omitted).

215 See *id.*

dard that “age was the determining factor,” or “the but-for” factor in the employment action.²¹⁶ Holding that Gross had not presented the direct evidence that the court considered critical for a mixed-motive instruction and that he had not met the higher but-for standard, the Eighth Circuit reversed and remanded for a new trial.²¹⁷

2. Supreme Court Decision

The question that was presented to the Supreme Court was quite clear. The parties asked the Court to decide if direct evidence was required before a court could issue a mixed-motive jury instruction in an age discrimination case.²¹⁸ In his petition for certiorari, Gross argued that the answer to this question had been expressly reserved in the Court’s earlier case of *Desert Palace v. Costa*²¹⁹ and that there was a conflict in the circuits over whether direct evidence was required to obtain a mixed-motive instruction in a non-title VII case.²²⁰ In its brief opposing certiorari, FBL argued that the Eighth Circuit’s decision was consistent with both the ADEA text and the Court’s precedent and there was no reason to consider the question presented.²²¹ It also argued that the cases Gross had discussed related to summary judgment and were irrelevant to the question presented, which dealt with jury instructions.²²² Finally, it argued that the Court should wait for a more suitable case for deciding the question presented, where the failure to use a mixed-motive instruction could have actually prejudiced the plaintiff.²²³ At no point in its brief opposing certiorari did FBL argue that the burden of proof structure for a discrimination case should change or that *Price Waterhouse* did not govern ADEA cases.

216 See *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2348 (2009).

217 See *Gross*, 526 F.3d at 362.

218 See *Gross*, 129 S. Ct. at 2346. The question presented was as follows: “Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?” See Petition for Writ of Certiorari, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2008 WL 4462099.

219 539 U.S. 90, 98 (2003). The Court held that a plaintiff in a Title VII case was not required to present direct evidence in order to obtain a mixed-motive instruction, but reserved decision as to whether direct evidence would be required in a non-Title VII case. *Id.*

220 See generally Petition for Writ of Certiorari, *supra* note 218.

221 See Brief in Opposition to Petition for Writ of Certiorari, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2008 WL 4824079 at *6–8.

222 See *id.* at *9–17.

223 See *id.* at *24.

Thus, Gross devoted his entire brief on the merits to arguing that the elevated evidentiary standard of direct evidence should not be required in order to obtain a mixed-motive instruction.²²⁴ FBL, however, in its responding brief, raised an issue that was not contained within the clear and straightforward question presented to the Court; nor was it raised in opposition to the petition for certiorari. FBL argued for the first time in its responding brief on the merits that the burden of persuasion should never be shifted to the employer in an age discrimination case and that *Price Waterhouse* should be overruled with respect to its application to the ADEA.²²⁵

Heeding the respondent's brief, the Court decided not to limit itself to the question it had granted certiorari to decide. Rather, it decided to change the law regarding proof in an age discrimination case. Despite the fact that twenty years earlier the Court had determined in *Price Waterhouse* that discrimination "because of" sex did not mean that a plaintiff had to prove that the discrimination was the "but-for" cause of the adverse employment action, the Court in *Gross* reverted to that definition.²²⁶ It did this despite Congress having codified the meaning of "because of" under Title VII to mean that a plaintiff need only show that discrimination was "a motivating factor."²²⁷

In the past, the Court had repeatedly refused to address an issue which was not raised prior to the respondent's merits brief.²²⁸ The important reason for this practice is that raising the issue so late in the process limits input by both the petitioner and interested amici. In *Alabama v. Shelton*,²²⁹ the Court emphasized this point in its refusal to follow respondent's late request that it overrule two earlier decisions:

We do not entertain this contention, for Shelton first raised it in his brief on the merits. We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.²³⁰

Nonetheless, in *Gross*, by agreeing to consider an issue not raised in the question presented, and not raised in the brief opposing the peti-

224 See generally Brief for Petitioner, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 208116.

225 See generally Brief for Respondent, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 507026.

226 See *Gross*, 129 S. Ct. at 2350.

227 42 U.S.C. § 20002-2(m) (2006).

228 See, e.g., *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999).

229 See *Shelton*, 535 U.S. 654.

230 See *id.* at 661 n.3.

tion for certiorari, the Court foreclosed the opportunity for amici, including the U.S. Government and state attorneys general, to weigh in on the proper burden of proof in a non-Title VII discrimination case.²³¹ The Court's refusal to follow prudential court practice underscores its failure to function properly as a court.

