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Advisory Adjudication

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Advisory Adjudication

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The Supreme Court decision in Camreta v. Greene is revealing. The Court first issues an opinion authorizing appeals by prevailing parties in qualified immunity cases, even though doing so entails the issuance of an advisory opinion that is not necessary to resolution of the dispute between the parties. And the Court then declines to reach the merits of the underlying constitutional claim in the case, because doing so would entail the issuance of an advisory opinion that was not necessary to the resolution of the dispute between the parties. The Court's decision, therefore, has the paradoxical effect of both honoring and violating the Article III jurisdictional limitation on advisory opinions at the same time. The Camreta paradox illustrates a problem that makes our current conception of judicial review incoherent. We insist that the Supreme Court avoid separation of powers problems by confining itself to the retrospective adjudicatory activities envisioned by the Marbury v. Madison dispute-resolution model of judicial review. But what we really want the Court to do is participate in the prospective formulation of governmental policy, as if it were part of a tricameral legislative process. These dual conceptions of judicial review reflect a tension inherent in liberalism itself. We want both to advance our own self-interests in an unflattering pluralist political process, but simultaneously we wish to think of ourselves as other-regarding adherents to loftier civic republican virtue. We ask the Supreme Court to mediate this tension for us by making our liberal political victories look as if they are rooted in deeper communitarian principles. But this mediation can be successful only to the extent that the Court can mask for us the underlying incoherence of the judicial review function that we ask the Court to perform. In Camreta, this incoherence is so close to the surface that, hopefully, we will be forced to confront it. Without the camouflage that we ask judicial review to provide for our baser instincts, perhaps we will come to treat each other less harshly, and with more empathy.

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I. INTRODUCTION

Sometimes a United States Supreme Court decision is reminiscent of a Robert Frost poem. It starts out by focusing on a particular incident, but ends up prompting an insight about some larger truth. That is the way I felt about the Supreme Court's recent decision in Camreta v. Greene. The decision starts out by addressing a dispute between the parties, but ends up prompting a larger insight about the nature of judicial review. The insight is that the institution of judicial review is largely incoherent.

In Camreta, government officials interviewed a nine-year-old elementary school girl in an effort to determine whether she was being sexually abused by her father. Her mother then sued the officials for damages, claiming that the interview violated her daughter's Fourth Amendment rights. The government prevailed in the United States Court of Appeals for the Ninth Circuit when that court found that the government officials were protected by qualified immunity. The curious Supreme Court decision that followed was issued not at the behest of the mother who had lost below, but at the behest of the prevailing government officials who preferred to win on the merits of the Fourth Amendment issue. But after holding that the Article III prohibition on advisory opinions did not preclude the Court from granting the request of the officials for prospective Fourth Amendment guidance, the Court nevertheless dismissed the appeal under Article III as moot.

If an advisory opinion is understood in its conventional sense as the adjudication of a legal issue that is not necessary for resolution of the dispute between the parties, the Supreme Court decision in

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1. For example, the well-known Robert Frost poem Stopping by Woods on a Snowy Evening, which many of us first encountered as schoolchildren, begins by describing the seemingly innocuous incident referred to in the poem's title, but ends up prompting an insight about the nature of life itself. See Robert Frost, Stopping by Woods on a Snowy Evening, in The Poetry of Robert Frost 224-25 (Edward Connery Lathem ed., 1969).
3. See id. at 2027-29, 2033-34.
Camreta is quite remarkable. In essence, the Supreme Court issued an advisory opinion holding that it had jurisdiction to review advisory opinions that were issued by lower courts in qualified immunity cases. But after having done so, the Court seemingly went on to hold that the Article III prohibition on advisory opinions prevented the Court from issuing the very advisory opinion that the Court itself had just issued. This dizzying self-referential paradox is more than just puzzling. It prompts the insight that judicial review cannot actually serve the constitutional function that we have traditionally envisioned for it.

Under our tripartite system of government, we normally think that the Supreme Court is institutionally competent to resolve concrete disputes between the parties. However, the very insulation from political accountability that is commonly thought to make the life-tenured federal judiciary a trustworthy arbiter of individual disputes also leaves it institutionally ill-suited to the formulation of prospective governmental policy. To avoid this counter-majoritarian difficulty, we therefore allocate such legislative policy-making functions to the politically accountable branches of government. Consistent with our commitment to separation of powers, the Article III-based prohibition on advisory opinions is intended to confine the practice of judicial review to the dispute-resolution arena and to prevent it from seeping into the realm of legislative policy making. This constitutional aversion to advisory opinions is traceable to the model of judicial review articulated in Marbury v. Madison. But the Marbury model has become so porous that it is unrealistic to believe that it can actually prevent judicial review from infiltrating the policy-making process. And there is a reason for that.

Article III considerations aside, we have never really viewed the Supreme Court as a dispute-resolution body. From the Marshall Court’s Commerce Clause decisions addressing the scope of federal power, to the Roberts Court’s campaign finance decisions addressing the scope of corporate power, we have always expected the Supreme Court to engage in prospective social policy-making activities concerning controversial political issues. Indeed, our reliance on the Court to resolve stubborn social policy issues has become so prevalent that the Court can plausibly be viewed as the final policy-making chamber of a tricameral legislature—a chamber whose members simply have longer terms of office than other officials, and whose

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4. 5 U.S. (1 Cranch) 137 (1803).
constituents simply prefer their policy preferences to be articulated as outgrowths of foundational principles. Accordingly, the concurrence of the Court—like the concurrence of the House, the Senate, and typically the President—is required before social policies affecting issues such as school prayer, abortion, and affirmative action can take effect. The fact that judicial policy making is clothed in the garb of constitutional adjudication, addressed to particular disputes between particular parties, does not negate the fact that Supreme Court decisions are useful primarily for their general, prospective effect. We affirmatively want the Supreme Court to issue advisory opinions so that we can rely on the policies advanced by those opinions to order our everyday lives—just as we rely on the policies advanced by other conventional legislative enactments to give us prospective guidance.

The Camreta decision exemplifies the incompatible demands that we make on judicial review. Realizing that separation of powers concerns limit legitimate adjudication to the retrospective resolution of particular cases and controversies, the Court invokes the doctrine of mootness to refrain from issuing an advisory opinion in a dispute that it no longer views as live. But realizing that the value of judicial review lies precisely in its prospective policy prescriptions, the Court issues an advisory opinion "holding" that the Court has jurisdiction to issue advisory opinions when the need for prospective guidance is sufficiently high. Then, as if to dispel the suspicion that Camreta might be an isolated anomaly, the Supreme Court went on to issue other advisory opinions during the same Term.

Don’t get me wrong. I am not suggesting that the Supreme Court should choose one model of judicial review and simply stick to it. On
the contrary, my point is that our sincere expectations for judicial review are themselves internally inconsistent. We want the Court to formulate prospective social policy for us, but simultaneously to convince us that it is merely applying the Constitution in a retrospective, nonpartisan way. There is an advantage in asking judicial review to serve this dual function.

Reflecting a dilemma inherent in liberalism, we are often confronted with the conflict that exists between our liberal inclinations to pursue pure self-interest through a commitment to pluralist politics, and our other-regarding inclinations to pursue collective welfare through a commitment to classical republican civic virtue. One way to help mediate this conflict is by asking the Supreme Court to do it for us. When the Court rules in our favor, it enables us to believe that the pluralist special interests we successfully lobby the Court to adopt in its tricameral policy-making capacity are actually rooted in the republican constitutional principles that the Court announces in its adjudicatory dispute-resolution capacity. These dual functions of judicial review can help us advance our own interests at the expense of others, while believing that we are doing something that is constitutionally noble rather than something that is selfishly political. However, judicial review can successfully serve this dual function only to the extent that we can suppress our own recognition of what is going on.

I think that cases like Camreta are useful precisely because they put enough strain on the Marbury-based adjudicatory model of judicial review to challenge our continued adherence to that model. When we adopt social policies that advance our own self-interests at the expense of others, simply because we possess the political power to sacrifice those other interests for our own well-being, we should at least recognize that this is what we are doing. If we can come to appreciate the incoherence produced by the conflicting demands that we place on judicial review, my hope is that we will no longer make the mistake of thinking that judicial review can somehow save us from the implications of our own parochial policy preferences.

Part II of this Article describes the doctrinal difficulties that are embedded in the Supreme Court's Camreta dalliance with advisory opinions. Part II.A discusses the doctrinal paradox created by the

REV. 847, 848-58, 935-36 (2005) (arguing that the current trend toward increased advisory opinions has the effect of increasing judicial power).

Camreta Court's application of the advisory opinion rule. Part II.B discusses other advisory opinions issued the same Term that implicate the Camreta paradox. Part III describes the manner in which Camreta's doctrinal difficulties reflect the inconsistent demands that we place on the conventional model of judicial review. Part III.A discusses the constitutional underpinning of the adjudicatory model of judicial review that emanates from Marbury v. Madison. Part III.B argues that, despite the constraints of the Marbury model, we still favor prospective judicial policy making as part of what amounts to a tricameral legislative process. Part IV considers why we remain attracted to the Marbury model of judicial review, despite the elusive distinction that exists between retrospective judicial adjudication and prospective legislative policy making. Part IV.A suggests that our adherence to the Marbury model reflects the liberal dilemma inherent in our efforts to be both self-interested and other-regarding. Part IV.B argues that by appreciating rather than suppressing the incoherence of the Marbury model, we may evolve to a postliberal stage of evolution in which we are better able to accept accountability for the policies that we impose on one another. The Conclusion, however, fears that the convenient insulation from accountability that is offered by the safeguard of judicial review may be so appealing that we will simply deflect any insights about the incoherence of the conventional model with which we are confronted.

II. ADVISORY OPINIONS

The Article III limitation of federal court jurisdiction to "Cases" and "Controversies" has been interpreted by the Supreme Court to prohibit the issuance of advisory opinions. An advisory opinion has, in turn, been held to entail the adjudication of an issue whose resolution is not necessary to settle a dispute between the parties. In Camreta v. Greene, the Supreme Court issued an advisory opinion that was not necessary to settle a dispute between the parties, and it did so.


13. See, e.g., Fallon et al., supra note 12, at 50-54, 70-73 (discussing the link between the prohibition of advisory opinions and the dispute-resolution model of judicial review); see also Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (emphasizing necessity to decision).
in a case that the Court went on to hold it lacked Article III jurisdiction to review. Whether or not two wrongs can ever make a right, in this instance two wrongs did make a paradox. The Court both issued and refused to issue an advisory opinion in the same case. Moreover, the Supreme Court's advisory opinion problem is not limited to Camreta alone. Other decisions issued by the Court that same Term illustrate—and even require—the issuance of advisory opinions in seeming violation of the Article III prohibition.

A. Camreta Paradox

The dispute before the Court in Camreta involved contested claims for damages under 42 U.S.C. § 1983 arising out of alleged constitutional violations, and pendant claims for damages arising out of state tort law violations. In the process of resolving that dispute, the United States District Court for the District of Oregon, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court all issued opinions that were in increasingly greater tension with the Article III prohibition on advisory opinions.

1. Factual Context

After a nine-year-old girl referred to as “S.G.” was interviewed in an Oregon elementary school by public officials, S.G.'s mother Sarah filed a damage action asserting that the interview violated a variety of constitutional and state law tort rights possessed by S.G. and her family. Most prominent among these was the Fourth Amendment right to be free from unreasonable searches and seizures, which Sarah claimed had been violated when S.G. was interviewed without a warrant, probable cause, exigent circumstances, or parental consent. The reason S.G. had been interviewed was that Oregon state and county officials feared that S.G. and her five-year-old sister K.G. were being sexually abused by their father Nimrod. Nimrod had been arrested on February 12, 2003, for suspected sexual abuse of an unrelated seven-year-old boy referred to as “F.S.” In connection with that arrest, the parents of F.S. reported that Sarah herself was concerned about Nimrod's potential sexual abuse of their own

15. The Supreme Court briefly discussed the facts in Camreta. Id. at 2027-28. A fuller discussion of the facts is set out in the court of appeals opinion, Greene v. Camreta (Greene I), 588 F.3d 1011, 1016-20 (9th Cir. 2009), and the district court opinion, Greene v. Camreta (Greene I), No. Civ. 05-6047-AA, 2006 WL 758547, at *1-2 (D. Or. Mar. 23, 2006).
children, S.G. and K.G. As part of the ensuing investigation, S.G. was interviewed on February 24, 2003, by Oregon Department of Human Services Child Protective Services caseworker Camreta, in the presence of Deschutes County Deputy Sheriff Alford. The two-hour interview was conducted while S.G. was at school, in the apparent hope of getting S.G. to speak freely in the absence of her parents. During the interview, S.G. initially denied that her father had abused her, but she eventually stated that her father did sometimes touch her in inappropriate ways while he was intoxicated. Subsequent to that interview, however, S.G. recanted. S.G. stated that she felt uncomfortable and intimidated during the interview and that she told Camreta what she thought he wanted to hear in order to be allowed to leave.\(^{16}\)

On March 6, 2003, S.G.’s father Nimrod was indicted for six counts of felony sexual assault against F.S. and S.G.\(^{17}\) At the close of Nimrod’s trial for sexual assault against F.S. and S.G., the jury failed to reach a verdict. In lieu of a retrial, Nimrod accepted an \textit{Alford} plea with respect to the charges concerning F.S., and the charges concerning his daughter S.G. were dismissed.\(^{18}\) Sarah then filed an action in federal district court against a variety of defendants, including caseworker Camreta and Deputy Alford. Sarah sued on behalf of herself and her daughters S.G. and K.G. She alleged unconstitutional and state tort law interference with their collective familial rights, as well as unconstitutional interference with S.G.’s Fourth Amendment rights. Nimrod did not sue.\(^{19}\)

2. Lower Courts

The district court rejected Sarah’s claims on the merits and entered summary judgment for defendants Camreta and Alford.\(^{20}\) The district court also held that Camreta and Alford were entitled to qualified immunity even if their interview of S.G. could be viewed as a Fourth Amendment violation. Qualified immunity was available,

\footnotesize{

17. See \textit{Greene II}, 588 F.3d at 1018; \textit{Greene I}, 2006 WL 758547, at *2.

18. See \textit{Camreta}, 131 S. Ct. at 2027; \textit{Greene II}, 588 F.3d at 1020. An \textit{Alford} plea maintains innocence, but admits the existence of sufficient evidence to warrant a conviction. See \textit{Greene II}, 588 F.3d at 1020 n.3 (citing North Carolina \textit{v. Alford}, 400 U.S. 25 (1970)). This “\textit{Alford}” bears no relation to Deputy Sheriff Alford in \textit{Camreta}.


