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The Limits of Advocacy

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THE LIMITS OF ADVOCACY

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ABSTRACT

Party control over case presentation is regularly cited as a defining characteristic of the American adversarial system. Accordingly, American judges are strongly discouraged from engaging in so-called "issue creation"—that is, raising legal claims and arguments that the parties have overlooked or ignored—on the ground that doing so is antithetical to an adversarial legal culture that values litigant autonomy and prohibits agenda setting by judges. And yet, despite the rhetoric, federal judges regularly inject new legal issues into ongoing cases. Landmark Supreme Court decisions such as Erie Railroad Co. v. Tompkins *and* Mapp v. Ohio *were decided on grounds never raised by the parties, and nearly every term the Supreme Court adds to the questions presented or assigns an amicus to argue an issue that the parties have no interest in discussing. These practices operate mostly under the academic radar, and thus there have been few attempts to theorize deviations from the norm of party presentation.*

This Article defends judicial issue creation as a necessary corollary to the federal judiciary's constitutional obligation to articulate the meaning of contested questions of law. Federal courts do not simply resolve disputes between parties; they are also responsible for making pronouncements of law that are binding on all who come after. When the parties fail to raise relevant legal claims and arguments—whether by error or through conscious choice—judges must do so themselves to avoid issuing inaccurate or incomplete statements of law. Although

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issue creation is often criticized as judicial overreaching, courts can use this authority to limit the scope of their decisions, narrowing the broad propositions of law relied on by the parties. Furthermore, judicial power to raise issues sua sponte is compatible with adversary theory as long as judges are careful to avoid slipping into the role of advocate, and make sure to preserve an opportunity for a dialectical exchange between the parties on new questions raised by the court.

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INTRODUCTION

Party control over case presentation is a central tenet of the American adversarial legal system. An adversarial system is typically defined as one in which the parties present the facts and legal arguments to an impartial and passive decisionmaker, who then decides cases on their terms. Indeed, party presentation is cited as the major distinction between the adversarial system in the United States and the inquisitorial systems of continental Europe, where judges take the lead in the investigation and presentation of the case.[1] Accordingly, American judges are strongly discouraged from engaging in so-called "issue creation"—that is, raising legal claims and arguments that the parties have overlooked or ignored—on the ground that doing so is antithetical to a legal culture that values litigant autonomy and prohibits agenda setting by judges.[2]

In light of the entrenched norm in favor of party presentation, what should a court do when the parties to litigation, either intentionally or by mistake, fail to raise key legal arguments? For example, what if the parties ignore a statute that would resolve their dispute, asking that the judge instead address a difficult constitutional question that the judge would prefer to avoid?[3] Or what if the parties

1. *See* McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."). *See generally* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (comparing the roles of lawyers and judges in the American and German legal systems).

2. *See infra* notes 42–43.

3. *E.g.*, Boynton v. Virginia, 364 U.S. 454, 457 (1960).

agree on the meaning of a constitutional provision, differing only over its application, and yet the judge thinks that both parties have misinterpreted the constitutional text at issue?[4] What should happen if the parties fail to raise a legal argument or to use an interpretive theory on which the judge would like to rely?[5] All of these "what ifs" describe actual cases in which courts were forced to choose between violating the norm of party presentation, on the one hand, or issuing an opinion containing inaccurate and misleading statements about the meaning of the law, on the other.

Despite the rhetoric in favor of party presentation, judicial issue creation is not uncommon. Indeed, some of the Supreme Court's landmark cases were decided on grounds that were never raised by the parties. For example, in *Erie Railroad Co. v. Tompkins*,[6] neither the petitioner nor the respondent took issue with *Swift v. Tyson*'s[7] holding that federal courts sitting in diversity jurisdiction could create federal common law,[8] and yet the Court overruled *Swift* and required federal courts to abide by state common law rules.[9] Although the parties in *Washington v. Davis*[10] agreed that the Equal Protection Clause barred conduct having a disparate racial impact,[11] the Court rejected that view and held that the Constitution prohibits only intentional discrimination.[12] Most recently, in *Dickerson v. United States*,[13] both the Fourth Circuit[14] and the Supreme Court[15] questioned whether a federal statute governed the admission of confessions, displacing the Court's ruling in *Miranda v. Arizona*,[16] even though neither party relied on that statute.[17] These cases are not outliers: the U.S. Supreme Court frequently rewrites the questions presented,

4. *E.g.*, Washington v. Davis, 426 U.S. 229, 238 (1976).