Ultimately, the Court held that interpretation of the ADEA was not controlled by *Price Waterhouse*, a Title VII case, claiming that because the *Price Waterhouse* framework was difficult to apply, there was no benefit to extending it to ADEA claims.²³² This holding changed the law abruptly, turning on its head a statutory interpretation that had been settled for decades. As the dissent noted, "Justice Kennedy's dissent in *Price Waterhouse* assumed the plurality's mixed-motives framework extended to the ADEA, and the Courts of Appeals to have considered the issue *unanimously* have applied *Price Waterhouse* to ADEA claims."²³³

The dissent took the Court to task both for its dictionary usage, and for its decision to interpret similar statutes differently.²³⁴ Justice

²³¹ In his Reply Brief, Gross argued that the Court should not engage in the unusual practice of deciding an issue that was first raised in respondent's merits brief, noting that:

Because respondent did not earlier indicate that it would challenge the holding in *Price Waterhouse*, the United States was deprived of an opportunity to address that important issue in its brief. A decision to overrule the decision in *Price Waterhouse* would affect not only the ADEA but also the large number of federal and state laws that since 1989 have been construed to embody the allocation of the burden of proof set out in *Price Waterhouse*. The decision in *Price Waterhouse* should not be revisited without affording to parties affected by a potential change in the interpretation of those other laws—including the attorneys general of the states involved—an opportunity to make their views known to this court.

Reply Brief for Petitioner, *supra* note 210, at *2 (footnote omitted).

²³² See *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2351–52 (2009). The Court thus in essence overruled *Price Waterhouse's* application to non-Title VII claims.

²³³ See *id.* at 2354–55 (Stevens, J., dissenting) (emphasis added). The Court's holding that an ADEA plaintiff must always establish but-for discrimination has been and may continue to be extended by lower courts to other civil rights statutes. For example, the Seventh Circuit has applied the rationale of *Gross* to the Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (2006). See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010). Other anti-discrimination and anti-retaliation statutes contain the same "because of" language as the ADEA, and may be interpreted the same way as *Gross*, include the Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-223, 122 Stat. 881 (codified as amended in scattered sections of 42 U.S.C. (2006)); the anti-retaliation provision of the Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C. (2006)); and the anti-retaliation provisions of the Fair Labor Standards Act, Pub. L. No. 81-393, 63 Stat. 910 (codified as amended in scattered sections of 29 U.S.C. (2006)).

²³⁴ In reaching the conclusion that "because of" meant "but-for," the Court used one textualist interpretive method—referring to definitions in the dictionary. See *Gross*, 129 S. Ct. at 2350. The Court cited 1 Webster's Third New International Dictionary 194 (1966), and 1 Oxford English Dictionary 746 (1933). See *Gross*, 129 S. Ct. at 2350 ("defining 'because of' to mean 'By reason of, on account of'"). But surprisingly, the Court neglected another

Stevens noted that although the dictionaries used by the majority define “because of” as “by reason of” or “on account of,” they do not establish that “because of” signifies but-for causation.²³⁵ The dictionaries “do not . . . define ‘because of’ as ‘solely because of’ or ‘exclusively on account of.’”²³⁶ Justice Stevens further observed that “[i]n *Price Waterhouse*, we recognized that the words ‘because of’ do not mean ‘solely because of,’ and we held that the inquiry ‘commanded by the words’ of the statute was whether gender was a motivating factor in the employment decision.”²³⁷ The dissent also pointed out that with respect to the interpretive method of construing similar language in similar statutes consistently, the relevant language in the ADEA and Title VII was identical:

That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII’s language apply “with equal force in the context of age discrimination, for the substantive provisions of the ADEA ‘were derived *in haec verba* from Title VII.”²³⁸

The majority offered no explanation for its refusal to follow its own policy of interpreting identical language in two discrimination statutes as having the same meaning. Nonetheless, it held that Congress meant something different in the ADEA and Title VII when it used

er textualist method, which is to consider the meaning of the same words in a similar statute. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) (finding that “substantially justified” in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), meant “justified in the main,” based on the meaning of “substantial” in the Administrative Procedure Act, 5 U.S.C. § 706 (2)(E), and the meaning of “substantially justified” in the Federal Rules of Civil Procedure, 37(a)(4) and (b)(2)(E)); *see also* *Kungys v. United States*, 485 U.S. 759, 769-70 (1988) (determining that the meaning of “material” under 8 U.S.C. § 1451(a) should be determined by reference to how it was defined by other statutes dealing with misrepresentations to public officers). Of course, using that method would point up the absurdity of interpreting “because of” differently in statutes such as Title VII and the ADEA where the purpose is the same—to prevent discrimination—and the language is the same, i.e., the employer cannot discriminate *because of* someone’s race, color, religion, sex, national origin, or age. Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (emphasis added) (2006). The ADEA makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” 29 U.S.C. § 623(a)(2) (2006) (emphasis added).

²³⁵ *Gross*, 129 S. Ct. at 2354 n.4 (Stevens, J., dissenting).

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ *See id.* at 2354 (citations omitted).

identical language prohibiting employers from discriminating “because of” a particular characteristic. In making such an abrupt and unexplained departure from prior interpretations, the Court does not persuade that it is being honest with itself or with us about the considerations driving its decision.