}
notwithstanding a hypothetical violation of the Fourth Amendment, because no law clearly established that the interview was impermissible, and reasonable officials could have believed that such an interview was lawful.21

In theory, the district court opinion could be said to pose an advisory opinion problem. Either the court's Fourth Amendment adjudication or its qualified immunity adjudication could technically be viewed as an impermissible advisory opinion. Because either was alone sufficient to dispose of the damage claim at issue, the court's resolution of the other issue was arguably unnecessary to settle the dispute between the parties. However, alternative holdings adjudicated by lower courts are not typically viewed as impermissible advisory opinions.22 Perhaps this is because both holdings are potentially necessary to the court's decision. If a lower court is later reversed on one issue by an appellate court, the alternative holding can still serve as a basis for affirming the lower court judgment. Therefore, considerations of judicial economy in resolving the dispute between the parties might justify any technical incursion on the advisory opinion rule that would otherwise be of concern. If this view is accepted, all of the issues that the district court addressed fall within an expansive understanding of what was necessary to resolve the disputed damage claim. Moreover, the district court was careful to deny those motions that it deemed to be moot, thereby further avoiding any additional advisory opinion problems.23

From an advisory opinion perspective, the decision of the court of appeals was far more problematic. The appeal to that court had been filed by Sarah, who lost in the district court below, and the court of appeals reversed the district court on the merits of Sarah's Fourth Amendment claim. The court of appeals held that the interview of S.G. at school was so entangled with the ongoing criminal investigation of Nimrod that conducting the interview without Fourth Amendment protections constituted an unreasonable seizure.24 However, the court of appeals ultimately affirmed the district court judgment granting qualified immunity to Camreta and Alford, because

21. See id. at *4-5.
it agreed that the Fourth Amendment law prohibiting S.G.'s interview was not clearly established at the time that the interview occurred.\textsuperscript{25}

Like the district court, the court of appeals adjudicated both the merits of the Fourth Amendment claim and the availability of the qualified immunity defense. Unlike the district court, however, the court of appeals could not maintain that it was merely issuing alternative holdings. Affirming the district court judgment on qualified immunity grounds completely resolved the dispute between the parties. And the court's additional decision upholding the Fourth Amendment claim could not have been an alternative holding because it did not support the court's judgment. That judgment rejected Sarah's damage claim, and the Fourth Amendment ruling provided a basis for upholding the claim. As a result, the Fourth Amendment ruling issued by the court of appeals was a pure advisory opinion, issued for reasons other than resolving the dispute between the parties. In the words of the Ninth Circuit itself, the Fourth Amendment decision was issued "to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment," because "although other circuits have provided guidance to parents, school officials, social workers, and law enforcement personnel on the issue, we have not."\textsuperscript{26}

In fairness to the court of appeals, it was not breaking new ground by adjudicating the Fourth Amendment claim. Rather, its adjudication of that claim had been expressly authorized by the Supreme Court.\textsuperscript{27} In fact, the Supreme Court's 2001 decision in \textit{Saucier v. Katz} actually \textit{required} lower courts to adjudicate the merits of the constitutional claims asserted in qualified immunity cases, in order to promote "the law's elaboration from case to case."\textsuperscript{28} The Court's more recent 2009 decision in \textit{Pearson v. Callahan} now gives lower courts discretion in deciding whether to resolve the constitutional issues presented in such cases.\textsuperscript{29} But \textit{Pearson} still authorizes the issuance of advisory opinions.

This Supreme Court authorization was designed to solve a particular, practical problem. If the advisory opinion rule were strictly applied in qualified immunity cases, there would rarely be an occasion

\begin{itemize}
\item 25. \textit{See id.} at 1030-33.
\item 26. \textit{Id.} at 1021-22.
\item 27. \textit{See id.}
\item 28. 533 U.S. 194, 201 (2001); \textit{see also} Camreta v. Greene, 131 S. Ct. 2020, 2031-32 (2011).
\item 29. 555 U.S. 223 (2009).
\end{itemize}
for a federal court to resolve the merits of a novel constitutional claim. Recognition of qualified immunity would preclude the court from addressing the novel claim the first time it was raised, which in turn would prevent the claim from becoming "clearly established" enough to override a qualified immunity claim in the next case that considered it. This process would go on indefinitely, in a way that left government officials without the constitutional guidance needed to prevent them from repeatedly violating novel but valid constitutional rights.\textsuperscript{39} Because the rights would never become sufficiently established to penetrate the qualified immunity defense, the development of constitutional law would remain "permanently in limbo."\textsuperscript{31} The lower courts, therefore, had the Supreme Court's blessing in issuing their Fourth Amendment advisory opinions. But the Supreme Court's own advisory opinion in \textit{Camreta} is considerably more difficult to fathom.

3. Supreme Court

One of the most noteworthy features of the Supreme Court decision in \textit{Camreta} is that it was issued at the behest of the parties who prevailed in the court of appeals, and not at the behest of the party who lost. Although Sarah's damage claim was rejected by the Ninth Circuit on qualified immunity grounds, Sarah did not seek review of that decision. Instead, the Supreme Court granted review based on petitions for certiorari that were filed by Camreta and Alford—the prevailing officials who had conducted the in-school interview of S.G. Those officials wanted to win on the merits of the Fourth Amendment issue, rather than simply on qualified immunity grounds, because they wanted to establish the constitutional validity of such in-school interviews in order to guide their actions in future cases.\textsuperscript{32} The petitioners, therefore, were expressly asking the Supreme Court to issue an advisory opinion.

The Supreme Court held that Article III did not prohibit prevailing parties from obtaining such advisory opinions. Writing for a five-Justice majority, Justice Kagan stated that an immunized official could still possess an interest in the outcome of a litigated issue. She also cited two precedents in support of the proposition that appeals by prevailing parties could satisfy the Article III case or controversy

\textsuperscript{30} See \textit{Camreta}, 131 S. Ct. at 2030-33.
\textsuperscript{31} \textit{id.} at 2031.
\textsuperscript{32} \textit{id.} at 2028.
requirement. This holding seems to have been motivated by Justice Kagan's desire to avoid an unintended consequence of the *Saucier* and *Pearson* decisions, which authorized lower courts to issue Fourth Amendment advisory opinions in qualified immunity cases. If prevailing parties were not permitted to seek review, those advisory opinions could be shielded from the Supreme Court in cases like *Camreta*, where the losing party chose not to appeal. It is also possible that *Camreta*'s authorization of prevailing-party appeals was a compromise designed to secure the votes of Justices who were prepared to overrule *Saucier* and *Pearson* in order to prevent lower courts from being able to issue Fourth Amendment opinions that the Supreme Court would not have the ability to reverse.

Justice Kagan, however, did go on to stress that Article III required both parties to retain a personal stake in the outcome throughout the course of the litigation. She stated that a party has such stake when that party has "'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" The language that Justice Kagan used to describe how both parties could retain the requisite Article III stake in the outcome is here reproduced in its entirety:

This Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials’ behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. The court in such a case says: “Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable.” If the official regularly engages in that conduct as part of his job (as *Camreta* does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action. *Cf. id.* [Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326 (1980)], at 337-338, 100 S.Ct. 1166 (discussing prevailing party’s stake in a ruling’s prospective effects). Only by overturning the ruling on appeal can the official gain clearance

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34. *Cf. id.* at 2043 (Kennedy, J., dissenting) (suggesting that lower court authorization to issue Fourth Amendment advisory opinions might have to be reconsidered); *accord id.* at 2036 (Scalia, J., concurring).
35. *Id.* at 2028 (majority opinion) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).
to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability.\textsuperscript{4} And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding. \textit{See Erie v. Pap's A.M.}, 529 U.S. 277, 287-289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); \textit{Honig v. Doe}, 484 U.S. 305, 318-323, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); \textit{cf. [Los Angeles v. Lyons]}, 461 U.S. [95], at 111, 103 S.Ct. 1660 [(1983)] (examining whether the plaintiff had shown "a sufficient likelihood that he will again be wronged in a similar way"). Only if the ruling remains good law will she have ongoing protection from the practice.\textsuperscript{36}

There are three problems with Justice Kagan's Article III discussion. First, the desire of parties for prospective constitutional guidance standing alone is typically not sufficient to create an Article III case or controversy. Second, it is difficult to see how a party adversely affected by a lower court decision retains an Article III stake in the outcome of the decision if that party has chosen not to appeal. Third, Justice Kagan's Article III discussion was paradoxically part of an advisory opinion that the \textit{Camreta} Court itself lacked Article III jurisdiction to issue.

\textbf{a. Prospective Guidance}

The advisory opinion prohibition of Article III does not seem to tolerate a party's bare request for prospective legal guidance. Just as the first Supreme Court famously declined to give requested legal advice to President George Washington in the absence of a live case or controversy,\textsuperscript{37} the Court cannot properly give legal advice to immunized officials concerning the Fourth Amendment validity of in-school student searches in the absence of a live case or controversy. Justice Kagan's quoted language concedes that \textit{Camreta} and \textit{Alford} ceased to possess a personal stake in Sarah's damage claim once that claim had been resolved in their favor by the Ninth Circuit's qualified

\textsuperscript{36.} \textit{Id.} at 2029. Footnote 4 stated, "Contrary to the dissent's view, the injury to the official thus occurs independent of any future suit brought by a third party. Indeed, no such suit is likely to arise because the prospect of damages liability will force the official to change his conduct." \textit{Id.} at 2029 n.4 (citation omitted).

\textsuperscript{37.} In 1793, Chief Justice John Jay's Supreme Court declined to answer a series of abstract international law questions posed by President Washington on the grounds that the Court was precluded from issuing what we now characterize as advisory opinions. \textit{See Fallon et al., supra} note 12, at 50-54. The advisory opinion prohibition on federal jurisdiction has been repeatedly enforced ever since. \textit{See Camreta,} 131 S. Ct. at 2037-38 (Kennedy, J., dissenting) (citing advisory opinion cases); \textit{Flast v. Cohen,} 392 U.S. 83, 95-96 (1968); \textit{Muskat v. United States,} 219 U.S. 346, 361-62 (1911).
immunity holding. Their only remaining interest, therefore, was in receiving prospective constitutional guidance concerning the validity of future in-school interviews that might be directed at future students. More specifically, they wanted the Supreme Court to free them from the prospective guidance that the Ninth Circuit had given them in holding that the Fourth Amendment prohibited in-school searches without adequate Fourth Amendment safeguards. But recognition of that interest poses a serious Article III problem.

Assume that it were Congress rather than the Ninth Circuit that prohibited the future in-school interviews that Camreta and Alford wished to conduct. If Congress had passed a statute, pursuant to its Section 5 power under the Fourteenth Amendment, that was designed to implement the Fourth Amendment by preventing in-school interviews without adequate Fourth Amendment safeguards, Article III would not give a federal court jurisdiction to adjudicate the validity of Congress's interpretation of the Fourth Amendment based solely on congressional enactment of the statute.\(^38\) Rather, a preenforcement challenge to the statute could be maintained only by filing an injunctive or declaratory judgment action against some particular student or class of students whom the officials planned imminently to interview in violation of the terms of the statute. Indeed, those stringent particularity and imminence requirements are imposed by the very \textit{Lyons} decision that Justice Kagan cites in the quoted excerpt from her opinion.

The desire of the officials to be free from the Ninth Circuit’s Fourth Amendment ruling in the actual \textit{Camreta} case seems vulnerable to precisely the same Article III problem. Just as Article III prohibited the officials from challenging a congressional interpretation of the Fourth Amendment in the absence of a live controversy that existed between the officials and some particular student whom the officials wished imminently to interview, Article III also prohibits the officials from challenging a Ninth Circuit interpretation of the Fourth Amendment in the absence of a live controversy that exists between the officials and some particular student whom the officials wish imminently to interview. But here there is no such student. The only particular student involved in the litigation is S.G., and the officials

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38. \textit{See Muskrat}, 219 U.S. at 360. The Supreme Court has limited the Section 5 remedial power of Congress to harms that the judiciary determines are produced by the violation of rights specified in or incorporated into the Fourteenth Amendment. \textit{See City of Boerne v. Flores}, 521 U.S. 507, 516-29 (1997); \textit{see also United States v. Morrison}, 529 U.S. 598, 619-28 (2000).
have expressed no desire to interview her again. Even if the officials 
were to announce a desire to interview S.G. or some other particular 
student in the future, that would not eliminate the Article III problem. 
Such an announcement might enable the officials to commence their 
own injunctive or declaratory judgment action against the identified 
student, in a way that presented an Article III case or controversy, 
provided that the Lyons imminence and particularity requirements 
were satisfied. However, it would have no bearing on the Article III 
validity of the Camreta appeal itself. The live dispute that had 
previously existed between Sarah and the officials terminated with the 
Ninth Circuit qualified immunity holding, and any future disputes that 
might occur between the officials and other hypothetical students had 
yet to arise.39

It is true that federal courts do possess Article III jurisdiction to 
issue declaratory judgments.40 However, no declaratory judgment 
action was ever filed by the officials against the contemplated target of 
any future in-school sexual abuse interview. Moreover, even if the 
Camreta and Alford petitions for certiorari could be viewed as 
alogous to a complaint commencing such a declaratory judgment 
action, a federal court’s declaratory judgment jurisdiction is still 
subject to the Article III case or controversy requirement.41 And once 
again, no ripe Article III case or controversy could exist in the absence 
of a particularly identified party before the court whom the officials 
sought imminently to interview.

b. Nonappealing Party

Even if the desire to obtain prospective constitutional guidance 
could somehow be viewed as sufficient to give prevailing immunized 
officials an Article III stake in obtaining an advisory opinion, Justice 
Kagan emphasized that the other party—the nonprevailing party, 
whose damage claim was rejected in the court below—would also 
have to retain an Article III stake in the outcome. Sarah did, of course, 
possess a cognizable interest in the damage claim that she asserted in 
the Camreta litigation. However, that interest ceased to exist once 
Sarah chose not to appeal the Ninth Circuit denial of her damage claim 
to the Supreme Court. Indeed, the absence of an appeal by Sarah

39. Justice Kennedy appears to make essentially the same point in his Camreta 
dissent. See Camreta, 131 S. Ct. at 2042-43 (Kennedy, J., dissenting).
40. See Declaratory Judgment Act of 1934, 48 Stat. 955 (1934) (codified as amended 
at 28 U.S.C. §§ 2201-2202 (2006)).
should have caused the Ninth Circuit denial of her damage claim to become final, and binding on all parties as the law of the case. Article III, therefore, permits Supreme Court review of the Ninth Circuit decision only if Sarah possesses some other interest that survived the unappealed denial of her damage claim.