5. *E.g.*, Phillips/May Corp. v. United States, 524 F.3d 1264, 1269–70 & n.2 (Fed. Cir. 2008).

6. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

7. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

8. *Erie*, 304 U.S. at 66 (argument for petitioner); *id.* at 68 (argument for respondent).

9. *See id.* at 80 (holding that by applying *Swift v. Tyson*, federal courts had assumed powers constitutionally reserved to the states).

10. Washington v. Davis, 426 U.S. 229 (1976).

11. *Id.* at 238 n.8.

12. *Id.* at 239.

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

14. United States v. Dickerson, 166 F.3d 667, 682 (4th Cir. 1999).

15. *See Dickerson*, 530 U.S. at 437, 441 n.7 (noting that because the parties had not argued in favor of the statute's constitutionality, the Court had invited amicus curiae to do so).

16. Miranda v. Arizona, 384 U.S. 436 (1966).

17. *See Dickerson*, 530 U.S. at 437, 441 n.7; *Dickerson*, 166 F.3d at 682.

adds new questions, and even assigns amici to argue positions that *no* party defends.[18] Such practices coexist uneasily within an adversarial tradition that supposedly gives the parties, and not the judge, control over case presentation.

Neither courts nor legal commentators have acknowledged the many institutionalized judicial practices that seem to undermine the norm against issue creation. To the contrary, judicial opinions and the academic literature confidently promote party presentation, and are critical of judges who raise issues sua sponte.[19] The lack of a conceptual framework to support judicial issue creation discourages some judges from raising issues sua sponte even when there are compelling reasons to do so, and leaves those judges who do supplement the parties' legal arguments open to the charge that they have transgressed the bounds of judicial power to further their personal ideological agenda.[20] As a purely practical matter, then, the tension between the rhetoric in favor of party presentation and the actual practice is one that deserves further discussion for the benefit of judges struggling to reconcile their conflicting obligations in specific cases.

From a jurisprudential perspective, the issue goes to the core of what judges, particularly *federal* judges, are asked to do.[21] Federal

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18. *See infra* Part I.B.

19. *See, e.g.*, Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding* Dickerson v. United States, 149 U. PA. L. REV. 287, 292 (2000) ("[T]he courts exceeded the appropriate judicial role in raising a major constitutional issue not presented by the parties . . . ."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) (asserting that the system works best when the decisionmaker "rests his decision wholly on the proofs and argument actually presented to him by the parties"); *infra* note 42 and accompanying text.

An exception is Neal Devins's article defending the Fourth Circuit's sua sponte questioning of the continuing validity of *Miranda* in its decision in *Dickerson v. United States*. Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 253 (2000). Professor Devins argues convincingly in support of the Fourth Circuit, but does not purport to defend sua sponte decisionmaking in circumstances outside of the unique situation presented by *Dickerson*. *See id.* at 277 (noting that "*Dickerson* is a truly unusual case" and commenting that he "do[es] not mean to suggest that courts ought to search out ways to decide cases in which the executive is unwilling to defend the constitutionality of an act of Congress").

20. *See, e.g.*, Chemerinsky, *supra* note 19, at 302 ("[I]n *Dickerson*, the Fourth Circuit invoked § 3501 over the objections of the parties precisely because it wanted to reach a particular result: upholding its constitutionality.").

21. Some of this Article's arguments regarding judicial power to raise new issues of law would apply to state as well as federal judges. Much of this Article focuses on the role of the federal courts in the constitutional structure, however, and thus the power of state courts may differ depending on their place in state government.

judges serve a dual role: they must resolve the concrete disputes before them, and yet under the constitutional structure and in the common law tradition they are also expected to make accurate statements about the meaning of law that govern beyond the parameters of the parties and their dispute.[22] Usually, the dispute-resolution and law-pronouncement functions complement one another because judges are more likely to reach the "right" legal answer when two parties, each with a stake in the matter, compete to present the most persuasive case to the court. But when the parties fail to fulfill their role in the adversary system—whether by error or through conscious choice—judges must choose between dispute resolution and law pronouncement. They may either decide the dispute on the parties' chosen terms, as the adversary model would seem to require, or introduce new grounds for a decision on their own initiative, producing a judicially driven, but more accurate, statement of law. This tension between the two central functions of the federal judge suggests that it is worth taking a closer look at the norm against judicial issue creation.