The Court’s policy preference carried out in *Gross* was to make it more difficult for plaintiffs to prevail by placing a higher burden of proof on plaintiffs in non-Title VII cases. To accomplish this goal, it reached out beyond the case properly before it, and violated its own rule about not hearing claims raised only in the respondent’s merits brief. It thus created new law in disregard of traditional Supreme Court rules and practice, in disregard of fairness to the interested parties, in disregard of stare decisis, and in disregard of Congress’ purpose to eliminate discrimination. Rather, the Court ignored any boundaries on its proper powers, either constitutional or prudential, and proceeded to engage in “an unabashed display of judicial law-making.”²³⁹

E. Advisory Opinions

Suppose the Court granted the writ of certiorari in a case and then decided not to consider the question presented but instead to consider another question not addressed by anything in the record of the case, by the lower courts, by the petition for certiorari or the brief opposing it, or by the briefs of the parties. By deciding a question that the Court itself has created, and that stands completely apart from the litigation that brought the case to the Court, the Court moves toward the issuance of an advisory opinion.²⁴⁰ If it is an advisory opinion, it would be beyond the justiciability requirements necessary for the Court to have jurisdiction.²⁴¹

²³⁹ See *id.* at 2358.

²⁴⁰ There is, of course, an argument to be made that the question raised by the Court sua sponte was “a subsidiary question . . . fairly included in the question presented for review.” SUP. CT. R. 14.1(a). The counter argument is that if the question was not litigated below, nor presented in the petition for certiorari, nor raised in the parties’ briefs, then a priori it was not a fairly included subsidiary question. If the Court thinks there was an antecedent question necessary for resolution of the case, it could dismiss the case as improvidently granted, and await the next case where the issue is squarely presented. Or, given the control it has over its certiorari jurisdiction, it would not have to grant certiorari to a case that does not raise the issues it thinks are important. What the Court should not be doing is changing the case before it so it can change the law. That is not its role within our constitutional structure.

²⁴¹ See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 212(b)(iii), at p. 68 (8th ed. 2009).

Compare the scenario above to the incident that led to the establishment of the advisory opinion rule in our constitutional jurisprudence—the request by then-Secretary of State Thomas Jefferson to the Court to answer the question of the rights and obligations of the United States under treaties with France and England when they were at war.²⁴² In both situations, the Court did not answer the question presented, but in our scenario it answered a different question, one that the Court itself raised *sua sponte*. Although there were no parties to a dispute before the Court in the Jefferson instance, in our scenario there was a controversy between two parties, but the issue the Court chose to decide was not in dispute between them. Thus, the Court's decision was arguably made outside of a genuine case or controversy, and was therefore an advisory opinion. The question to be answered in this scenario is whether, in this situation, the Court has gone beyond its constitutional powers, and, if not, how close it is to the line, if there is a line.

F. Summary

When the Court decides only the cases or controversies put before it by the parties, it plays its legitimate role in our constitutional structure. A decision based on a record with thorough briefing and argument by the parties, with decisions taken on the issue by the lower courts, and with broad public participation through the amicus process is more likely to lead to decisions based on law rather than politics. However, the Court acts as a super-legislature when it reaches beyond cases and controversies to make law. Going beyond the case or controversy requirement also appears to lead the Court down the slippery slope to acting with no boundaries at all. As seen in the cases above, when the Court has reached out for issues not put before it by the parties, it has also violated its own rules, failed to respect prudential judicial practices, and denied parties the right to a full and fair process. This is more than judicial activism. The Court is no longer acting as a court.

III. CAN THE SUPREME COURT'S CONDUCT BE LIMITED?

The Supreme Court has made clear that it does not view deciding issues that have not been presented by litigants within an adversarial context as a violation of the case and controversy requirement. For example, the Court noted in one case, "An order limiting the grant of

²⁴² See CHEMERINSKY, *supra* note 19, at 54.

certiorari does not operate a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case.”²⁴³ And of course, the Court determines what is necessary for the proper disposition of the case. Thus, the Court essentially determines its own boundaries.

Nonetheless, the case and controversy requirement does place some limits on the judiciary’s power. Whatever different views one might have about the Constitution’s grant of judicial power, there is no basis for arguing that it is without limits.²⁴⁴ The judiciary is one branch in our system of separation of powers, and that system should limit the Court to its judicial role. Moreover, it is certainly questionable whether limits on the Court’s role should be largely determined by the Court itself. Although Congress clearly has power to place limits on the Court’s powers,²⁴⁵ to date it has largely cooperated in giving the Court maximum discretion in how it conducts its business.²⁴⁶ In the 70’s and 80’s Congress gave the Court much more control over its docket by repealing four different statutes which had authorized direct appeals from district courts,²⁴⁷ and by repealing in 1988 “the last remnant of the Court’s once-flourishing appeal jurisdiction over judgments of the federal courts of appeals.”²⁴⁸ Thus, except in a very few cases, the Court has been given complete discretion over its docket, because it will only hear those cases in which it determines to grant certiorari.²⁴⁹ In addition, at the same time that the Court gained virtually total control of its docket, it also reduced the total number of cases it agreed to hear.²⁵⁰ Perhaps this has pushed the

243 Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

244 See, e.g., MARTIN H. REDISH, WHOLESALÉ JUSTICE 74 (2009) (stating that even for those most cynical about the doctrine of separation of powers, “[t]here is some point at which the Constitution will be found to prohibit the delegation of purely legislative authority to the Supreme Court”).