In determining whether some other such interest exists, it is worth noting that Sarah's decision not to appeal may well have been both deliberate and strategic. After having lost in the Ninth Circuit, Sarah may have chosen not to appeal precisely because she did not want to incur the risk of creating an adverse Supreme Court precedent. If that were the case, recognition of a continuing interest that Sarah possessed in Supreme Court review—an interest that would be diametrically opposed to Sarah's manifest interest in avoiding review—would permit the prevailing officials to foist upon Sarah an appeal that she had affirmatively chosen not to take.

Because Sarah sued only for damages, she could not have possessed any cognizable interest in prospective relief that persisted after her damage claim had been denied. Indeed, no such interest was ever present in the *Camreta* litigation, because Sarah never sued for declaratory or injunctive relief. As a result, it seems that there are only two ways in which Sarah could possess an interest in Supreme Court review of the unappealed Ninth Circuit denial of her damage claim. It might be that some de facto desire to avoid future unconstitutional interviews of S.G. could give Sarah an Article III interest in Supreme Court review, even though Sarah had never asserted a claim for prospective relief in the litigation. Alternatively, it might be that an appeal by the prevailing immunized officials could somehow give Sarah a continuing prospective interest in the outcome that she would not have possessed in the absence of such an appeal. But neither theory seems plausible.

It is unlikely that a de facto desire to avoid future unconstitutional interviews could give Sarah an Article III interest in Supreme Court review of the Ninth Circuit's Fourth Amendment ruling even though Sarah had never requested declaratory or injunctive relief in the course of the *Camreta* litigation. It is true that Article III now recognizes jurisdiction based on an "injury in fact," rather than on the narrower conception of a "legal right" that characterized earlier eras of justiciability jurisprudence. But the contemporary law of

justiciability is quite strenuous in its insistence that Article III demands highly particularized allegations and proof of injury, causation, and redressability.\(^{43}\) Accordingly, the *Lyons* case that Justice Kagan cites in the block quote reproduced above reversed an injunction affirmed by the court of appeals that barred excessive police force in the form of choke holds that were allegedly used in routine traffic stops and other nonthreatening situations.\(^{44}\) The Supreme Court reversed because Article III did not permit the suit to be maintained by a plaintiff who had been the victim of such a choke hold in the past and who feared the repeated use of such choke holds in the future. Although Article III permitted the plaintiff to sue for damages caused by his past choke hold injuries, it did not permit him to sue for prospective declaratory or injunctive relief, because he failed to establish a “real and immediate” threat of recurrence that was not “conjectural” or “hypothetical.”\(^{45}\) Any prospective interest that Sarah had in avoiding a repeated unconstitutional interview of her daughter S.G. would certainly fall victim to the same fate. The fact that Sarah—unlike the plaintiff in *Lyons*—had never requested prospective relief means that there was never an occasion for her to allege or prove the threat of prospective injury that *Lyons* holds is required by Article III. As a result, even if an unarticulated prospective interest in avoiding unconstitutional interviews could constitute an “injury in fact,” it would still be far less “real and immediate”—and far more “conjectural” and “hypothetical”—than the prospective interest found wanting for Article III purposes in *Lyons*.

It is equally implausible that Sarah simply acquired a stake in Supreme Court review of the Ninth Circuit decision once the immunized officials were granted review. Normally, a respondent has a continuing stake in the outcome of an appeal because the respondent is defending a victory below. Here, however, the respondent had no victory to defend, so it is unclear how she could have any continuing stake in the outcome. As a formal matter, it cannot be that simply granting review to one party automatically gives the other party an Article III stake in the outcome of an appeal. That would tautologically collapse Justice Kagan’s insistence that each party have a continuing stake in the outcome into a requirement that only one party have a continuing stake.\(^{46}\) As a substantive matter, the claim that one

\(^{43}\) *See* *Lujan*, 504 U.S. at 559-62.

\(^{44}\) *See supra* text accompanying note 36.

\(^{45}\) *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101-13 (1983).

\(^{46}\) *See* Camreta, 131 S. Ct. at 2028.
party's appeal automatically vests the other party with a stake in the outcome. There is an instrumental reason for the Article III requirement that both sides retain a personal stake in the outcome throughout the course of the litigation. As Justice Kagan stated, "[T]he opposing party also must have an ongoing interest in the dispute, so that the case features 'that concrete adverseness which sharpens the presentation of issues.'”\(^7\) "That concrete adverseness" seems unlikely to be present when a party both lacks any prospective stake in the outcome, and chooses not to appeal an adverse ruling below.

In this regard, it is interesting to note that the transcript of the oral argument in \textit{Camreta} includes an amusing colloquy between Chief Justice Roberts and Sarah's lawyer that seems to illustrate the "concrete adverseness" point. Wondering about Sarah's continuing interest in the litigation, Chief Justice Roberts asks, "[W]hy are you here? ... You're not challenging the qualified immunity ruling? ... [W]hy didn't you just go away?" After the ensuing laughter died down, Sarah's lawyer responded, "S.G. does not have a legally cognizable stake, Your Honor. She won a moral victory when she obtained a ruling in her favor on the Fourth Amendment claim in the Ninth Circuit, but as this Court said in \textit{Hewitt v. Helms}, a moral victory is no victory at all ..."\(^8\)

In light of this colloquy, it is also interesting to wonder what the Supreme Court would have done in \textit{Camreta} if Sarah had elected not to participate in Supreme Court review of the Ninth Circuit decision, precisely because she did not view herself as retaining any prospective stake in the outcome of the case once her damage claim had been denied. In such an event, the Article III problem would have been presented in a way that was even more stark. However, past decisions reveal the Supreme Court might still have permitted review. The Court sometimes reviews a case on an issue, despite what would normally be viewed as a stark absence of Article III adverseness, by appointing an amicus curiae to support the challenged judgment below. The modern Court has done this twice every three Terms,\(^9\) and the current Court

\(^7\) See \textit{id.} (quoting Lyons, 461 U.S. at 101).


did it in another case decided during the *Camreta* Term. More famously, the Court also did this in the 2012 Health Care litigation, appointing amici to argue severability and Anti-Injunction Act positions that none of the parties supported. In such cases the Supreme Court chooses to review the decision below, but it is able to do so only at the cost of imposing a serious strain on the concept of Article III jurisdiction. Likewise in *Camreta*, the Supreme Court authorized review of the decision below, but once again, it did so only at the cost of imposing a serious strain on Article III.

c. *Camreta* Paradox

Even if one assumes that the Supreme Court properly found the existence of Article III jurisdiction to review constitutional claims asserted by prevailing parties against opposing parties, in retrospective damage actions that the opposing parties chose not to appeal, the Supreme Court's decision in *Camreta* would still be paradoxical. Despite taking such pains to hold that it had Article III jurisdiction when both parties possessed a prospective stake in the outcome, the Supreme Court ultimately held that it lacked Article III jurisdiction to review the lower court's Fourth Amendment ruling in *Camreta* itself. Although Camreta retained a stake in the outcome, Sarah's claim had become moot. At the time of Supreme Court review, S.G. had moved from Oregon to Florida, was a few months away from her eighteenth birthday, and would soon graduate from high school. As a result, the Court concluded there was no realistic likelihood that S.G. would again be subject to an interview as a minor by Oregon public officials during a child sexual abuse investigation.

If that mootness determination was correct, the Supreme Court properly held that it lacked Article III jurisdiction to review the Ninth Circuit's Fourth Amendment decision. But if the case was moot, the Supreme Court also lacked Article III jurisdiction to issue that portion

50. See *Bond v. United States*, 131 S. Ct. 2355, 2361, 2363-67 (2011) (appointing amicus to permit adjudication of private party's standing to raise Tenth Amendment claims of interference with state sovereignty, even though both parties conceded standing on appeal).


52. See *Camreta*, 131 S. Ct. at 2033-34. Unlike Camreta, Deputy Sheriff Alford ceased to possess a stake in the outcome. Because he was no longer serving as a law enforcement officer, he would not be involved in future child sexual abuse investigations. See *id.* at 2034 n.9.
of the opinion holding that it possessed jurisdiction to review constitutional claims by prevailing parties in more typical qualified immunity cases. The bulk of the Court’s *Camreta* opinion was, therefore, a classic advisory opinion. It was issued despite the fact that it did nothing to resolve a live case or controversy. Paradoxically, the *Camreta* Court had issued an advisory opinion in the process of holding that it lacked jurisdiction to issue the very advisory opinion that it had just issued.53

Normally, when a case becomes moot on appeal, the Supreme Court dismisses the appeal and vacates the judgment below in accordance with the procedure specified in *United States v. Munsingwear, Inc.*54 Justice Kagan followed that procedure in dismissing the Ninth Circuit holding that the in-school interview of S.G. violated the Fourth Amendment. In freeing the officials from the prospective effect of the Ninth Circuit holding, Justice Kagan stated, “The equitable remedy of vacatur ensures that ‘those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.’”55 This prevented the Ninth Circuit interpretation of the Fourth Amendment from becoming final without the opportunity for Supreme Court review. But given that the *Munsingwear* mootness dismissal eliminated any prospective effect of the Ninth Circuit’s Fourth Amendment ruling, the interesting question is why Justice Kagan saw the additional need to issue her advisory opinion holding that Article III permitted prevailing parties to obtain review of constitutional issues in qualified immunity cases. It appears that Justice Kagan was trying to solve a practical problem.

As noted above, constitutional claims in qualified immunity cases might never be adjudicated if lower courts were not permitted to issue advisory opinions addressing those claims despite the existence

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53. Arguably, the holding in *Camreta* was merely anomalous, rather than truly paradoxical. The Supreme Court could have waited for a case that was not moot in which to announce its new prevailing-party review rule. However, no prevailing party was likely to seek review in a subsequent qualified immunity case. Prior to *Camreta*, such review would have been viewed as barred by the advisory opinion prohibition. It was only by authorizing prevailing-party review in the course of its *Camreta* mootness dismissal that the Court could realistically effectuate such review in future cases. The Court apparently did not want to waste the potentially unique opportunity presented by the unorthodox *Camreta* petition for review—a petition filed by a prevailing party in a case where the losing party had chosen not to appeal. In any event, the Fourth Amendment exposition that the Court has authorized in qualified immunity cases is truly paradoxical.


of dispositive immunity defenses. Justice Kagan was acutely aware of this problem. In cases like Camreta, where the losing party elected not to seek Supreme Court review, the lower court's potentially erroneous constitutional ruling would remain in effect without any opportunity for Supreme Court review. There would be no occasion for a Munsingwear dismissal on mootness grounds, because there would be no appeal to serve as the vehicle for a Munsingwear dismissal.

Perhaps review could simply be exercised in the next case that presented the asserted constitutional claim. But the next case might not readily arise. Once the lower court ruled that the actions of the government official were unconstitutional, government officials would be unlikely to engage in the conduct at issue—even though the lower court decision might be an erroneous decision that was never reviewed by the Supreme Court. Officials would be directly precluded from doing so in the circuit that had issued the lower court decision, because the lower court decision would be the law of that circuit. Moreover, government officials in other circuits would likely also cease the practice, because they could no longer confidently rely on qualified immunity to protect them from damage claims. The lower court decision might render the supposed unconstitutionality of the practice "clearly established," thereby depriving officials of qualified immunity if they continued to engage in the practice. Accordingly, Justice Kagan issued her advisory opinion in order to solve this problem. Her advisory opinion held that prevailing parties would have the Article III ability to seek Supreme Court review in such situations, as a way of permitting review that might otherwise be unavailable.

In balancing the practical need to provide a route for Supreme Court review against the constitutional need to remain within the confines of Article III jurisdiction, Justice Kagan favored the practical need. At least four other Justices, however, disagreed with her resolution of that conflict. Justice Sotomayor concurred in the judgment, in an opinion joined by Justice Breyer. She asserted that the Camreta case should simply be dismissed as moot, and the Fourth Amendment portion of the Ninth Circuit opinion that the prevailing officials sought to challenge should be vacated under Munsingwear. Justice Kennedy dissented in an opinion joined by Justice Thomas.

56. See supra notes 30-31 and accompanying text.
57. See Camreta, 131 S. Ct. at 2030-32.
58. See id. at 2031-32.
59. See id. at 2036-37 (Sotomayor, J., concurring).
Even after recognizing the practical problem that Justice Kagan was trying to solve, Justice Kennedy nevertheless concluded that Justice Kagan's opinion authorizing review by prevailing parties was an advisory opinion that exceeded the scope of the Court's constitutional jurisdiction under Article III. He also disputed Justice Kagan's suggestion that the Supreme Court had ever in the past granted review to prevailing parties. Justice Kennedy viewed the advisory opinion problem as being so serious that "the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect." Although Justice Scalia concurred in Justice Kagan's opinion as one that "reasonably applies our precedents, strange though they may be," Justice Scalia was willing in an appropriate case to consider Justice Kennedy's suggestion that the Court "end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity." Accordingly, at least four—and possibly five—of the Justices on the *Camreta* Court appear to view Justice Kagan's opinion as an unconstitutional advisory opinion.