This Article contends that there are good reasons to promote judicial issue creation in certain categories of cases. Issue creation is an essential means of protecting the judiciary's role in the constitutional structure. As the third branch of government, federal judges are assigned the task of settling the meaning of disputed questions of law, not just for the parties, but for all who must comply with it. Furthermore, they must do so free from outside influence. As a result, courts have the power to look beyond the parties' arguments

22. *See, e.g.*, Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995) ("Almost everyone today would agree that adjudication is about articulating public norms as well as settling private disputes . . . ."); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981) ("Adjudication in the common law mold entails two simultaneously performed functions: dispute resolution and norm articulation."); Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978) ("One function of adjudication is the settlement of past disputes. Frequently the adjudicator assumes a second function of making rules to govern future conduct."); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) (stating that "dispute resolution may be one *consequence* of the judicial decision" but the "*function* of the judge" is to "give the proper meaning to our public values"); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 137–38 & n.51 (2005) (discussing the courts' dual function of dispute resolution and law pronouncement, and stating that "there is general agreement that both functions play some role in adjudication").

when failing to do so would lead to an inaccurate or incomplete description of the law.

Furthermore, because federal judges operate within a common law system in which the precedent in one case establishes the law for all who follow, it is particularly important that they make accurate statements about the meaning of law. Lower federal courts are bound by hierarchical precedent, and stare decisis instructs that judges should not reject their own court's past precedent absent special circumstances.[23] In a legal system in which appellate opinions not only establish the meaning of law, but do so through precedent that binds future litigants, courts cannot cede to the parties control over legal analysis.[24] In truth, as will be discussed in Part I, judges in the United States often reach beyond the four corners of the parties' briefing when they think that the parties have not accurately described the law. This Article defends that choice.

To be sure, the parties are essential to the exercise of federal judicial power; without them, there would be no "[c]ase[]" or "[c]ontrovers[y]" on which a federal court could act.[25] The parties are also in the best position to find and make all the arguments in their favor, and usually (though not always) can be relied upon to do so. Issue creation should not be an everyday occurrence, because it can lead to delay, disrupt settled expectations, and undermine litigant autonomy.[26] Yet the parties cannot be allowed to completely control the judiciary's statements of law, or even the interpretive process, lest they undermine the federal courts' role to independently ascertain the meaning of legal texts for the benefit of all.

Although judicial issue creation itself has not received much attention, striking the right balance between dispute resolution and law pronouncement has long been the subject of debate among legal academics. Lon Fuller is most closely associated with the traditionally adversarial "dispute resolution" model of adjudication, in which private disputes are resolved by a neutral and passive

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23. *See infra* Part II.D.

24. In common law jurisdictions, "precedents were not merely evidence of the law but the law itself." GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT 35 (2005). In civil law countries, "cases are merely evidence of the law." *Id.* at 36.

25. U.S. CONST. art. III, § 2.

26. See *infra* Part IV for further discussion of the criteria that should govern issue creation.

decisionmaker.[27] In contrast, scholars such as Owen Fiss and Abram Chayes described a "public values" model that they claimed better suits modern, public law litigation in which judges articulate legal standards that affect large numbers of stakeholders.[28] As these scholars themselves recognized, however, the complex, multipurpose act of adjudication need not be forced into one of two polarized camps.[29] Any viable model of adjudication has to make room for both dispute resolution and law pronouncement, without sacrificing either function for the sake of the other. Rather than deepening the dichotomy, this Article attempts to bring these two functions of adjudication closer together by describing how federal courts can reconcile their duty to decide cases through the adversarial system with their competing constitutional and common law obligations to establish legal standards for the nation.

This Article proceeds as follows. Part I.A describes the norm against judicial issue creation and discusses the rationales that underlie it. Part I.B then makes the descriptive claim that, in practice, the norm is weaker than the rhetoric promoting it would suggest. Part II seeks to bridge the gap between rhetoric and practice by laying out a defense of judicial issue creation grounded upon the federal judiciary's constitutional obligation to declare the meaning of federal law free from outside influence. Part III discusses how courts can balance dispute resolution with law pronouncement—the subject of longstanding debate among proceduralists—and explores ways in which the adversarial system can account for the latter task. Finally, Part IV translates theory into practice by describing the criteria that

27. *See* Fuller, *supra* note 19, at 364 (characterizing adjudication as a process that gives the private parties whose interests are at stake the opportunity to present arguments in their favor to a neutral arbiter).

28. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976) (contrasting the "traditional" model of adjudication as "a vehicle for settling disputes between private parties about private rights" with a "public law" model where "the object of litigation is the vindication of constitutional or statutory policies"); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (stating that the "job" of a judge "is not to maximize the ends of private parties . . . but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes"); Fiss, *supra* note 22, at 30 (arguing that "dispute resolution may be one *consequence* of" adjudication, but the "*function* of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values"); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 34–35 (2003) (discussing the differences between Fuller's and Chayes's models of litigation).

29. *Cf.* Bone, *supra* note 22, at 1275 (asserting that Lon Fuller's theory of adjudication has been distorted by scholars who wrongly perceive of Fuller as promoting a "dispute resolution model" that stands in polar opposition to Chayes and Fiss's "public law model").

judges may consider when deciding whether to raise new legal issues or arguments that have gone unmentioned by the parties, and suggests that courts carefully weigh the costs to the parties of raising new issues against the benefits of preserving the judiciary's law-pronouncement function.

The arguments in favor of judicial issue creation are not trump cards that always outweigh the strong rationales against it. Nonetheless, good arguments for the practice do exist. The purpose of this Article is to demonstrate that judicial issue creation is not a deviant act of judicial overreaching, and to provide a defense for a practice that operates mostly under the academic radar and without explanation or support. By articulating the rationales supporting judicial issue creation—rationales that are currently absent from most judicial opinions and academic commentary—I hope this Article will assist judges in determining when raising new issues is a legitimate exercise of judicial power, and defend judges that do so from charges of overstepping.

I. THE PARTY PRESENTATION NORM

The rhetoric in favor of party presentation is not always consistent with actual judicial practice. Part I.A defines the norm against judicial issue creation and describes how party presentation is viewed as an essential aspect of the adversarial system. Part I.B points out occasions on which courts deviate from the norm, usually without providing an explanation for doing so, and argues that these exceptions suggest that issue creation is sometimes justified.

A. The Norm against Judicial Issue Creation

1. *Defining the Norm.* Before discussing the rationale underlying the norm against judicial issue creation, a clarification of terms is needed. This Article repeatedly refers to the norm in favor of "party presentation" and against "judicial issue creation," which is also sometimes described as the prohibition against "sua sponte decisionmaking." These terms are used by political scientists, legal scholars, and jurists as shorthand for the conventional view that the parties to litigation, and not the judge, are responsible for raising the legal questions that will ultimately be resolved by the court.[30] As the

30. *See, e.g.*, Greenlaw v. United States, 128 S. Ct. 2559, 2564 (2008) (describing the "principle of party presentation," under which "the parties . . . frame the issues for decision"

U.S. Supreme Court explained in its recent decision in *Greenlaw v. United States*:[31]

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.[32]

Not all judicial involvement in case presentation, however, would violate the norm as typically described. Indeed, if the party presentation rule were taken literally, courts would violate it simply by relying on overlooked legal sources, such as judicial precedent that the parties did not cite. But the norm does not extend to such minimally proactive judicial conduct, which is viewed as well within judicial power, and thus is not the focus of this Article.[33]

In contrast, the norm against issue creation clearly discourages judges from raising new legal claims missed by the parties. For example, if the parties differ over the meaning of a particular statutory provision, but neither party cites or relies upon a different statute that appears to resolve their dispute, judges will generally claim that they lack the authority to rely on the uncited statute to decide the case.[34] Likewise, if the parties fail to raise a constitutional challenge to a statute, the norm generally bars courts from doing so

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and the courts take on "the role of neutral arbiter of matters the parties present"); Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 251 (2004) (discussing uncertainty about the extent to which a court "may choose to consider . . . an issue [not raised by the parties] *sua sponte*"); Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845, 845 (1996) (describing the "practice disfavoring the creation of issues not raised in the record before the Court" as a "norm"); Eric D. Miller, Comment, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1049 (1998) ("In practice, it is unusual for courts to consider issues sua sponte . . . .").

31. Greenlaw v. United States, 128 S. Ct. 2559 (2008).

32. *Id*. at 2564.