245 See *infra* notes 287–88 and accompanying text.

246 See, e.g., Judiciary Act of 1988, 102 Stat. 662 (eliminating de facto the Court’s mandatory jurisdiction); Rules Enabling Act of 1934, 28 U.S.C. § 2072(a) (“The Supreme Court shall have the power to proscribe general rules of practice and procedure.”); Judiciary Act of 1925, 43 Stat. 936 (granting the Court control over most of its work); see also CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 7 (7th ed. 2011) (stating that the Judiciary Act of 1925 was known as the “Judges’ Bill” because a committee composed of Supreme Court Justices drafted it).

247 See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE, § 2.7, at 90 (9th ed. 2007).

248 *Id.* at § 2.2, at 78.

249 The number of direct appeals from both one and three judge district courts went from 211 in the 1971 term, to two in the 2004 term. See *id.* at § 2.7, at 91.

250 See, e.g., LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA DECISIONS AND DEVELOPMENTS 75 tbl. 2-8 (3d ed. 2003); Arthur D. Hellman, *The Shrunkén Docket of the*

Court to try to extend the boundaries of the cases that come before it, because it decides so few of them.²⁵¹ However, even if the Court is attempting to issue very broad decisions in the few cases it hears, it should nonetheless not step out of its role as a court when it does so. In the cases discussed in this Article, the flaws in the Court's process resulted from its disregard both of the structural limitations imposed by separation of powers and its own prudential practices. When the Court reached out for issues not in dispute between the parties, and therefore not arising out of the adversary system, and decided these issues without a record below, without opinions of lower courts, and in some cases without briefing or arguing by the parties, it was not fulfilling its proper judicial role. As will be discussed below, both aspirational and practical steps can be taken to help limit the Court's conduct and to try to ensure that it acts within constitutional boundaries.

A. *The Problem*

As the final arbiter of constitutional decisions, the Court might seem to be above the law when it comes to determinations as to the propriety of its own conduct, particularly concerning its constitutional decisions. Decisions interpreting statutes can, of course, be overturned by Congress, but it is complex and in some instances impossible to counter a Supreme Court finding that a statute, or a part of it, is unconstitutional, as in *Citizens United*. Thus, what can be done if the Court does not adhere to the constitutional structure, and in the process ignores prudential practices and its own rules? In such a case, the Court appears to be a political body beyond any control or accountability. This perception is damaging to the Court as an institution and to a representative democracy that is supposedly built on a structure of checks and balances among the separate branches. A lack of control raises the spectre of the question Judge Posner asked about judges who function as a political rather than a judicial branch: “[W]hat prevents the descent of the judiciary into an abyss of unchanneled discretionary justice that would render law so uncertain and unpredictable that it would no longer be law but instead would

Rehnquist Court, 1996 SUP. CT. REV. 403 (1996); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2006).

251 See, e.g., Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 59 (2009) (“[T]he Court must make the most of the cases it does hear by issuing broad decisions that govern a number of future cases in the lower federal and state courts.”).

be the exercise of raw political power by politicians called judges?”²⁵² It is to avoid this abyss that controls are needed.

B. Judging the Judges

One potential source of control of judicial conduct is public opinion. It is important for the Court as an institution that it be held in high regard by the public.²⁵³ Because the Court has to depend upon other branches of government to enforce the laws as it has interpreted or declared them, its stature and its power derive to some extent from the good will and sense of justice of the public and its representatives.²⁵⁴ The Court’s high stature derives in large part from the public’s belief that the Court is doing its job, acting in the best interest of the country, and supporting the rule of law. But what standards are available to the bench and bar, much less to the general public, to consider the quality of judges, and to understand the appropriateness of their conduct and their decisions?

The role of judges and the work of judging is increasingly examined through interdisciplinary studies involving psychology, political science, behavioral economics, as well as other fields.²⁵⁵ Theories abound as to what judges should be doing and how their decisions should be made. The dominant normative legal theories of consequentialism (predominantly law and economics) and deontology (rights-based notions of liberty and equality) have a new competitor arising out of the field of virtue ethics—*aretaic* or virtue-centered theory—which is based on Aristotelian concepts of virtue and excellence.²⁵⁶ Contrary to Posner’s position that there is no moral dimen-

²⁵² See, e.g., POSNER, *supra* note 34, at 372.

²⁵³ See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 634 (2009) (“[Judge] Richard Arnold [U.S. Court of Appeals for the Eighth Circuit] observed that ‘the courts, like the rest of the government, depend on the consent of the governed,’ and they need often to be reminded of that dependence.” (citation omitted)).

²⁵⁴ See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1017 (2009) (“[T]he Court’s interpretations of the Constitution must be likely to be accepted and enforced by at least a critical mass of the officials normally counted on to implement judicial decisions, and they should not trigger a strong and enduring sense of mass outrage by political majorities that the Court has overstepped its constitutional powers.” (citations omitted)).