Although constitutional limitations on the scope of federal court jurisdiction under Article III would seem to be fundamental, the various *Camreta* opinions reveal that reasonable minds can differ about the degree to which those limitations should give way to practical considerations concerning the need to provide prospective constitutional guidance to government officials. The availability of alternate routes for obtaining Supreme Court guidance would seem to be relevant to this issue, and Justice Kennedy argued, "Other dynamics permit the law of the Constitution to be elaborated within the conventional framework of a case or controversy." He suggested that, aside from qualified immunity cases, Supreme Court constitutional guidance could be provided in cases or controversies that arose out of Fourth and Fifth Amendment suppression challenges, defenses against criminal prosecutions, civil suits, cruel and unusual punishment claims, constitutional suits against municipalities (where qualified immunity is not available), suits against officials whose conduct was

60. See *id.* at 2037, 2040-43 (Kennedy, J., dissenting).
61. See *id.* at 2038-40. Justice Kagan responded that she was merely asserting that the Supreme Court had never stated that Article III was a bar to review by prevailing parties. See *id.* at 2029 n.3 (majority opinion).
62. *Id.* at 2043 (Kennedy, J., dissenting).
63. *Id.* at 2036 (Scalia, J., concurring).
64. *Id.* at 2043 (Kennedy, J., dissenting).
too extreme to warrant qualified immunity, and ripe preenforcement declaratory or injunctive actions that did not include claims for damages.\textsuperscript{65}

If Justice Kennedy's suggested alternative routes for obtaining Supreme Court review seem adequate, there was no pressing need for Justice Kagan to issue her prevailing-party advisory opinion. But even if Justice Kennedy's alternatives seem inadequate, it is important to remember that the absence of an opportunity for the Supreme Court to clarify the meaning of a constitutional provision is not necessarily a bad thing. The Supreme Court's own justiciability decisions have held that the absence of an Article III route to federal court adjudication of a constitutional issue may reflect the fact that the issue at stake is simply not suitable for judicial resolution, and should instead be resolved by the political branches of government consistent with our system of separated governmental powers.\textsuperscript{66} If the need for constitutional guidance can tolerate wholesale preclusion of review when necessary to satisfy Article III, it should also be able to tolerate the mere delay that would be occasioned by declining to authorize review at the request of prevailing parties in qualified immunity cases.

There are also some seeming inconsistencies in Justice Kagan's opinion that might cause one to question the need for her advisory opinion authorizing review by prevailing parties. Justice Kennedy points out that Justice Kagan's advisory opinion permits prevailing immunized parties to seek Supreme Court review of adverse lower court constitutional rulings, but it does not authorize courts of appeals


to entertain such appeals by officials who prevailed in a district court. Justice Kagan justifies this differential treatment by noting that district courts do not establish binding law for circuits in the way that courts of appeals do. However, if the point of Justice Kagan’s *Camreta* opinion is to provide prospective judicial guidance so that government officials would not be chilled by potentially erroneous constitutional rulings issued by lower courts, it is not clear why that rationale would not also apply to the correction of potential district court errors by a court of appeals. This is particularly true in light of the fact that the overwhelming majority of court of appeals decisions end up being final under the Supreme Court’s certiorari practice. Because the whole point is to prevent an official from having to wonder whether a constitutional rule has been “clearly established” for qualified immunity purposes, the technical binding effect of a lower court ruling would seem to be largely irrelevant.

Justice Kagan’s opinion also seems internally inconsistent in how it treats the concept of a continuing stake in the outcome. Justice Kagan emphasizes that both parties must have a personal stake in the outcome of a case in order to give the Supreme Court Article III jurisdiction to review the case. She then views Sarah’s continuing stake in the *Camreta* litigation as sufficient to permit the Supreme Court to issue its prevailing-party advisory opinion, but not sufficient to permit the Court to issue a Fourth Amendment advisory opinion. Stated differently, if Sarah’s stake in the outcome became moot enough to prevent the Court from addressing the Fourth Amendment issue, why was it not also moot enough to prevent the Court from addressing the prevailing-party issue? These are, of course, simply different ways of phrasing my basic point that *Camreta’s* treatment of the advisory opinion prohibition was paradoxical. However, focusing on the mootness aspect of the Court’s decision is illuminating.

It turns out that, in addition to asserting her Fourth Amendment claims against Camreta and Alford, Sarah also asserted a Fourth

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68. *See id.* at 2033 & n.7 (majority opinion). Justice Kagan’s opinion expressly leaves open the question of whether courts of appeals could entertain appeals brought by prevailing immunized parties. *Id.* at 2033.
69. In its 2009 Term, the Supreme Court granted review in 0.9% of the certiorari petitions filed. *See The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 418 (2010).
70. *See Camreta*, 131 S. Ct. at 2028.
71. *Compare id.* at 2029, *with id.* at 2033-34.
72. *See supra* Part II.A.3.c.
Amendment municipal liability claim against the county that employed Alford as a Deputy Sheriff. The district court, however, granted summary judgment for the county, and Sarah did not appeal that ruling. The municipal liability claim is relevant because Camreta argued that the existence of that claim prevented the Fourth Amendment issue from becoming moot. Camreta argued that Sarah had a continuing interest in resolution of the Fourth Amendment issue because, if it were resolved in her favor, that would facilitate her ability to establish municipal liability against the county. Justice Kagan rejected that argument, quoting Judge Posner's proposition: "[O]ne can never be certain that findings made in a decision concluding one lawsuit will not some day . . . control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot." However, the very thing that prompted Justice Kagan to authorize prevailing-party appeals in her advisory opinion was the desire to "be certain" that "findings made in a decision concluding one lawsuit" would directly "control the outcome of another suit." She wanted proper resolution of the constitutional claim presented in a qualified immunity decision to control the outcome of future suits in which an official's conduct would be subject to the same constitutional claim. If Camreta's interest in a ruling that would facilitate his defense to a constitutional claim in a future suit is sufficient to satisfy Article III, it is difficult to see why Sarah's interest in a ruling that would facilitate her assertion of a constitutional claim in the same suit should not also be sufficient to satisfy Article III. And if Sarah's interest had as much prospective utility as the interest of Camreta that Justice Kagan found

73. See Camreta, 131 S. Ct. at 2034. As Justice Kagan characterizes the procedural history, it is not clear why the district court denial of Sarah's municipal liability claim was not simply the law of the case. The court of appeals held that Sarah's failure to appeal the district court rejection of her municipal liability claim constituted a waiver of that claim. See Greene II, 588 F.3d 1011, 1020 n.4 (9th Cir. 2009). Justice Kagan's opinion states that Sarah's more recent request to have the claim reinstated was also denied by the district court on January 4, 2011. See Camreta, 131 S. Ct. at 2034. That should have barred future efforts to assert the claim as res judicata. However, during oral argument in the Supreme Court, counsel for Camreta stated that Sarah's motion to reinstate the claim was being held in abeyance by the district court pending Supreme Court resolution of the case. See Transcript of Oral Argument at 7-8, Camreta, 131 S. Ct. 2020 (Nos. 09-1454, 09-1478). In addition, Sarah's brief in the Supreme Court stated that her Rule 60 motion to reinstate the municipal liability claim had been denied by the district court as premature, without prejudice to renewing that motion after the Supreme Court ruled. See Brief for Respondents at 32 n.20, Camreta, 131 S. Ct. 2020 (Nos. 09-1454, 09-1478). This would arguably avoid immediate res judicata problems by leaving the claim potentially alive, and potentially available to avoid a Supreme Court mootness determination.

74. See Camreta, 131 S. Ct. at 2034 (alteration in original) (quoting Commodity Futures Trading Comm'n v. Bd. of Trade of Chi., 701 F.2d 653, 656 (7th Cir. 1983)).
to be live, it is difficult to see why Sarah’s interest should be viewed as moot.\textsuperscript{75}

In the process of holding Sarah’s municipal liability damage claim moot, Justice Kagan notes that Sarah did not appeal the district court denial of that claim.\textsuperscript{76} But Sarah did not appeal the court of appeals denial of her damage claim against Camreta and Alford either. If Sarah’s failure to appeal the district court rejection of her municipal liability claim was sufficiently final to make her claim against the county moot, why was not her failure to appeal the court of appeals rejection of her damage claim against Camreta and Alford sufficiently final to make her claim against Camreta and Alford moot as well?

It is true that Justice Kagan did vacate the appellate court’s Fourth Amendment holding as moot, but that simply exacerbates the finality problem. After having dismissed the court of appeals Fourth Amendment claim as moot, Justice Kagan did \textit{not} dismiss the court of appeals qualified immunity holding as moot—even though both holdings would seem to be equally final in light of Sarah’s decision not to appeal. Moreover, Justice Sotomayor’s concurrence in the judgment appears to agree with this bifurcated application of the mootness doctrine.\textsuperscript{77} Nevertheless, there does not seem to be any doctrinal basis for treating the finality of Sarah’s failure to appeal differently with respect to the two courts of appeals holdings.

One might be tempted to argue that the difference between the two courts of appeals holdings is that the prevailing parties appealed the Fourth Amendment holding, while no party appealed the qualified immunity holding. However, that argument ultimately seems circular. The very issue under consideration is \textit{whether} Article III permits review by prevailing parties in qualified immunity cases. As a result, the suggestion that mootness is avoided \textit{because} a prevailing party has appealed simply begs the question. In distinguishing between the Fourth Amendment and qualified immunity holdings for mootness purposes, it seems that the Supreme Court was merely motivated by a desire to authorize review by prevailing parties who seek prospective constitutional guidance. Achieving that objective would have been more awkward if the lower court qualified immunity holding were dismissed as moot.

\textsuperscript{75} This problem reemerges in \textit{United States v. Juvenile Male}, 131 S. Ct. 2860 (2011) (per curiam), which is discussed \textit{infra} Part II.B.

\textsuperscript{76} \textit{See Camreta}, 131 S. Ct. at 2034.

\textsuperscript{77} \textit{See id.} at 2036-37 (Sotomayor, J., concurring) (favoring vacatur only of the portion of the lower court opinion officials sought to challenge).
As indicated above, one cannot help but notice that the interest of immunized government officials in obtaining prospective constitutional guidance that Justice Kagan finds sufficient for Article III purposes in *Camreta* would probably not be sufficient to satisfy Article III under *Lyons* if the officials were filing a declaratory or injunctive action of their own in a federal district court. That raises the possibility that Article III justiciability concerns apply with less force in the Supreme Court than they do in lower federal courts. To the best of my knowledge, the Supreme Court has never held this directly. However, the Supreme Court does sometimes behave as if this were true. In addition to issuing its advisory opinion in *Camreta*, the Court has held that it has Article III jurisdiction to review constitutional decisions of state courts even when the state court litigation did not present an Article III case or controversy. Moreover, Justice Kagan's willingness to permit prevailing-party review in the Supreme Court, even though it might not be permitted in courts of appeals, suggests that Article III might apply with greater force in the lower federal courts than it does in the Supreme Court. Although the idea that Article III might be sufficiently flexible to impose different demands on different federal courts is an intriguing one, it can claim little support from the text of Article III. And to the extent that Article III is properly understood as serving separation of powers functions, separation of powers dangers are more likely to be present when the Supreme Court is adopting prospective constitutional rules than when lower courts are resolving disputes between the parties.

It is difficult to square Justice Kagan's *Camreta* opinion with the traditional Article III prohibition on advisory opinions. The portion of the opinion that authorized prevailing parties in qualified immunity cases to seek Supreme Court review of lower court constitutional rulings seems to have violated Article III in two different respects. It constituted the issuance of an advisory opinion that was not necessary

78. See supra text accompanying notes 43-45.
80. See *Camreta*, 131 S. Ct. at 2033. Justice Kagan does not address whether the different status presented by court of appeals review is rooted in Article III or prudential considerations. See id.
81. See U.S. CONST. art. III, § 2. The text of Article III does distinguish between "Cases" and "Controversies" in a way that could support a view that the various justiciability doctrines associated with Article III apply to "Controversies" but not to "Cases." See Spann, supra note 10, at 607 n.83. However, to the best of my knowledge, the Supreme Court has never distinguished between "Cases" and "Controversies" in articulating the scope of federal court jurisdiction.
to resolution of the dispute between the parties. And it constituted the issuance of an advisory opinion in a case that the Court held was moot. The Court appears to have permitted practical considerations related to the desire for prospective judicial guidance to override constitutional considerations related to the limitations on federal jurisdiction. Moreover, it did so in a case where the Court's sole motive seems to have been to facilitate the very provision of abstract constitutional exposition that the advisory opinion prohibition was designed to prevent. As it turns out, Camreta is not the only case in which the Supreme Court has made that trade-off.

B. See Also

In one sense, the Camreta decision is unusual. Although it is doctrinally complex, its internal contradictions reside fairly close to the surface of the opinion. However, in another sense, the case is quite pedestrian. In fact, one need look no further than the last month of the same 2010 Term in which Camreta was decided to find that the Court often issues decisions that pose similar advisory opinion problems.