33. *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 511–12 (1994) (holding that an appellate court should take notice of relevant legal precedent overlooked by the parties). It is worth noting that the unquestioned judicial power to sua sponte take notice of relevant precedent suggests that judges have an obligation to pronounce upon an objective version of the law, and not simply the parties' subjective view of it—an observation that supports giving judges broader power to raise overlooked legal claims and arguments.

34. *See, e.g.*, United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) (refusing to address sua sponte a legal argument that the parties had failed to raise).

sua sponte.[35] And if neither party questions whether a regulation is authorized by a federal statute, the courts will interpret and apply the regulation without addressing that question.[36] Although judges have at times reached these issues despite the norm, as will be described in detail in Part I.B, the general understanding is that they should not.

A closer question is whether the norm prohibits judicial creation of a new legal theory to support a party's existing claim. For example, if a party asserts that a statute's plain language is in its favor, but fails to cite or make any arguments regarding legislative history, can a court sua sponte take notice of the legislative history and craft an argument about statutory meaning on that basis, or has the party forfeited any such argument by failing to discuss it?[37] This type of issue creation falls in a gray area in which some judges think they are free to raise additional arguments that support a party's claims, while others contend courts should not go so far.[38] Thus, although the norm does not clearly apply here, it nonetheless maintains some residual influence over courts trained to assume that parties control case presentation. Confusion over the judicial role in borderline cases further underscores the need to develop a rationale to govern judicial discretion to raise issues and arguments overlooked by the parties.

2. *Rationales for the Norm.* Party control over case presentation is described as an essential aspect of the American adversarial

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35. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1640 (2007) (Thomas, J., concurring) ("I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring) (noting, but declining to address, a potential constitutional problem with a federal statute because the parties did not raise the issue).

36. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 279 (2001) ("We do not inquire here whether the DOJ regulation was authorized by § 602 . . . . The petition for writ of certiorari raised, and we agreed to review, only the question . . . whether there is a private cause of action to enforce the regulation.").

37. *See, e.g.*, Phillips/May Corp. v. United States, 524 F.3d 1264, 1270 n.2 (Fed. Cir. 2008) (noting that neither party cited legislative history that the court found dispositive of a legal question in the case).

38. *Compare Bombardier*, 380 F.3d at 497 (refusing to address sua sponte a legal argument that the parties had failed to raise), *and* Warner v. Aetna Health Inc., 333 F. Supp. 2d 1149, 1154 n.7 (W.D. Okla. 2004) (refusing to address a legal argument not raised by the parties), *with* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

system.[39] The federal reporter is replete with cases asserting that courts have "no right to consider issues not raised by a party"—a position routinely accepted by every circuit court in the country.[40] As Justice Scalia declared in a concurrence: "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[41]

Legal scholars agree that the norm against judicial issue creation is firmly entrenched in adversarial theory. As Judith Resnik has observed, "our tradition is considered more adversarial than most, and its basic principle is that the parties, not the judge, have the major responsibility for and control over the definition of the dispute."[42]

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39. *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 n.23 (1982) ("Some proceduralists identify 'party-presentation' and 'party-prosecution' as the two fundamental elements of adversarialism."); *supra* note 1.

40. *See, e.g.*, Clements v. Serco, Inc., 530 F.3d 1224, 1229 n.4 (10th Cir. 2008) (declining to decide the case on grounds not raised by the parties); e360 Insight v. Spamhaus Project, 500 F.3d 594, 599 (7th Cir. 2007) (declining to raise an affirmative defense sua sponte); Kropelnicki v. Siegel, 290 F.3d 118, 130 n.7 (2d Cir. 2002) (stating that statutes of limitations ordinarily should not be raised sua sponte); Curry v. Beatrice Pocahontas Coal Co., 67 F.3d 517, 522 n.8 (4th Cir. 1995) ("The normal rule of course is that failure to raise an issue for review in the prescribed manner constitutes a waiver."); Hardiman v. Reynolds, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense sua sponte."); Bolden v. Se. Pa. Transp. Auth., 953 F.2d 807, 812 (3d Cir. 1991) (en banc) ("We do not generally consider issues not raised by the parties . . . ."); Izquierdo Prieto v. Mercado Rosa, 894 F.2d 467, 471 n.4 (1st Cir. 1990) ("Ordinarily, we would decline to raise a defense *sua sponte* that a party had failed to raise on his own behalf."); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

41. United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

42. Resnik, *supra* note 39, at 382 (footnote omitted); *see also* Greenlaw v. United States, 128 S. Ct. 2559, 2564 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial . . . is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."); *Carducci*, 714 F.2d at 177 ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 268 (5th ed. 2007) ("In American courts that are committed to the adversary system, generally judges are supposed to rule only on motions brought by the parties."); Epstein et al., *supra* note 30, at 845 (describing the "practice disfavoring the creation of issues not raised in the record before the Court" as a "norm"); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND.