²⁵⁵ See Paul Horwitz, *Judicial Character (and Does It Matter): Constitutional Conscience: The Moral Dimension of Judicial Decision*, *H. Jefferson Powell*; *How Judges Think*, *Richard A. Posner*; *Judgment Calls: Principle and Politics In Constitutional Law*, *Daniel A. Farber & Suzanna Sherry*, 26 CONST. COMMENT. 97, 98 (2009) (Book Review).

²⁵⁶ See Colin Farrelly & Lawrence B. Solum, *Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE*, 1–23 (Colin Farrelly & Lawrence B. Solum eds., 2008).

sion to a judge's decision,²⁵⁷ these new normative legal theories focus on judicial character and on a moral dimension of judging. The virtue-centered theory of judging is grounded in judicial excellence²⁵⁸ and "requires the selection of judges who possess the judicial virtues—civic courage, judicial temperament, judicial intelligence, wisdom, and above all justice."²⁵⁹

Like other normative theories (whose ability to actually affect judicial conduct appears quite limited),²⁶⁰ the virtue-centered theory may not itself contribute to curbing judicial discretion. Nonetheless, virtue theory does provide a matrix of qualities for evaluating judges and the decisions they make. By providing a clearer theory of how to judge the judges, a virtue-centered theory could help change the public's view of what judges should be doing. As H. Jefferson Powell concluded in his book, *Constitutional Conscience, The Moral Dimension of Judicial Decision*,

constitutional decision is an ethical activity, one that demands individual moral choices by the interpreter There is no escape, not even in theory, from the problem of how to play the game fairly, no set of determinate, substantive principles that are somehow the unwritten meaning of the Constitution, adherence to which validates one's choices in constitutional decision making. There is no escape, not even for legal instrumentalists such as Judge Posner, from individual moral responsibility in constitutional law.²⁶¹

Powell also lists judicial virtues he considers critical to the process of judging: humility about the Court's role, acquiescence in past judicial interpretations (*stare decisis*), integrity, and candor.²⁶² He considers integrity and candor as linked and as indispensable consti-

257 See POSNER, *supra* note 34, at 307–12 (explaining that a decision taking sides on a moral issue is a political decision); see also POWELL, *supra* note 3, at 9 ("Posner's view of law as a morally neutral tool for the achievement of goals set by wholly extralegal considerations is widely shared.").

258 See Lawrence B. Solum, *The Aristotelian Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 486 (2005).

259 *Id.* at 478. As Colin Farrelly and Larry Solum explain in the introduction to their anthology, virtue ethics transplanted into legal theory holds that "the final end of law is to promote human flourishing—to enable humans to lead excellent lives." See FARRELLY & SOLUM, *supra* note 256, at 2. Moreover, virtue jurisprudence is guided by the process of phronesis, or "practical wisdom." See Lawrence B. Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, 142–62, in VIRTUE JURISPRUDENCE, *supra* note 256.

260 See *supra* notes 33 and 34; see also Fallon, *supra* note 254, at 1013 ("Constitutional theories hold endless interest for law professors. Interestingly, however, the justices themselves appear less preoccupied with constitutional theory as they go about their workaday business of resolving constitutional controversies.").

261 POWELL, *supra* note 3, at 107.

262 See *id.*

tutional virtues.²⁶³ By candor, he means the Justices must “be clear about why they give the answers they do. Candor is indispensable if the system is to retain its moral dignity.”²⁶⁴

Powell also focuses on the judicial oath, as Chief Justice Marshall did in *Marbury v. Madison*.²⁶⁵ The requirement of the oath, according to Powell, links a judge’s personal conscience and obligations as a moral actor to the obligations that arise from the exercise of the power of judicial review.²⁶⁶ It implicates the judge in the moral dimension of judicial decision-making.²⁶⁷

Although this is a very brief sketch of a virtue-based theory of judging, it provides one metric for considering the actions of the Supreme Court majority in the cases discussed above. It offers a perspective to consider whether the Justices are acting appropriately as a court, or whether they have gone far afield from proper judicial conduct. How does the current majority measure up under a moral dimension of judging? To what extent do members of that majority exemplify the constitutional virtues of humility, acquiescence, integrity and candor, or the characteristics of an excellent judge—civic courage, judicial temperament, judicial intelligence, wisdom, and concern for justice?

If the constitutional virtues and judicial qualities set forth above are applied to the conduct of the majority of the Justices in the cases discussed in this Article, one could fairly conclude that these Justices

²⁶³ See *id.* at 88–89.

²⁶⁴ See *id.* at 90. For emphasis on importance of judicial candor, see also Allison Siegler & Barry Sullivan, “‘Death Is Different’ No Longer”: *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 379–80 (“[I]t is essential to our system of judicial review that judges not just give reasons for their decisions, but that the reasons they give be the true reasons for their decisions [J]udges necessarily have choices to make, and, at the end of the day, it is how those choices are made, and how they are explained, that matters.”).

²⁶⁵ 5 U.S. 137, 180 (1803). Under 28 U.S.C. § 453, each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his or her office:

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

²⁶⁶ See POWELL, *supra* note 3, at 3.