In Ashcroft v. al-Kidd, issued just five days after Camreta, the Court issued another advisory opinion under similar doctrinal circumstances.\(^82\) Al-Kidd sued Attorney General Ashcroft for damages, alleging that he was harshly detained for an extended period of time under a material witness warrant. He argued that he was arrested pursuant to the Attorney General's post-September 11, 2001, policy of making pretextual use of the federal material witness statute for the preventive detention of suspected terrorists whom the government had no intention of calling as witnesses but lacked evidence to arrest. Al-Kidd's allegation that this pretextual policy violated his Fourth Amendment rights survived a motion to dismiss in the district court. The Ninth Circuit ruled in favor of al-Kidd on both Fourth Amendment and immunity grounds, rejecting Ashcroft's qualified and absolute immunity claims.\(^83\) The Supreme Court reversed, finding no Fourth Amendment violation, and finding that Ashcroft was entitled to qualified immunity.\(^84\)

Al-Kidd is reminiscent of Camreta, but without the mootness or prevailing-party appeal complications. In al-Kidd, Justice Scalia's majority opinion resolved both the qualified immunity claim and the

\(^82\) 131 S. Ct. 2074 (2011).
\(^83\) See id. at 2079-80.
\(^84\) See id. at 2083, 2085.
merits of the Fourth Amendment claim. One or the other of those holdings constituted an advisory opinion, because either standing alone was sufficient to resolve the dispute between the parties. Accordingly, three Justices argued that the Court should not have reached the merits of the Fourth Amendment claim.\textsuperscript{85} Interestingly, Justices Kennedy and Thomas did not adopt this position. They instead joined Justice Scalia's majority opinion,\textsuperscript{86} even though they had argued that the \textit{Camreta} prevailing-party holding was an advisory opinion.\textsuperscript{87} Justice Kagan took no part in the decision, but to be consistent with her \textit{Camreta} opinion, it seems that she would have had to join Justice Scalia's majority opinion in \textit{al-Kidd}, rather than agreeing with the three other Justices typically identified as liberals in rejecting the propriety of issuing an advisory opinion resolving the merits of the Fourth Amendment claim.\textsuperscript{88} It is also interesting to note that Justice Scalia's \textit{al-Kidd} majority opinion declined to address the rejection of Ashcroft's absolute immunity defense by the Ninth Circuit. Ironically, Justice Scalia emphasized that resolution of the absolute immunity issue was not necessary to the decision.\textsuperscript{89}

In \textit{United States v. Juvenile Male}, a per curiam Supreme Court decision dismissed as moot an ex post facto challenge to a federal statute requiring sex offenders to register in any jurisdiction where the offender resides, is employed, or attends school.\textsuperscript{90} A juvenile convicted of sex offenses that occurred prior to enactment of the statute challenged a district court supervision order that included a registration requirement. The district court order was apparently based on an interim rule issued by the Attorney General, providing that the federal registration statute applied retroactively. The Ninth Circuit vacated the district court registration requirement, holding that retroactive application of the federal statute violated the Ex Post Facto Clause of the Constitution. However, the district court supervision order had expired when the juvenile turned twenty-one—prior to the Ninth Circuit decision—and the Supreme Court found an absence of

\textsuperscript{85} \textit{See id.} at 2087 (Ginsburg, J., concurring, joined by Breyer & Sotomayor, JJ.); \textit{id.} at 2089-90 (Sotomayor, J., concurring, joined by Ginsburg & Breyer, JJ.).
\textsuperscript{86} \textit{See id.} at 2085 (Kennedy, J., concurring).
\textsuperscript{88} Note, however, that Justice Ginsburg joined Justice Kagan's advisory opinion in \textit{Camreta}, see \textit{id.} at 2025-26, but objected to the Fourth Amendment advisory opinion in \textit{al-Kidd}. \textit{See al-Kidd}, 131 S. Ct. at 2087 (Ginsburg, J., concurring).
\textsuperscript{89} \textit{See al-Kidd}, 131 S. Ct. at 2085.
\textsuperscript{90} 131 S. Ct. 2860 (2011) (per curiam).
any continuing collateral consequences resulting from the order. As a result, the Supreme Court vacated the Ninth Circuit's ex post facto holding as moot, finding the lack of Article III jurisdiction.91

The Supreme Court purported to be preventing the issuance of an advisory opinion in *Juvenile Male*, but the Court's mootness determination seems curious in light of *Camreta*. The *Juvenile Male* Court found no continuing collateral consequences of the juvenile's registration order, but the actual continuing effects seem quite significant. Although the district court order expired when the juvenile became twenty-one, he was still required to register under both federal and Montana laws—unless, of course, retroactive application of those laws violated the Ex Post Facto Clause. This not only gave the juvenile a continuing stake in the outcome of his ex post facto claim, but the district court registration order seems specifically to have been based on acceptance of the Attorney General's interim rule providing for retroactive application of the federal statute.92 It is not surprising, therefore, that the Ninth Circuit's ex post facto holding was expressly addressed to the demands of the federal statute on which the district court relied in issuing its registration order.93 The desire to defend that holding on appeal would certainly seem like a sufficient stake in the outcome to prevent a mootness dismissal. The Supreme Court recognized this but stated that any ex post facto challenge to the federal statute had to be brought in a separate preenforcement challenge.94 Although the validity of the statute and the Attorney General's retroactive application rule seem fairly encompassed within the juvenile's ex post facto challenge to the district court order that interpreted them, the Supreme Court's mootness dismissal seems inconsistent with *Camreta* even if the Court is correct in requiring a separate preenforcement challenge. The *Juvenile Male* Court cites *Camreta*, and its quotation of Judge Posner's language, for the proposition that mootness in a particular case cannot be avoided by a desire for some prospective benefit in a future case.95 But as emphasized above,96 the desire to permit an advisory opinion issued in one case to govern the resolution of a constitutional issue in a subsequent case is precisely what prompted the Court to issue its

91. See id. at 2862-65.
92. See id. at 2862.
93. See United States v. Juvenile Male, 581 F.3d 977, 978-79 (9th Cir. 2009).
94. See *Juvenile Male*, 131 S. Ct. at 2864-65.
95. See id. at 2864.
96. See supra text accompanying notes 73-75.
prevailing-party advisory opinion in *Camreta* in the first place.\(^97\) And the *Camreta* Court declined to require the very same preenforcement challenge that the *Juvenile Male* Court insisted on. Justices Ginsburg, Breyer and Sotomayor would have remanded the case so that the Ninth Circuit could consider whether the case was moot, and Justice Kagan did not participate.\(^98\)

In *Turner v. Rogers*, the Supreme Court issued another advisory opinion in a mootness case.\(^99\) There, the Supreme Court held that the Fourteenth Amendment Due Process Clause did not automatically provide a right to counsel in civil contempt hearings that could result in incarceration for failure to make child support payments.\(^100\) The case should have been moot by traditional standards, because the petitioner seeking counsel had already completed his twelve-month prison sentence, and there were no collateral consequences of his contempt citation to keep the case alive. However, the Court held that Article III permitted resolution of the right to counsel claim under an established mootness exception for cases that are "capable of repetition, yet evading review."\(^101\) Even though a twelve-month prison sentence might be long enough to permit some lower court determinations of a right to counsel claim, it is not long enough to permit full litigation through the Supreme Court.\(^102\) Reminiscent of *Camreta*, therefore, the very existence of this mootness exception is to permit an opportunity for Supreme Court resolution of legal issues, even when resolution is not necessary to settle the dispute between the parties.

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court issued alternative holdings in concluding that a large, nationwide class action alleging employment discrimination against women could not be maintained as a class action under Federal Rule of Civil Procedure 23.\(^103\) The Court held five-to-four that the commonality requirement of

\(^{97}\) Although the Supreme Court chose not to address the ex post facto issue in *Juvenile Male*, it subsequently held in another case that the Sex Offender Registration and Notification Act did not require pre-Act offenders to register until the Attorney General validly specified that it did. The Court then remanded the case for a determination of whether the Attorney General's interim regulations constituted such a valid specification. See *Reynolds v. United States*, 132 S. Ct. 975 (2012); see also *Juvenile Male*, 131 S. Ct. at 2862 n.1.

\(^{98}\) *See Juvenile Male*, 131 S. Ct. at 2865.


\(^{100}\) *See id.* at 2512-13.

\(^{101}\) *See id.* at 2514-15 (internal quotation marks omitted).

\(^{102}\) *See id.; see also id.* at 2521 n.1 (Thomas J., dissenting).

\(^{103}\) 131 S. Ct. 2541 (2011).
Rule 23(a) had not been satisfied, and it held nine-to-zero that the back pay sought by the plaintiffs was not available in the Rule 23(b)(2) class action that the plaintiffs were seeking to maintain. Because either one of those holdings would have been sufficient to resolve the dispute between the parties, the other holding was, once again, an advisory opinion. As was discussed above, it may be justifiable for a lower court to issue alternative holdings in order to reduce the likelihood of reversal on appeal. However, the Supreme Court is not subject to reversal on appeal. As a result, alternative holdings at the Supreme Court level seem like classic advisory opinions, intended only to provide prospective legal guidance. Justice Ginsburg's dissent does point out that the plaintiff in the district court requested certification under Rule 23(b)(3) as an alternative to Rule 23(b)(2) certification. The Supreme Court's Rule 23(a) commonality advisory opinion might, therefore, seem efficient if it is viewed as providing dispositive guidance for any subsequent proceedings that might have occurred in the district court. However, that advisory opinion would still have been unnecessary if, as seems likely, the plaintiffs would have chosen not to pursue Rule 23(b)(3) certification in the district court. Perhaps that is why Justice Ginsburg went on to argue that the propriety of any Rule 23(b)(3) class action should have been resolved by the district court before being considered by the Supreme Court.

In *Bond v. United States*, a unanimous Supreme Court issued an advisory opinion in a case where there was no continuing dispute between the parties—something that would normally preclude the existence of an Article III case or controversy. The case involved the conviction of a defendant who challenged the constitutionality of the federal criminal statute under which she was convicted. The statute prohibited the nonbenign use of toxic chemicals, and it was adopted in order to implement a chemical weapons treaty to which the United States was a party. However, the defendant argued that the statute exceeded the scope of congressional power under the Tenth

104. See *id.* at 2556-57; *id.* at 2561-62 (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor, & Kagan, JJ.).

105. See *Dukes*, 131 S. Ct. at 2557 (majority opinion); *id.* at 2561-62, 2567 (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor, and Kagan, JJ.).

106. See *supra* text accompanying notes 22-23.

107. See *Dukes*, 131 S. Ct. at 2561 n.1 (Ginsburg, J., concurring in part and dissenting in part).

108. See *id.* at 2561.

Amendment. The Third Circuit rejected the challenge, finding that individuals lack standing to complain about alleged Tenth Amendment federalism violations, because such violations harm states rather than individuals. The Supreme Court reversed, finding that the defendant did have standing to assert the Tenth Amendment claim, and remanded for consideration of the merits of that claim.  

The Supreme Court holding was an advisory opinion because a lack of adverseness meant that there was no continuing dispute between the parties when the Supreme Court resolved the standing issue. The United States had initially contested the defendant’s standing, but it had conceded standing by the time of Supreme Court review. This lack of adverseness would seem to have deprived the Court of Article III jurisdiction to determine whether individuals have standing to raise Tenth Amendment claims. The Court dealt with this problem pragmatically, by appointing an amicus curiae to argue in support of the Third Circuit decision under review. But because a nonparty by definition has no judicially cognizable stake in the outcome of the particular dispute before the Court, the appointment of an amicus served to highlight rather than remedy the advisory opinion problem. Nevertheless, the Supreme Court has held that it does possess jurisdiction to resolve confession-of-error and voluntary-cessation cases. Moreover, the Court frequently appoints amici to “solve” advisory opinion problems in cases where there is no continuing dispute between the parties. One study has found that the Court does this twice every three Terms. Rather than dismiss and vacate the lower court judgments in such cases, as is done after a mootness determination under the Munsingwear doctrine, the Supreme Court presumably appoints amici precisely so that it can provide prospective judicial guidance to nonparties. In Bond, the Court provided immediate prospective guidance concerning who had standing to raise Tenth Amendment claims, rather than waiting for a case in which the issue was contested. If it turns out that the issue will

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110. See id. at 2360-61.
111. See id. at 2361.
112. See id. The Supreme Court held that there was no Article III problem because the defendant’s desire to overturn her conviction gave her a continuing stake in the outcome. However, the Court did not discuss the Article III problem posed by lack of adverseness. See id. at 2361-62.
114. See Goldman, supra note 49, at 909-10.
115. See supra text accompanying notes 54-55.
never be contested, once again, the Supreme Court has held that Article III commits the issue to the political branches rather than the judiciary for resolution.116

In Davis v. United States, the Supreme Court compounded the Camreta advisory opinion problem by apparently requiring the issuance of advisory opinions in order to permit the future development of Fourth Amendment law.117 Justice Alito’s majority opinion in Davis expanded the good faith exception to the Fourth Amendment exclusionary rule that the Court first recognized for police officers acting on invalid warrants in United States v. Leon.118 Davis held that evidence seized in violation of current Fourth Amendment law should not be suppressed in criminal trials if, at the time of the violation, then-binding precedent permitted the seizure.119 Conceding that the new Fourth Amendment rule applied to the defendant’s conviction for possession of a firearm under the Court’s retroactivity precedents, Justice Alito concluded that the Fourth Amendment still did not require suppression. After balancing the respective costs and benefits, he concluded that suppression was not compelled where the police officer who seized the firearm was acting in good faith, objectively reasonable compliance with then-binding Eleventh Circuit precedent. As a result, suppression of the evidence would serve no prospective deterrent function.120

Justice Breyer’s dissent pointed out that the Court’s new good faith exception to the Fourth Amendment exclusionary rule was likely to ossify the future development of Fourth Amendment law, because defendants no longer had an incentive to raise novel Fourth Amendment claims once winning those claims ceased to result in the suppression of unconstitutionally seized evidence.122 Similar concerns prompted Justice Sotomayor to argue that the new good faith exception should not apply in cases where existing law is unsettled.123

116. See supra text accompanying note 66. It is worth noting that the United States conceded the existence of standing for the defendant to challenge the scope of congressional authority but did not concede the existence of standing to challenge federal interference with state sovereignty. Although the Supreme Court rejected this distinction, it does suggest that Tenth Amendment cases could arise in which the United States did not concede standing. See Bond, 131 S. Ct. at 2365-67.


119. 131 S. Ct. at 2423-24.