Stephan Landsman, a scholar of the adversarial system, declared that "reliance on party presentation of evidence" is one of the "key elements" of adversarialism.[43] Likewise, in her critique of adversarial process, Ellen Sward explained that the "adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard."[44]

The norm against judicial issue creation is grounded in American cultural conceptions regarding the proper role of the judiciary in a constitutional democracy. American legal culture promotes litigant autonomy over control by government actors, particularly when those actors are unelected, and thus unaccountable, members of the federal judicial branch.[45] The litigants' control of case presentation is thought to promote dignitary and participation values by "affirm[ing] human individuality" and showing "respect for the opinions of each party," producing an outcome more satisfying to winners and losers alike.[46] Professor Landsman explained: "Adversary theory holds that if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not."[47]

In contrast, a judge-dominated inquisitorial system is viewed as uniquely un-American in its emphasis on management of litigation by government bureaucrats, and the concomitant disempowerment of the private litigant. As David Sklansky recently observed,

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L.J. 301, 302 (1989) ("The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard.").

43. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988); *see also id.* ("The adversary system relies on a neutral and passive decision maker to adjudicate disputes after they have been aired by the adversaries in a contested proceeding.").

44. Sward, *supra* note 42, at 302; *see also* Devins, *supra* note 19, at 252 ("[A] central tenet of our adversarial system is that (save for jurisdictional issues) the parties to a case—not the judges deciding the case—raise the legal arguments.").

45. *See, e.g.*, STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 22–25 (2006); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2130 (2000) (identifying the freedom of civil litigants to "make their way through the adversarial processes . . . on their own" as a premise "deeply embedded within United States culture").

46. LANDSMAN, *supra* note 43, at 33–39.

47. *Id*. at 34.

inquisitorialism is an epithet among American judges, practitioners, and scholars, and consequently the American legal system has been constructed to avoid even the whiff of its judge-dominated procedures.[48]

The norm against issue creation can even be said to have quasi-constitutional roots. It has at least a passing relationship to Article III's case or controversy requirement, which limits courts to deciding disputes between parties with actual injuries that were caused by the legal wrong of which they complain and which are remediable by a court. To be sure, courts are not constitutionally barred from raising new issues.[49] Nonetheless, the principle that the parties, and not the judge, should frame cases is grounded upon the same values as those underlying the doctrine of standing. Both promote separation of powers by preventing courts from setting their own agendas, as is the prerogative of the legislature.[50] And both ensure that courts decide only those issues that are briefed and argued by stakeholders with an incentive to adequately represent their interests to the court, which in turn will produce better judicial decisions.[51]

In addition, the party presentation norm has a relationship to some of the core elements of due process. At a minimum, due process requires that the state provide notice and an opportunity to be heard by an impartial decisionmaker before it can take away life, liberty, or property.[52] Due process focuses on giving the *individual* an opportunity to present his case, rather than on ensuring that a case is accurately and fully argued by some third party who claims to have the individual's interest in mind.[53] Furthermore, because the decisionmaker must remain impartial, he cannot serve as an advocate

48. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1638 (2009) ("[T]he vast majority of American scholars, like the vast majority of American judges, are apt to agree with the Supreme Court that the civil-law mode of criminal procedure, far from meriting emulation, should be studiously avoided — indeed, that avoiding inquisitorial justice is what our own system is all about." (internal quotation marks omitted)).

49. *See infra* Part I.B.

50. LANDSMAN, *supra* note 43, at 34 ("When litigants direct the proceedings, there is little opportunity for the judge to pursue her own agenda or to act on her biases.").

51. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–61 (1992); *see also* Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 24 (1982) (stating that standing doctrine "ensur[es] vigorous adversary presentation").

52. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

53. *Cf.* LANDSMAN, *supra* note 43, at 35 ("Party control . . . . affirms human individuality. It mandates respect for the opinions of each party rather than those of his attorney, of the court, or of society at large.").

for the interests of either party. The judge's "detachment" is claimed to "preserve[] the appearance of fairness as well as fairness itself."[54] These characteristics of due process are promoted by the adversarial system's reliance on the parties to take the lead in case presentation.[55]

Finally, party presentation serves important practical purposes. It promotes judicial economy, efficient resolution of disputes, and finality. Requiring that the parties and not the court frame legal issues preserves precious judicial resources; courts simply do not have the time or personnel to act as auxiliary counsel.[56] Cases are most efficiently resolved when the parties lay out all of their arguments at the outset, giving each side a chance to fully brief and argue the issues relevant to their dispute. Moreover, if courts raise new issues at the eleventh hour, they risk needlessly extending costly and disruptive litigation.[57]

For all these reasons, the norm against judicial issue creation appears embedded in the American legal system. Yet the significant number of exceptions to the norm discussed below demonstrates that it is less foundational than the rhetoric would suggest.

B. Exceptions to the Norm

Courts have developed a number of doctrinal exceptions to the party presentation rule, some of which are so broadly worded as to essentially give courts carte blanche to raise new issues at any time.[58] Such exceptions include: the ability of courts to examine jurisdictional questions sua sponte, the justification of issue creation for exceptional

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54. *Id.* at 34 ("Because the judge seldom takes the lead in conducting the proceedings, she is unlikely to appear to be partisan or to become embroiled in the contest. Her detachment preserves the appearance of fairness as well as fairness itself.").

55. *Id.* at 37 (noting that due process requires judicial neutrality and an opportunity to present evidence).

56. *See id.* at 35 ("According to adversary theory, when each actor performs only a single function the dispute before the court will be resolved in the fairest and most efficient way.").

57. *E.g.*, United States v. Wiseman, 297 F.3d 975, 980 (10th Cir. 2002) (declining to raise a new issue sua sponte because it would delay resolution of the litigation).

58. *See* THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 124 (1978) ("[One] court rule, applied to issues not raised at trial as well as on appeal, is that issues not raised will be ignored unless doing so would result in an injustice. . . . [T]his is a very uncertain standard, and it leaves the judges a good deal of discretion. . . . Other courts often use 'justice' or other elusive standards, such as 'plain error' or 'fundamental error,' in determining when to decide an issue not raised."); *see also* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 248 (2002) (noting that despite the rhetoric against sua sponte decisionmaking by courts, "raising issues sua sponte is not an uncommon practice").

issues on the merits, procedural rules and practices allowing for modification of the questions presented, and the use of amicus curiae. These exceptions coexist uneasily with the party presentation rule, with no judicial acknowledgement that they are seemingly at odds with a primary characteristic of the adversary system.

1. *Jurisdiction*. The best-known exception to the party presentation rule permits courts to question their capacity or suitability to hear a case or a specific issue. For example, courts will investigate their subject matter jurisdiction, the litigant's standing to sue, and whether federalism or comity concerns counsel judicial restraint, even if the parties fail to raise these issues. Indeed, federal judges are obligated to establish that a case falls within one of the subject matter headings of Article III to ensure that they do not impinge on the role of the other two branches of the federal government or undermine state courts.[59] Likewise, Article III limits federal judicial power to "Cases" or "Controversies," and thus federal courts must find that the plaintiff has standing—that is, a concrete injury, caused by the challenged conduct, which a court can remedy—before presiding over that plaintiff's case.[60] A court's responsibility to satisfy itself of its jurisdiction to proceed is rationalized as necessary to maintain the judiciary's limited role in the constitutional structure.[61]

Although not constitutionally compelled to do so, courts will raise preclusion, abstention, and sovereign immunity in a similar spirit of judicial restraint.[62] Courts justify raising questions of issue and claim preclusion sua sponte as necessary to protect the resources and integrity of the federal judiciary.[63] Abstention and sovereign immunity are given special attention out of concern for state sovereignty, which courts argue must be protected from litigants who might not have state interests in mind.[64]

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59. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 258 (3d ed. 1999).

60. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–61 (1992).

61. *Id.*

62. *See, e.g.*, Cincinnati Indem. Co. v. A&K Constr. Co, 542 F.3d 623, 625 (8th Cir. 2008) (raising abstention sua sponte); Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 461, 474 (6th Cir. 2006) (raising sovereign immunity sua sponte); Scherer v. Equitable Life Assurance Soc'y, 347 F.3d 394, 398 n.4 (2d Cir. 2003) (noting that "a court is free to raise [res judicata] *sua sponte*").