²⁶⁷ See Horwitz, *supra* note 255, at 163–64 (“[T]he judicial oath, and the formalities attendant upon swearing it, ties the judge’s character intimately to his or her office, rendering every decision in office both one that has official weight and must be undertaken consistently with the judge’s official duties, and one that has about it a sense of personal moral obligation. Properly understood and seriously considered, the oath can be a forceful reminder of what virtuous judging demands.” (footnotes omitted)).

can be found lacking. Certainly, they lacked humility when they disregarded the constitutional structure that limits their judicial power to the review of cases or controversies and reached out to decide issues that were not before them in the four cases discussed herein. Moreover, they lacked “acquiescence,” when they overruled cases in *Citizens United* (*McConnell* and *Austin*), *Iqbal* (*Bivens* supervisory responsibility), *Montejo* (*Jackson*), and *Gross* (*Price Waterhouse* as applied to age discrimination cases), and particularly since they did so by deciding issues that were not brought before them by the parties. They lacked integrity and candor when they claimed implausibly that a decision was “passed upon below” when it was not, as they did in *Citizens United*. They lacked wisdom and concern for justice when they decided an issue without a record below, as they did in *Citizens United*, and when they decided an issue that had been conceded below and did not permit the issue to be briefed or argued, as in *Iqbal*, and when they broke the Court’s own rule about not considering an issue raised only in respondent’s merits brief, thereby denying participation of amici, as they did in *Gross*. The conduct engaged in by the majority of the Justices in these four cases shows that they lacked basic and important judicial characteristics. Such conduct can only reinforce the public’s image of the members of the Court as “politicians in robes.”

Nonetheless, public opinion appears to be important to the Court. Although its conduct suggests that the Court is quite political and ideological, the majority also takes pains to look like it is not. Thus, the Justices pay lip service to prudential practices and claim they have not overruled cases they have clearly gutted.²⁶⁸ Barry Friedman points out how the Roberts Court has chosen a path of “stealth overruling.”²⁶⁹ For example, the Court in a series of cases has essentially overruled *Miranda v. Arizona* but has not declared that it has done so.²⁷⁰ The Court accomplished this by speaking to different audiences simultaneously in the same opinion.²⁷¹ It made clear to lower courts and to the police that *Miranda* will not be enforced, while leaving the public, which highly approves of the *Miranda* rule, in the misguided belief that *Miranda* is still the law.²⁷²

Miranda is a very good example of such stealth overruling, but there are many others. The Court did the same thing in cases lead-

268 See Friedman, *supra* note 8.

269 See *id.* at 3–5.

270 See *id.* at 5, 42, 52–53.

271 See *id.* at 5.

272 See *id.*

ing up to *Iqbal*, *Montejo*, *Gross*, and *Citizens United*. It cut away at the various supporting doctrines, so that by the time it got to each of these cases, it did not require a very big step to do what it did. Thus, by sequencing its decisions to make them appear less activist, the Court has attempted to avoid negative public reaction.²⁷³ The Justices occasionally misjudge. As Professor Friedman noted, the Court apparently was surprised by the public outcry against *Citizens United*²⁷⁴ because earlier, in a prior case that had largely passed unnoticed, *FEC v. Wisconsin Right to Life, Inc.*,²⁷⁵ it had already gutted much of the *McConnell* case, which it then overruled in *Citizens United*.

Stealth overruling is at odds with transparency, predictability, and proper judicial conduct. Yet precisely because it tends to obfuscate what appears to be a deliberate law-making agenda by the majority, it is more difficult to challenge head-on. Part of the difficulty in raising a challenge to the Court's conduct as going beyond the proper role of a court is that the decisions the Court produces frequently obscure what it is actually doing. There is a lot of intelligence put to the service of the Court's agenda. The Justices themselves are very intelligent, highly trained, and quite skillful at legal argument. In addition, they hire some of the brightest young minds in the country as clerks to do their bidding.²⁷⁶ So in the service of carrying out an agenda, the Justices are skilled at using smoke and mirrors, and at writing opinions in which they claim to be following standard interpretative and prudential judicial practices when they are not.²⁷⁷ As a result, the general public, not to mention many in the legal community, may

273 See *id.* at 31–32. Perhaps because the court had incrementally cut back on precedent, it found it easy to take a final step by reaching beyond the boundaries of the case before it.

274 See *id.* at 11–12, 32; *id.* at 38 (“[*Citizens United*] looks very much like a case of miscalculation.”); see also Barry Friedman & Dahlia Lithwick, *Speeding Locomotive: Did the Roberts Court Misjudge the Public Mood on Campaign Finance Reform?*, SLATE (Jan. 25, 2010), <http://www.slate.com/id/2242557> (discussing the possibility that Court misjudged the reaction to its decision in *Citizens United*).

275 551 U.S. 449 (2007).

276 See, e.g., POSNER, *supra* note 34, at 286 (“[A] Supreme Court Justice—however questionable his position in a particular case might seem to be—can, without lifting a pen or touching the computer keyboard, but merely by whistling for his law clerks, assure himself that he can defend whatever position he wants to take with enough professional panache to keep the critics at bay.”).