120. See id. at 2425-26, 2429-32.

121. See id. at 2426-29.

122. See id. at 2436-39 (Breyer, J. dissenting, joined by Ginsburg, J.).

123. See id. at 2433-36 (Sotomayor, J., concurring in the judgment).
Justice Alito responded that there were still ways in which novel Fourth Amendment claims could make their way to the Supreme Court notwithstanding the new good faith exception. However, he did not suggest ways that seem more realistic than the alternate ways that Justice Kennedy's dissent proposed for presenting novel Fourth Amendment claims in *Camreta*. And the *Camreta* Court viewed those alternatives as *insufficient* to prevent ossification of the Fourth Amendment—thereby justifying advisory resolution of Fourth Amendment claims in the qualified immunity, prevailing-party appeals that *Camreta* authorized.

There is a serious advisory opinion problem with the *Davis* decision. The defendant's Supreme Court brief in *Davis* succinctly crystalized the issue, arguing that prospective-only application of new Fourth Amendment law would amount to """a regime of rule-creation by advisory opinion."" Moreover, the brief noted that criminal defendants might even lack Article III standing to assert novel Fourth Amendment claims if the good faith exception meant that prevailing on those claims would not redress the injuries that they sought to prevent through suppression of the unconstitutionally seized evidence that was presented to convict them. The *Davis* decision may not itself be an advisory opinion, but it seems to create a situation in which future Fourth Amendment law can evolve *only* through the issuance of advisory opinions. The new good faith exception means that novel Fourth Amendment claims cannot have an effect on the outcome of the dispute between the parties. Qualified immunity precludes the development of Fourth Amendment law in damage actions—other than through the issuance of the advisory opinions authorized in *Camreta*. And *Lyons* seems to preclude the development of Fourth Amendment law through prospective injunction or declaratory judgment actions. Therefore, the only way that Fourth Amendment law can develop is at the hands of judges who are willing to include their musings about the Fourth Amendment in advisory opinions. Indeed, the Supreme Court in *Leon* expressly appears to have

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124. *See id.* at 2433 (majority opinion).
126. *See Davis*, 131 S. Ct. at 2432 n.7 (quoting Brief for Petitioner at 25, *Davis*, 131 S. Ct. 2419 (No. 09-11328)).
127. *See id.* at 2434 n.10.
128. *See supra* text accompanying notes 56-58.
129. *See supra* text accompanying notes 42-45.
contemplated the issuance of such opinions. But it is, of course, precisely those advisory opinions that Article III says federal courts lack the jurisdiction to issue.

The advisory opinion problem that permeates *Camreta* and other Supreme Court decisions is both pervasive and persistent. But despite the foundational nature of the Article III prohibition on advisory opinions, no one seems to be particularly troubled by the frequency of Supreme Court deviations from this constitutional limitation on federal court jurisdiction. The interesting question is why that should be so.

III. JUDICIAL REVIEW

The classical model of judicial review is commonly traced to Chief Justice John Marshall’s decision in *Marbury v. Madison*, which authorized the Supreme Court to invalidate acts of the coordinate branches of government only when necessary to resolve particular disputes between the parties. However, the Court’s use of advisory opinions to provide prospective constitutional guidance, in cases like *Camreta* and the other decisions described in Part II.B, is difficult to square with the *Marbury* model of adjudication. The Court’s advisory opinion practice is, instead, more consistent with a model of adjudication that views the Court as a policy-making branch in a tricameral legislative process.

A. Marbury Adjudication

The Constitution does not explicitly authorize the Supreme Court to invalidate the acts of coordinate branches of the federal or state governments. Rather, John Marshall recognized the power of judicial review in *Marbury* only as a necessary incident to the judicial function of resolving disputes between the parties in a way that complied with the dictates of the Constitution. In addition, Chief Justice John Jay’s 1793 *Correspondence of the Justices* adopted a prohibition on advisory opinions, while declining to answer certain abstract questions about the law of nations propounded by President George Washington’s administration. Juxtaposing those two Supreme Court decisions

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131. *See* 5 U.S. (1 Cranch) 137 (1803).
132. *See* id. at 176-80; *see also* FALLOn et al., supra note 12, at 72-73; SPAnn, supra note 10, at 589-90; NOTE, supra note 12, at 2064, 2068-69.
133. *See* FALLOn et al., supra note 12, at 50-54; NOTE, supra note 12, at 2066-67.
proclamations, the prohibition on advisory opinions is now understood to reflect the Marbury dispute-resolution model of adjudication.\textsuperscript{134}

The advisory opinion prohibition is rooted in separation of powers concerns. By limiting the constitutional exposition engaged in by federal courts to the resolution of Article III cases or controversies, the judiciary is less likely to intrude into the realm of legislative policy making.\textsuperscript{135} Accordingly, the Framers rejected the idea of creating a Council of Revision that would have permitted federal judges to rule on the constitutionality of proposed legislation, rejected the idea of having the Chief Justice serve on an advisory Privy Council to the President, and rejected the idea of authorizing the legislative and executive branches to compel legal opinions from the Supreme Court.\textsuperscript{136} In addition to the advisory opinion prohibition—or, more precisely, as specific instantiations of the advisory opinion prohibition—other justiciability doctrines associated with the Article III case or controversy provision seek to limit the courts to dispute-resolution activities. These include the doctrines of standing, ripeness, mootness, finality, the political question doctrine, and the prohibition on collusive suits.\textsuperscript{137} Similarly, the doctrine of constitutional avoidance precludes federal courts from unnecessarily expounding the meaning of the Constitution, if a dispute can be resolved without such exposition.\textsuperscript{138} In addition, the fact that courts invoke varying levels of scrutiny to govern the degree of deference that they will accord the representative branch actions presented to them further illustrates the importance of insulating legislative policy making from judicial interference.\textsuperscript{139} In fact, some claims will never satisfy the Article III justiciability requirements, thereby indicating that they have been allocated by the Constitution to the political policy-making process rather than the courts for resolution.\textsuperscript{140}

In a representative democracy, the goal of limiting the federal judiciary to dispute resolution activities, rather than legislative policy-

\begin{footnotesize}
\begin{enumerate}
  \item See FALLON ET AL., supra note 12, at 72-73; Spann, supra note 10, at 589-90; Note, supra note 12, at 2064, 2068-69.
  \item See FALLON ET AL., supra note 12, at 72-73; Spann, supra note 10, at 632-36; Note, supra note 12, at 2068-69.
  \item See Spann, supra note 10, at 635.
  \item See id. at 617-18; see also FALLON ET AL., supra note 12, at 49, 72-73; Note, supra note 12, at 2064 n.2.
  \item See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); see also FALLON ET AL., supra note 12, at 76-80; Spann, supra note 10, at 591 n.19; Note, supra note 12, at 2064, 2079 n.64.
  \item See STONE ET AL., supra note 11, at 489.
  \item See sources cited supra note 66.
\end{enumerate}
\end{footnotesize}
making initiatives, is particularly important. The life tenure and salary protections accorded the unelected federal judiciary are designed to insulate the courts from political pressure in the resolution of disputes.\textsuperscript{141} However, this political insulation reduces the institutional competence of the courts to engage in legislative policy-making activities precisely because the courts lack direct political accountability to any elected constituents. As a result, the \textit{Marbury} dispute-resolution model's prohibition on advisory opinions is designed to minimize the countermajoritarian difficulties that would be posed by judicial policy making.\textsuperscript{142}

\textbf{B. Tricameral Legislation}

The problem with the \textit{Marbury} model of judicial review is, of course, that no one believes it. We are far more concerned with the prospective impact of Supreme Court decisions than with the manner in which they resolve the particular disputes before the Court. And we expect the Court to be an active participant in the resolution of public policy debates, rather than a passive umpire concerned only with the application of existing constitutional rules to claims asserted by the parties. It is, therefore, descriptively more accurate to conceptualize the Supreme Court as the third chamber of a tricameral legislative policy-making body than as a \textit{Marbury} dispute-resolution tribunal.

The Supreme Court has always been more concerned with the prospective effect of its decisions than with the retrospective resolution of particular disputes. \textit{Marbury} itself was replete with the resolution of legal issues—concerning who had what rights, and who was entitled to what remedies—that could only have prospective effect, because of the \textit{Marbury} Court's own holding that it lacked jurisdiction to provide a remedy in the case before the Court. And \textit{Marbury} did this in the process of establishing the prospective practice of judicial review.\textsuperscript{143} One commentator has even argued that the \textit{Correspondence of the Justices}—which prospectively prohibited the issuance of advisory opinions—was itself advisory, because it did not arise out of a particular case or controversy.\textsuperscript{144} Moreover, the infamous decision in \textit{Dred Scott v. Sanford}—arising out of a dispute that the Court, once

\begin{footnotesize}
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\item \textsuperscript{141} See Spann, \textit{supra} note 10, at 607-09.
\item \textsuperscript{142} See Stone \textit{et al.}, \textit{supra} note 11, at 43-51; cf. Spann, \textit{supra} note 10, at 605-06.
\item \textsuperscript{143} See Spann, \textit{supra} note 10, at 589-92.
\item \textsuperscript{144} See Note, \textit{supra} note 12, at 2067 n.14. Indeed, it is difficult to see how the Court could have responded to the questions presented without issuing an abstract, prospective response.
\end{enumerate}
\end{footnotesize}
again, held it lacked jurisdiction to resolve—was designed to have the prospective effect of protecting the institution of slavery and prohibiting black citizenship.\(^ {145} \)

In addition, some of the most famous contemporary Supreme Court decisions can only be understood as prescribing prospective legislative-type rules that were designed to regulate future conduct. \textit{Miranda v. Arizona} required law enforcement officials to begin the well-known practice of reciting a statement of rights to criminal suspects in order to ensure that any subsequent confessions would be deemed voluntary.\(^ {146} \) And \textit{Roe v. Wade} articulated the type of trimester rules for determining when future abortions could be regulated or prohibited that we would normally expect to be prescribed by a legislative body.\(^ {147} \) Moreover, recent cases like \textit{Camreta, al-Kidd,} and \textit{Davis} strained the Article III case or controversy restriction for the \textit{explicit} purpose of providing prospective constitutional guidance that was unnecessary to the resolution of disputes before the Court.\(^ {148} \)

Current Supreme Court practice also seems skewed in favor of prospective advisory guidance, with minimal attention being paid to retrospective dispute resolution. The factors that govern the Court’s grant of certiorari focus heavily on splits between federal courts of appeals, inconsistent decisions between federal courts of appeals and state courts of last resort, and splits among state courts of last resort.\(^ {149} \) Such concern with the clarification of federal law is perfectly understandable in the quest for prospective guidance, but it is largely irrelevant for dispute-resolution purposes.\(^ {150} \) In addition, the questions and hypotheticals that the Justices pose during oral argument often seem more concerned with the prospective effect of various contemplated rulings than with the best way to resolve the disputes between the parties.\(^ {151} \) And the very existence of dicta, concurrences, dissents, and separate opinions—which by definition do not resolve disputes between the parties—can best be understood as efforts on the part of Justices to provide guidance on how to limit, expand, or

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145. 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. Const. amend. XIV; see Spann, \textit{supra} note 10, at 609.
148. \textit{See supra} Part II.
149. \textit{See SUP. CT. R.} 10.
150. \textit{See Spann, supra} note 10, at 613-17; \textit{see also} FALLON ET AL., \textit{supra} note 12, at 72-80.
interpret the Court’s present ruling in future cases. In fact, the practice of issuing published opinions at all seems designed to have primarily prospective effect. Disputes could be resolved by simple judgments, with any descriptive elaboration necessary to explain the court’s reasoning distributed to the parties. Only the legitimacy thought to be provided by the doctrine of stare decisis requires publication, but the orientation of stare decisis is itself inherently prospective.

As discussed above, the fact that the Supreme Court often appoints amici to argue cases where there is no longer a dispute between the parties further illustrates the prospective focus of the Court’s attention. This prospective-guidance rationale also explains why the Court deems it advisable to review state court decisions resolving questions of federal law, even when those decisions do not satisfy the Article III requirements for federal jurisdiction that would apply if the case had been commenced in federal court. And it explains why the Supreme Court sometimes issues alternative holdings even though its decisions are not subject to reversal on appeal. The focus on prospective guidance further helps to explain the Court’s practice of issuing rulings under the harmless error rule that it does not apply to the litigants themselves, and the Court’s prospective announcement of new rules that are not applied to other cases pending at the time of the Court’s decision. It also explains “hypothetical jurisdiction” cases in which the Court resolves the merits of cases rather than resolving more difficult threshold jurisdictional issues, as well as decisions in which the Court resolves federal constitutional issues despite the seeming existence of adequate and independent state grounds that would alone resolve the dispute between the parties. This prospectivity focus even explains why the Court has sometimes gone so far as to resolve issues in uncertified “headless” class actions, despite the fact that they have become moot with respect to the named plaintiffs.

In addition to expecting prospective guidance from the Supreme Court, we also expect the Court to be actively engaged in the resolution of social policy issues. In fact, landmark Supreme Court

152. See supra text accompanying notes 114-115.
153. See supra text accompanying note 79.
154. See supra text accompanying notes 103-108; see also FALLON ET AL., supra note 12, at 55.
155. See FALLON ET AL., supra note 12, at 54-55.
156. See id. at 55-56; see also Michigan v. Long, 463 U.S. 1032, 1038-44 (1983) (discussing adequate and independent state grounds).
decisions, such as those identified above, tend to be viewed as "landmark" precisely because they involved the Court in public policy debates. *Dred Scott* inserted the Supreme Court deeply into the pre-Civil War slavery debate. 158 *Miranda* inserted the Court into the criminal justice law and order debate.159 *Roe* inserted the Court into the emerging feminist abortion rights debate. It has even been suggested that the Court declined to issue the requested advisory opinions in the *Correspondence of the Justices* in order to avoid taking sides in a political controversy that might undermine the desire of the Justices to be relieved of their obligation to ride circuit.160 And, of course, *Marbury* itself grew out of an intensely political debate that was at its core about the degree to which judicial review could be used to retain partisan political power after a change in presidential administrations.161

Our expectations of Supreme Court involvement in the public policy-making process are especially strong where controversial issues of social policy are at stake. Accordingly, *Brown v. Board of Education*162 was not so much about whether Linda Brown could attend a particular school in Topeka, Kansas, as it was about whether the practice of southern school segregation should be viewed as consistent with our mid-twentieth century conception of equal protection.163 And *Citizens United v. Federal Election Commission*164 was not so much about whether a particular film could be shown prior to a particular election, as it was about whether the twenty-first century First Amendment should be understood as permitting significant corporate influence over our electoral process.165 It has become literally unthinkable that controversial social policy debates over issues such as affirmative action, school prayer, abortion, same-sex marriage, and now the health care mandate could be resolved without significant input from the Supreme Court.

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164. 130 S. Ct. 876 (2010).
The Supreme Court’s pervasive involvement in the formulation of prospective public policy suggests that the Court can be more usefully conceptualized as a legislative body than as a dispute-resolution tribunal. Rather than passively applying settled law to disputes between the parties, the Court actively adopts and refines governmental policies through the process of judicial review. Accordingly, I have previously argued that the Court should be viewed as the third branch of a tricameral legislature, because it makes legislative-type social policy in much the same way that the political branches of government do. The Court can be viewed as a third legislative chamber that exists in addition to the House and the Senate, or as a third policy-making branch of government that exists in addition to Congress and the President. Under either view of Supreme Court tricameralism, the important point is that the process of constitutional interpretation is so loosely constrained by textual language, original intent, and constitutional theory that the Court is required to make prospective policy determinations in order to give operative meaning to constitutional provisions.

In fact, the policy-making latitude of the Supreme Court seems roughly analogous to the policy-making latitude of the political branches. Actions of the orthodox political branches are constrained by political forces that emanate from constituent desires, whose immediacy is mediated by the length of the term of office associated with each political branch. Actions of the Supreme Court are similarly constrained by political forces that emanate from the appointment and confirmation process, and are similarly mediated by the longer term of office associated with life tenure. That tends to make the Supreme Court responsive to durable political interest groups, who are primarily concerned with maintenance of the status quo, and who want their preferences to be enshrined in constitutional principles. This, in turn, dampens the effect of any redistributive efforts that might emerge from the conventional political branches. However, the Court is ultimately doing what it thinks will prospectively advance its vision of sound

166. See Girardeau A. Spann, Constitutional Hypocrisy, 27 CONST. COMMENTARY 557, 561-64 (2011). Although the President is technically charged with the executive implementation of legislative policies, the demise of the nondelegation doctrine and the rise of the administrative state have given the President vast amounts of policy-making discretion that is more legislative than executive in nature. See Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 472-76 (2001) (recognizing permissive nondelegation doctrine); Peter L. Strauss et al., Gellhorn and Byse’s Administrative Law: Cases and Comments 101-18 (rev. 10th ed. 2003) (discussing constitutionality of administrative state).

167. See Spann, supra note 166, at 559-60.
social policy. And that is the very same activity in which the conventional political branches are engaged. Accordingly, legislative policies cannot be adopted without the concurrence of all three chambers of our tricameral policy-making government—the House and Senate chamber, the presidential chamber, and the third prospective policy-making chamber that is known as the Supreme Court.

The issuance of advisory opinions fits comfortably within this tricameral legislative model of judicial review. Like conventional legislation, advisory opinions are designed to implement prospectively the social policies that they embody. That is precisely what happens in Camreta-type situations, where advisory opinions in qualified immunity cases tell government officials how they are to behave in the future. Despite their legislative character, advisory opinions have also been provided to political leaders by individual Justices in the past, and several state and foreign courts are expressly authorized to issue advisory opinions in the present.

Some commentators have suggested that a benign judicial function is the provision of advisory guidance to the political branches, precisely because that guidance will enhance the quality of legislative policy making. Moreover, advisory opinions have been used to exert a more intrusive influence on the legislative process by threatening a judicial veto of unwanted actions favored by other political bodies, in much the same way that political vetoes are threatened by the House, Senate, and President when they seek to gain political leverage over proposed legislation. The Roberts Court provided a striking example of this sort of effort to gain political leverage over legislation in Northwest Austin Municipal Utility District Number One v. Holder, when the Court in advisory dicta strongly suggested that it would hold Section 5 of the Voting Rights Act unconstitutional if Congress did not act to modify its provisions.

To make matters worse, the advisory opinion prohibition itself may be legislative in nature. Some economic models of the legislative process have suggested that even the refusal to issue advisory opinions can create constitutional uncertainty that ends up giving the Supreme Court more influence over the legislative process than it would have in

168. See id. at 561-64.
169. See Fallon et al., supra note 12, at 52-54, 58; Jay, supra note 12, at 1-112.
the absence of the advisory opinion prohibition.\textsuperscript{172} As a result, it seems that the Supreme Court is destined to act as a legislative policy-making body whether it issues advisory opinions or not. Because the separation-of-powers-based \textit{Marbury} model of adjudication is ultimately about preventing the Supreme Court from engaging in such legislative policy-making activities, the very coherence of judicial review is drawn into question by the prospective orientation of Supreme Court adjudication.

IV. CONSTRUCTIVE INCOHERENCE

The \textit{Marbury} model limits judicial review to the necessary incidents of retrospective dispute resolution. But what we actually want the Supreme Court to do is issue the sorts of prospective policy decisions that are more honestly captured by a legislative model of judicial review. An insistence that the Court simultaneously adhere to these two conflicting models renders our prevailing conception of judicial review incoherent. The question that naturally arises, therefore, is why we do not restore coherence by simply choosing one model over the other. I believe that we adhere to these conflicting models in the hope that, by doing so, we can transcend a dilemma inherent in liberalism itself—the simultaneous conception of ourselves as autonomous liberal individuals who pursue pluralist self-interest, and as other-regarding republican communitarians who pursue civic virtue. Supreme Court mediation offers an escape from the tension that exists between these two conflicting conceptions, by helping us to avoid accountability for the selfish ways in which we treat each other. However, recognition of the incoherence inherent in the demands that we place on a liberal conception of judicial review may actually promote accountability for our egocentric inclinations, and prompt us to treat each other in more empathetic ways.

A. \textit{Liberal Dilemma}

Because we live together, rather than in isolation, each of us experiences a constant tension between our own self-interests and the conflicting interests of others. But because we are committed to liberalism, we seek to dissipate that tension in ways that will privilege individual liberty over collective welfare that could take the form of oppressive collective coercion. Social contract theory attempts to

\textsuperscript{172} Note, supra note 12, at 2077-82.
resolve this liberal dilemma by positing the existence of a mutual agreement pursuant to which each of us relinquishes a limited portion of individual autonomy in exchange for a corresponding relinquishment of autonomy by other members of society. Thomas Hobbes theorized that this relinquishment of liberal autonomy to the sovereign grants the sovereign absolute power to protect us from the mutually destructive forces that we would inflict on each other in a state of nature, thereby enabling us to relate to each other safely and productively in civil society. John Locke envisioned a more contingent nature of sovereign power. Because individuals agree to impose natural law norms on themselves as terms of the social contract into which they enter, he advanced a liberal conception of the sovereign as an entity that is ultimately subject to the authority of the contracting parties who have ceded the power necessary to create it.

Duncan Kennedy used the term "fundamental contradiction" to emphasize the internal, psychological dimension of the liberal dilemma. Not just social circumstances, but individual identity itself, is dependent on relationships with others—for example, employer, friend, spouse, father, sister, lover. That gives others the power to threaten not only an individual's material comfort, but to threaten an individual's sense of self as well. Accordingly, the liberal dilemma causes individuals both to seek out connections with others in order to make themselves feel materially secure and psychologically complete, and to reject connections with others in order to protect themselves from the dangers that others pose to an individual's material and psychological integrity. Individual autonomy is, therefore, ultimately vulnerable to the coercive power of others, including the collective coercive power on which Hobbes and Locke would rely to protect that autonomy. In order for this tension to be successfully mediated, there must be some reliable means of confining coercive social power to its proper sphere. We tend to rely on courts to mediate the tension by articulating doctrinal rules that offer liberal accounts of how social power can properly be cabined. But to the extent that liberal theory ends up simply masking hierarchical structures of social power, that are based on things like social class or genetic endowments, we remain mired in the liberal dilemma.

175. See Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF. L. REV. 205, 211-13, 216-21, 256-72 (1979). Kennedy has since suggested that the fundamental
The tension between individual and collective interests that is highlighted by the liberal dilemma also lies beneath debates about the appropriate function of constitutional governance. Contemporary liberal theories of constitutional law privilege personal liberty and view the state as existing primarily to protect the rights of autonomous individuals. Accordingly, sound governmental policy results from the aggregation of individual preferences that emerge from the clash of special interest factions in the pluralist political process. Under this view, individual rights tend to be important as safeguards against redistributive initiatives of the state that would threaten existing property entitlements. Classical republican theories of constitutional law echo anti-federalist arguments that resisted adoption of the Constitution. They are more communitarian than liberal in nature, and they view the state as existing primarily to facilitate public deliberation and the inculcation of civic virtue in citizens. Under this view, individual rights are secondary to the collective welfare, which can sometimes be advanced through redistributive efforts that promote equality among citizens. The Madisonian version of republicanism that ultimately provided the basic architecture of the Constitution was an effort to merge the practicalities of liberal pluralism with the benefits of classical republicanism. However, Madisonian republicanism is itself sufficiently liberal that it remains vulnerable to the individual-collective tension that lies at the heart of the liberal dilemma.

I think that we are, understandably, trying to have it both ways. We need to find some method of mediating the tension inherent in the liberal dilemma, so that we can feel secure in our belief that the state will protect us against the aggression of others but will not itself utilize coercive state power to harm us. And we also want the freedom to...
pursue our individual self-interests in a liberal pluralist manner, while still thinking of ourselves as virtuous and other-regarding in a civic republican sense. Stated more succinctly, we want both to be compassionate citizens who are protected from the selfish aggression of others, and to be the selfish others who are inflicting that aggression on compassionate citizens. Needless to say, these conflicting preferences are difficult to reconcile. But we seem to be asking judicial review to reconcile them for us.

B. Enhanced Accountability

The Supreme Court's curious exercise of judicial review in *Camreta* can be understood as an effort to legitimate a liberal status quo by using the recognition of constitutional rights to mediate a particular incarnation of the liberal dilemma. Close examination reveals that the Court's effort is analytically inadequate to achieve this objective—an objective that, of course, is ultimately unattainable. But we have little incentive to engage in such close examination, precisely because of its destabilizing effect on the perceived coherence of judicial review. Nevertheless, a more mature appreciation of the incoherence inherent in our liberal conception of judicial review might cause us to accept more accountability for our individual and collective actions, which in turn might cause us to treat each other more empathetically.

Sarah's nine-year-old daughter S.G. confronted a dilemma. Consistent with the terms of the Hobbesian-Lockean social contract, she favored state protection of her individual autonomy from the threat posed by adults who would subject her to sexual abuse. But she also wanted the state to refrain from overriding her autonomy in a way that would subject her to compelled governmental seizure against her will. More subtly, S.G. is also likely to have confronted the psychological dilemma highlighted by Kennedy's fundamental contradiction. She almost certainly experienced conflicting desires to be connected with a father whom she loved, and to be distanced from a father who threatened her with sexual abuse. To make matters worse, S.G. may have experienced additional conflicting emotions toward her mother, as someone with whom she wished to connect as a source of affectionate maternal security and to be distanced from as a force seeking to manipulate her in ways that were designed to protect her father from criminal prosecution. Liberal theory posits the existence of a coercive state whose selective intervention will adequately mediate these conflicting impulses. But if not properly mediated, these
conflicting desires for state intervention and state nonintervention will paralyze each other in a way that will be destabilizing for a liberal theory of the state.

The existence of a Fourth Amendment right to be free from unreasonable searches and seizures held out hope that Supreme Court enforcement of that constitutional right could perform the needed mediation function. By harmonizing S.G.'s competing interests in a way that authorized state intervention only to the extent necessary to protect S.G.'s autonomy—including her need for psychological serenity—the Fourth Amendment guarantee could transcend the liberal dilemma. Moreover, the imprecision inherent in the "reasonableness" standard of the Fourth Amendment could be overcome through the process of judicial review, where the Supreme Court could provide the constitutional guidance needed for proper application of the Fourth Amendment. Unfortunately, however, these are not tasks that judicial review can perform coherently.

Leaving aside the difficult policy question of how the mere "reasonableness" requirement of the Fourth Amendment could tell the Court where to locate the proper crossover point between S.G.'s conflicting autonomy interests, the Court would still have to find some way to transmit its interpretation of the Fourth Amendment guarantee. Child welfare officials would need to know what level of state intervention was appropriate to protect S.G.'s autonomy, and individuals like S.G. would need to believe that their autonomy was being protected by the Supreme Court's Fourth Amendment jurisprudence. Normally, the Court would do this by adjudicating claims of Fourth Amendment violations. If the state violated a Fourth Amendment right, the victim's autonomy could be protected with a compensatory damage award, and the Court's opinion would provide prospective guidance to others about the requirements of the Fourth Amendment. However, as the facts of *Camreta* show, that process will not work in cases where the Supreme Court changes its interpretation of where the Fourth Amendment crossover point is located—something that the Court must do from time to time, in order to keep pace with our evolving cultural maturation.

In novel Fourth Amendment cases, the Court would have to make qualified immunity available to officials who relied on the Court's prior interpretations of the Fourth Amendment. If the Court did not do so, those officials would be deterred from engaging in the proper level of state intervention that was necessary to guard against child sexual abuse, which in turn would leave individual autonomy insufficiently
protected under the social contract. But once qualified immunity was recognized, two distinct autonomy problems would arise. First, an individual such as S.G. would have had his or her autonomy wrongly deprived by the state with no ability to recover damages to compensate for that deprivation. Second, from that point on, the Court would be disabled from engaging in future Fourth Amendment exposition, because Article III jurisdictional rules would preclude the Court from addressing the merits of the Fourth Amendment in cases that could thereafter be disposed of on qualified immunity grounds. As a result, Fourth Amendment evolution would be arrested, and the proper crossover point that established the evolving level of state intervention needed to protect individual autonomy could no longer be ascertained or transmitted. Therefore, the Court would no longer possess the ability to mediate the liberal dilemma, and individuals would be left fearing their return to a state of nature.