277 In *14 Penn Plaza v. Pyett*, the Court claimed to rely on the statutory text of the ADEA and the NLRA in reaching its decision and in claiming that its interpretation carried out the will of Congress. See 129 S. Ct. 1456, 1466 (2009). However, nothing in the texts of the two statutes supported the Court's view. Rather, “[t]he Court's approach is to articulate its policy preference despite the absence of any textual support, and then interpret absence in the text to mean its policy prevails.” See Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 834–36 (2010).

not be aware of the degree to which the Court is disregarding constitutional structure and traditional judicial practices.

An example of a deceptive rationale provided by the Court can be seen in *Citizens United*. Even though the issue of facial validity had been expressly abandoned below by the parties, the Roberts Court majority claimed that its review of the issue was appropriate. However, under its own Rule 14.1(a),²⁷⁸ only questions set forth in the petition for certiorari or fairly included there can be considered by the Court.²⁷⁹ The Court had clearly stated in earlier cases that “it is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed”²⁸⁰ and it is “only in the *most* exceptional cases’ that we will consider issues outside the questions presented.”²⁸¹

In an attempt to fit the procedural facts within its rules, the majority in *Citizens United* claimed the issue had been “passed upon” below.²⁸² Its reasoning was as follows: The issue of facial validity was properly before the Court because the district court had considered the issue at an earlier point in time before the parties expressly abandoned it, and the district court’s later opinion was based on the reasoning of the prior opinion.²⁸³ Although at first blush this rationale may sound reasonable, it is in fact quite disingenuous. Because the parties had abandoned the issue of facial validity—they expressly stipulated to the dismissal of that claim—the district court’s “later opinion” that the Court referred to had not considered facial validity at all because the claim did not exist at that point in time. Thus, the district court could not possibly have relied upon anything in a prior decision regarding the issue of facial validity because the issue itself was not before it. In the district court’s final decision that went up on appeal, there was no issue of facial validity, and therefore it had not been “passed upon.” Moreover, neither the litigants nor the Court made any argument, nor could they, that there was an exceptional factor that made it proper for the issue of facial validity to be considered. Instead, as the dissent bitterly noted, “[e]ssentially, five Justices were unhappy with the limited nature of the case before us, so

278 SUP. CT. R. 14.1(a). For pertinent text, see *supra* note 31.

279 See *id.*

280 *Citizens United v. FEC*, 130 S. Ct. 876, 932 (2010) (Stevens, J., dissenting) (citations omitted) (internal quotation marks omitted).

281 See *id.*

282 *Id.* at 892.

283 See *id.* at 893.

they changed the case to give themselves an opportunity to change the law."²⁸⁴

The Justices' failure to provide decisions that offer clear, persuasive and transparent reasoning, to engage in traditional prudential practices, including following the Court's own rules, to be honest about the considerations driving their decisions, and to conform to the constitutional structure by deciding only cases or controversies brought to them by litigants, should raise red flags with the public. People at any location on the political spectrum should be quite troubled by the Court's disregard of any boundaries on its role as a court. We the people should make our voices heard.

C. What Congress Should Do

One way members of the public can make their voices heard is through their representatives in Congress. Although it is always difficult to get any action through Congress, and especially in recent times, Congress should be concerned that its law-making power is being undermined. The Court is intruding on congressional prerogatives on a rather regular basis when it reaches out for issues not legitimately before it in order to legislate by striking down existing laws and making its own new laws, as seen in the cases discussed above. The structure of the Constitution counsels against unlimited judicial power.

Congress has the power to pass laws governing the appellate jurisdiction of the Court.²⁸⁵ Pursuant to the Exceptions Clause of Article III, it could enact legislation that would make the boundary line regarding the cases and controversies requirement much brighter, spelling out more clearly the limitation on the Court's ability to change the issues in the cases brought to it by litigants.²⁸⁶ Case law since the 19th century has supported Congress's right to limit the Supreme Court's appellate jurisdiction.²⁸⁷ Many scholars believe that Congress has significant, if not plenary, power under the Exceptions Clause to

284 *Id.* at 932 (Stevens, J., dissenting).

285 *See infra* note 88 and accompanying text.

286 The Constitution provides that the conferral of appellate jurisdiction on the Supreme Court is subject to "such Exceptions, and under such Regulations as Congress shall make." U.S. CONST. art III, § 2.

287 *See Ex parte McCordle*, 74 U.S. 506 (1868) (dismissing McCordle's appeal on the basis that the Court no longer had jurisdiction after Congress had repealed a provision of an act granting habeas corpus).

limit the Court's jurisdiction.²⁸⁸ Many others believe there are also limitations on Congress's power.²⁸⁹ Much of the scholarship on the Exceptions Clause deals with the extent to which Congress could strip the Court of jurisdiction, particularly of jurisdiction to decide certain types of cases.²⁹⁰ This Article does not propose that Congress should strip the Court of jurisdiction of any particular kind of case, but rather that Congress should use its power to shore up the structural limitations on the judiciary set forth in Article III.

Scholars have discussed a number of steps Congress could take to try to add some controls to the Court's unbounded discretion and lack of accountability.²⁹¹ As one recent example, Paul Carrington and Roger Cramton have proposed a way to help transform the Supreme Court from its current role as a super-legislature into a true court.²⁹² They would limit the Court's discretion with respect to granting certiorari by restructuring the current certiorari process.²⁹³ Instead of having the judges' law clerks in charge of this process, a panel of experienced federal judges would review and determine which certiora-

288 See, e.g., Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 614 (1983); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990); Martin H. Redish, *Text, Structure and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990).

289 See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1050 (2010); 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); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 66–67 (1981).

290 See, e.g., Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy and Article III*, 96 GEO. L. J. 59, 64 (2007); Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1009 (2006); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1500–01 (2000).

291 See, e.g., Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 233–34 (2010) (listing the following ways that Congress could constrain the Court: "articles of impeachment, and jurisdiction stripping legislation," as well as "[u]sing the Senate's confirmation power to select certain types of judges[,] . . . withdrawing Court jurisdiction over certain subjects, . . . altering the selection and removal process, . . . requiring extraordinary majorities for declarations of unconstitutionality, . . . allowing appeal from the Supreme Court to a more representative tribunal, removing the power of judicial review, slashing the budget, altering the size of the court, . . . freez[ing] judicial salaries, adjust[ing] staff fund[ing], requir[ing] circuit duty, collect[ing] and publish[ing] information about disfavored judges, and specify[ing] the number of votes needed to exercise the power of judicial review" (citations omitted) (internal quotation marks omitted)).

292 Carrington & Cramton, *supra* note 253, at 634.

293 See *id.* at 636.

ri petitions must be granted and therefore which cases the Court must hear.²⁹⁴ The panel would make its decisions in accordance with standards determined by Congress.²⁹⁵ Carrington and Cramton see the restructuring of the certiorari process as one way to restore and rehabilitate the judicial function and reduce an excess of judicial independence.²⁹⁶

This Article proposes that Congress should enact legislation that would give teeth to the case and controversy requirement.²⁹⁷ For example, in a case where the Court wanted to decide issues which had not been litigated below, Congress could impose one or more specific requirements. First, the Court could be required to dismiss a case as improvidently granted unless the issues to be decided were supported by a full record below, were the subject of lower court decisions, had been briefed and argued by the parties, and had had the opportunity for amicus participation. In that instance, the Court would have to await the next case before deciding the issue it preferred to decide. Second, the Court could be required to send the case back to the trial court for the development of a record on the issue it believed necessary to resolve the case. As a third possibility, the Court could be required to propose a new question presented and ask for briefs and argument by the parties and amici.

The stronger alternatives for Congress to adopt are the first two listed above. These requirements would appear to more significantly limit the Court to its role within an adversarial system, by ensuring that the issues it decides are based on a record below and lower court decisions. The third possibility is probably the weakest option, because it would still permit the Court to decide issues without there being a record below or decisions by lower court judges. It is also a method that the Court already uses, but not consistently, as seen in the *Iqbal* case. In *Iqbal*, the Court did not allow briefing or arguing or participation by amici on the issue of supervisory responsibility under *Bivens*.²⁹⁸ Thus, making this alternative a requirement would ensure

294 See *id.* at 632–33.

295 See *id.* at 633.

296 See *id.* at 636.

297 As Chief Justice Ellsworth noted in an early case, *Wiscart v. D'Auchy*, 3 U.S. 321, 327 (1796):

If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate proceeding; and if the rule is provided, we cannot depart from it.

The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?

298 See *Aschroft v. Iqbal*, 129 S. Ct. 1937, 1957 (2009) (Souter, J., dissenting) (“[W]e have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require.”).

that the Court could not simply choose an issue and decide it without the opportunity for the parties and amici to brief and argue the question.

Although any law Congress would enact to shore up the constitutional structure would be subject to interpretation by the Court, nonetheless, it would focus more attention on the expectation that the Court could not easily change the case before it so that it could change the law. Congress could and should take steps to ensure that our independent judiciary is not so independent that it is accountable to no one. If there are no checks and balances, and no controls on separation of powers, then the Supreme Court becomes a law unto itself and descends into the abyss of unchanneled discretionary justice, where law is simply the exercise of raw political power.

CONCLUSION

The Supreme Court of the United States is a very important branch of the government. The current path of the Roberts Court, however, risks undermining not only the public's respect for the Court but also its respect for the rule of law. When members of the Court act like "politicians in robes," who overstep the proper boundaries of the constitutional structure regarding the role of the judiciary, when a majority of the Justices ignore their own rules and prudential practices, when they do not respect long-held judicial traditions about the way cases should be decided, they need to be called to account. Judicial power in a constitutional democracy is not boundless, and Justices should not roam at will. Congress should exercise its power under the Exceptions Clause to clarify the outer boundaries of the Court's power by limiting the Court's ability to reach out for issues that are not grounded in the adversary process. The Supreme Court is too important to be left to its own devices.