The Camreta Court tried to avoid this result by modifying its Article III jurisdictional rules in a way that permitted the Court to provide prospective Fourth Amendment guidance through the issuance of advisory opinions in cases where qualified immunity applied, even on appeals by prevailing parties. But that strategy simply confounded the problem of establishing the proper crossover point by creating new liberal autonomy problems of its own. Just as the absence of qualified immunity would provide an incentive for state underintervention in the protection of individual autonomy, the presence of qualified immunity provides an incentive for state overintervention. Because officials will not have to compensate individuals whose autonomy is interfered with, the presence of qualified immunity is as likely to distort the Fourth Amendment crossover point in one direction as the absence of qualified immunity is to distort it in the other direction. But a more serious problem emerges once one recognizes that the Article III advisory opinion prohibition that the Court ignores in its quest to provide constitutional guidance in immunity cases is itself a rule that protects liberal autonomy.

One justification for Article III restrictions on federal court jurisdiction lies in the recognition that judicial power is itself a form of state power that can interfere with individual autonomy. Like the Fourth Amendment, therefore, Article III jurisdictional rules also establish a crossover point that is needed to harmonize the conflicting needs of individuals to invoke judicial protection against incursions on their autonomy by other individuals and to avoid incursions on their autonomy by the judiciary itself. As a result, the advisory opinions
that are necessary for the Fourth Amendment to establish the appropriate liberal autonomy crossover point preclude Article III from establishing the appropriate liberal autonomy crossover point. And vice versa. Because the Court cannot both issue and refuse to issue advisory opinions in the same case, it is once again difficult to see how it could ever ascertain or transmit the level of state intervention that is necessary to mediate the liberal dilemma. Undaunted, however, the Camreta Court nevertheless attempted to do precisely that.

Although the Court was willing to authorize the issuance of advisory opinions when needed to establish the proper Fourth Amendment autonomy crossover point, it refused to issue a Fourth Amendment advisory opinion in the Camreta case itself. That was because the doctrine of mootness dictated that withholding a Fourth Amendment advisory opinion was necessary to establish the proper Article III autonomy crossover point. If this is to make any sense, it must be because the issuance of some advisory opinions is necessary to achieve the proper level of state intervention, while a prohibition on other advisory opinions is necessary to achieve the proper level of state intervention. But it is unclear how the Court could ever distinguish between the two. The case or controversy provision of Article III does not by its terms distinguish between different types of advisory opinions—in fact, Article III does not mention advisory opinions at all. And any effort to invoke a liberal theory of the state to distinguish between mandatory and prohibited advisory opinions seems doomed to fail. If the Court were to hold some individuals entitled to more judicial protection of their autonomy than others—even though all were involved in cases where advisory opinions were equally unnecessary to the Court's decision—the Court would be discriminating against similarly situated individuals in seeming violation of the equality principle that is central to liberal theory.

As has been shown, the issuance of Fourth Amendment advisory opinions is necessary to establish the level of state intervention required to protect individual autonomy, but the Article III prohibition on advisory opinions is also necessary to establish the level of state intervention required to protect individual autonomy. That makes Supreme Court efforts to mediate the liberal dilemma through judicial review unlikely to be successful. But things get even more complicated once one realizes that individual autonomy is a two-sided coin. Because autonomy claims are necessarily asserted in a social context, protecting one person's individual autonomy will often leave another person's competing autonomy unprotected.
For example, in Camreta, the autonomy of the child welfare officials was advanced by immunizing them from damage awards, and by authorizing them to receive advisory guidance that would help them perform their jobs more effectively. But those autonomy benefits to the officials were obtained at the cost of S.G.'s own autonomy. S.G. was unable to obtain damages for what the court of appeals held to be a violation of her Fourth Amendment rights. Moreover, because the Supreme Court permitted the officials to appeal as prevailing parties, S.G. was even deprived of the declaratory victory she won in the court of appeals. Ironically, therefore, the autonomy of the child welfare officials was preserved by denying the autonomy of the child whose welfare was supposed to be protected. That not only illustrates a zero-sum problem posed by competing demands for autonomy, it suggests the existence of a problem inherent in liberal theory itself.

The autonomy benefits that Camreta granted to the child welfare officials were not personal benefits. Rather, they were benefits that the Supreme Court thought would make it easier for the child welfare officials to do their jobs effectively. Although S.G.'s own autonomy may have been denied, the Court presumably thought that its ruling would advance the goal of protecting aggregate child welfare autonomy in the future. Even in cases where the Court resolves competing claims of purely private autonomy that do not involve government officials, the Court presumably resolves the competing claims in a way that it thinks will prospectively best protect aggregate autonomy. But that begins to sound more like utilitarianism than like standard liberal theory. Without getting embroiled in a debate about whether liberalism and utilitarianism should ultimately be viewed as resting on the same moral foundation, this observation does highlight a tension present in liberal theory that has ramifications for judicial review.

In mediating disputes, the Supreme Court acts as an arm of the state. And a properly functioning liberal state has no interest in doing anything other than protecting the individual autonomy of its citizens. But competing autonomy claims of individuals will necessarily generate conflict. And resolution of that conflict is the whole justification for the state's existence under social contract theory in the first place. Therefore, state interference with the autonomy of one individual can always be justified by its corresponding protection of the autonomy of another individual. As a result, judicial review can be characterized as either always serving its liberal function of protecting individual autonomy, or as never serving its liberal function of
protecting individual autonomy. Once we realize this, the Court can never successfully mediate the liberal dilemma in a way that saves the coherence of a liberal conception of the state. It is not simply that the appropriate level of state intervention to protect liberal autonomy is overdetermined. It is that the appropriate level of state intervention to protect liberal autonomy cannot be determined at all—because it does not exist. No level of state intervention can adequately protect liberal autonomy, because the liberal dilemma is so fundamental that it simply cannot be mediated.

All of this suggests that we should by now have recognized the incoherence entailed in a liberal conception of judicial review, which depicts the Supreme Court as simply a retrospective dispute-resolution tribunal that is unconcerned with the prospective formulation of legislative social policy. However, we continue to adhere to the Marbury model despite the problems embedded in its liberal foundations. I believe that we do so because judicial review helps to mediate yet another destabilizing aspect of the liberal dilemma that we would like to avoid. Just as judicial review helps us to suppress the realization that we are both dependent on and threatened by the state in our quest for individual autonomy, judicial review helps us to suppress the realization that we are both perpetrators and victims in the state's regulation of that autonomy.

We seem to be ambivalent about the political theory that we wish to have embodied in our Constitution. We sometimes view ourselves as pluralists who treat the Constitution as a document that is designed to facilitate the formulation of democratic policy through the aggregation of self-interested preferences in the political process. And we sometimes view ourselves as other-regarding members of a political community who treat the Constitution as a document that is designed to facilitate the inculcation of republican civic virtue through a collective deliberative process. Just as we rely on judicial review to mediate the tension that exists between our conflicting autonomy preferences, we also rely on judicial review to mediate the tension between our conflicting liberal and communitarian inclinations. And once again, we have an incentive to believe that judicial review can serve this function, even in the face of its familiar coherence problems.

Realistically, we treat the Supreme Court as if it were a political branch of a tricameral legislative policy-making body. We select Justices based on their political and ideological beliefs. We focus on their party memberships, religious affiliations, and abortion sympathies during the nomination process. We float stories about their
private club memberships and alleged sexual indiscretions during the confirmation process. We attend to their prior opinions to ascertain the planks in their political platforms, and we monitor the speeches and campaign promises that they make—or withhold—in the hope of winning election in the Senate.

Once confirmed, we try to influence a majority of the Justices to vote in our favor by pitching arguments in our briefs that are designed to appeal to their perceived political and ideological leanings. We then form political coalitions to lobby the Court through the coordinated submission of amicus briefs by special interest groups. We make oral arguments that consist of carefully rehearsed talking points that were previously vetted before coalition partners in moot court arguments. When we win our cases, we praise the Court for reading the Constitution in a manner that corresponds to our own ideological preferences. And when we lose, we chastise the Court in our State of the Union messages for overruling a century of constitutional precedent.

With the arguable exception of direct campaign contributions, we seem to treat the Supreme Court in the same way that we treat the other political branches of government. We treat it as an institution that should adopt our views, not because those views will advance our collective welfare, but because those views will advance our own self-interests in the ongoing struggle for dominance in the pluralist political process. Such behavior is classically liberal, in that it satisfies the selfish urge to place our own welfare above the collective welfare of others. But this aspect of liberalism is not very pretty.

A competing civic republican vision of social policy making seems to have more normative appeal. It posits the existence of a Supreme Court that is more concerned with collective welfare than with the bare aggregation of self-serving preferences. Under a civic republican view, social policies emanate from the pursuit of civic virtue rather than the pursuit of self-interest. As a result, the vision of democracy encompassed by civic republicanism is other-regarding. Its hope is to foster interdependence rather than liberal isolation. To that end, it seeks to promote conditions of widespread education and general economic security that will facilitate the common acquisition of civic virtue. Robin West has argued that contemporary liberal legal theory seems affirmatively to have excluded empathy for others

179. *See supra* text accompanying notes 177-178.
as a permissible consideration when pursuing the rule of law. In a civic republican society, however, individuals are characterized more by their capacity for empathy than by their willingness to marginalize the welfare of others in the name of objective legal liberalism. This aspect of republicanism seems prettier. But, it also seems more aspirational than realistic.

I think that we cling to the Marbury dispute-resolution model of judicial review—despite the prospective legislative policy-making function that we obviously desire the Supreme Court to serve—because the Marbury model helps us to hide from ourselves the degree to which we are simply liberal pluralists. The Madisonian Republicanism around which our Constitution is structured embodies a compromise between classical liberalism and communitarianism that is helpful in this endeavor. It allows us to treat the Court politically as the legislative policy-making body that it is, but by having the Court insist that it is merely resolving retrospective disputes between the parties, we can believe that our political victories are actually victories of constitutional principle. This allows us to think well of ourselves, because we have contributed to the maintenance of our constitutional order. It also allows us to dismiss even the empathetic appeal of claims asserted by our opponents as themselves entailing nothing more than demands for self-interested political concessions. We can dismiss those competing claims precisely because the Supreme Court has assured us that they are not rooted in constitutional principle. That, in turn, allows us to exploit the interests of others for our own advantage in a way that we might be reluctant to do without the assurance that we were doing something more noble than merely advancing our own self-interests. Accordingly, things like the maldistribution of wealth, or the unequal distribution of resources over categories such as race, religion, gender, and sexual orientation, bother us less than they would without the buffer of Supreme Court constitutional legitimation. Under the Marbury model, we are able to use judicial review to mediate the liberal dilemma in a way that hides from us not only the dark side of liberal autonomy, but the dark side of human personality as well.

The reason I view the largely technical Supreme Court decision in Camreta as important is that its reasoning forces the incoherence inherent in judicial review to rise to the surface. Because the Court

strains so hard to honor the dispute-resolution model, while simultaneously inventing new ways to circumvent it, the duplicity of that model becomes easier to recognize than to deny. If we can no longer hide behind the institution of judicial review to mask the degree to which we are willing to do unpleasant things to each other, my hope is that we will begin to resist the lure of liberalism. By focusing more on our collective welfare than our individual preferences, we may arrive at a postliberal stage of evolution in which we can begin to treat each other with less hostility and more empathy. In that way, the incoherence inherent in judicial review can turn out to be a form of constructive incoherence that prompts us to question the appeal of liberal theory itself.

V. CONCLUSION

The Supreme Court decision in Camreta is paradoxical. The Court issues an advisory opinion authorizing itself to engage in the formulation of prospective Fourth Amendment constitutional policy that is not necessary to resolution of the dispute between the parties in qualified immunity cases. But the Court goes on to hold that, because the Camreta dispute between the parties has become moot, the Court lacks Article III jurisdiction to issue an advisory opinion formulating Fourth Amendment constitutional policy in that particular case. However, if the Court lacked jurisdiction to issue an advisory opinion resolving the Fourth Amendment issue in Camreta, it also lacked jurisdiction to issue an advisory opinion authorizing itself to issue advisory opinions in other cases.

The Camreta paradox is symptomatic of the incoherence that is embedded in our conception of judicial review. We want the Supreme Court to provide us with prospective constitutional guidance, but we insist that the Court do so in the guise of retrospective adjudication that merely resolves disputes between the parties. Because it is difficult to imagine that the Court could depart from the traditional Marbury dispute-resolution model of judicial review without also crossing the line into legislative policy making, we are further insisting that the Supreme Court pose the precise separation of powers danger that the Marbury model of judicial review was designed to guard against.

The inconsistent demands that we place on judicial review reflect a dilemma inherent in liberal theory. We want the state to protect individual autonomy without itself interfering with that autonomy, but in addition, we secretly want the state to help us deny the autonomy of others in order to advance our own self-interests. In the process, we
also want the Court to portray our pluralist political policy preferences as if they were the products of our civic republican constitutional principles. Our desire to have judicial review serve these inconsistent functions is what makes judicial review incoherent, but the *Marbury* model helps us to mask that incoherence from ourselves. I believe that the *Camreta* paradox ought to be viewed as an opportunity to highlight, rather than suppress, the incoherence of our prevailing conception of judicial review. By confronting directly the manner in which we often sacrifice the interest of those unlike ourselves in order to advance parochial interests of our own, we may end up treating each other with less harshness and more empathy. The danger is that we will resist such self-revelation precisely because we are unwilling to inhibit our continued ability to engage in the sorts of exploitation to which we have grown accustomed—because we are inescapably liberal. If that is the case, I am not sure how we could ever escape the incoherence of judicial review. Alas, we would actually have to *be* the civically virtuous, empathetic people that we now seem capable of only pretending to be.