63. *See, e.g.*, Salahuddin v. Jones, 992 F.2d 447, 449 (2d Cir.1993).

64. *See, e.g.*, *Cincinnati Indem. Co.*, 542 F.3d at 624–25 (raising abstention sua sponte); *Nair*, 443 F.3d at 474 (raising sovereign immunity sua sponte).

The rationales for these exceptions have potentially broad application. The judiciary's interest in protecting the constitutionally demarcated limits on its authority, preserving judicial resources, and protecting interests beyond those of the parties would justify issue creation in a wide range of situations, and thus could extend beyond questions of prudential and constitutional limits on federal jurisdiction.

2. *Merits*. The second and more amorphous category of exceptions includes merits issues that are in some way exceptional. Judges justify raising issues sua sponte to avoid plain error, or because it is in the public interest to do so, or to prevent a miscarriage of justice.[65] This second category of exceptions is not much of a category at all, because judges have not articulated a clear set of conditions that lead them to deviate from their typical practice of letting the parties frame the dispute. A leading treatise on Supreme Court practice acknowledged that the Court's practice is ad hoc:

> Analysis of other cases in which the Court considered a question not presented in a petition suggests that the exception from the normal rule is not circumscribed by any particular formula, and that it reflects the Court's discretionary authority to dispose of cases in what it determines to be the most sensible and reasonable way.[66]

Federal circuit courts similarly act with little rhyme or reason.[67] The absence of principled guidelines governing judicial issue creation has

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65. *See, e.g.*, Curry v. Beatrice Pocahontas Coal Co., 67 F.3d 517, 522 n.8 (4th Cir. 1995) ("The normal rule of course is that the failure to raise an issue for review in the prescribed manner constitutes a waiver. But the rule is not an absolute one and review may proceed (even completely *sua sponte*) when the equities require." (citation omitted)); Lambert v. Genesee Hosp., 10 F.3d 46, 56 (2d Cir. 1993) ("We recognize that th[e] issue was not presented to this court . . . . However, we have discretion to consider and decide *sua sponte* a dispositive issue of law . . . ."); Counts v. Kissack Water & Oil Serv., Inc., 986 F.2d 1322, 1325–26 (10th Cir. 1993) ("Although it is rarely done, an appellate court may, sua sponte, raise a dispositive issue of law when the proper resolution is beyond doubt and the failure to address the issue would result in a miscarriage of justice.").

66. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 346 (7th ed. 1993).

67. *See* United States v. Boyd, 208 F.3d 638, 651 (7th Cir. 2000) (Ripple, J., dissenting), *judgment vacated*, 531 U.S. 1135 (2001) ("There is . . . no rigid and undeviating judicially declared practice under which courts of review invariably and under all circumstances decline to consider all questions which have not previously been specifically urged. . . . Exceptional cases or particular circumstances may prompt a reviewing court, where injustice might otherwise result or where public policy requires, to consider questions neither pressed nor passed upon below." (first alteration in original) (quoting Nuelsen v. Sorensen, 293 F.2d 454, 462 (9th Cir. 1961))).

led some to accuse judges of raising new issues when doing so accords with their personal preferences.[68]

3. *Questions Presented*. In addition to judges' willingness to raise new legal claims and arguments on their own motion, federal courts have also adopted a number of procedural rules and practices at odds with the party presentation rule. For example, the Supreme Court has long assumed the power to amend or add to the questions presented by the parties for resolution. Frequently, the Court rewrites those questions to clarify, narrow, or simplify the issues framed by the parties. On occasion, the Court has even made substantive changes to the issues the parties ask it to review, or has added entirely new questions.[69]

The Supreme Court has never reconciled its habit of adding to the questions raised by the parties with the norm of party presentation. Moreover, the practice is also at odds with Supreme Court Rule 14(1)(a), which provides: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Although the Court acknowledges that "we ordinarily do not consider questions outside those presented in the petition for certiorari," it has gone on to describe that practice as "prudential," and thus one that can be "disregard[ed]" in "exceptional cases," when "reasons of urgency or of economy" justify doing so.[70] In short, the

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68. *See, e.g.*, Chemerinsky, *supra* note 19, at 302 ("[I]n *Dickerson*, the Fourth Circuit invoked § 3501 over the objections of the parties precisely because it wanted to reach a particular result: upholding its constitutionality."); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1256–58, 1260 (2002) ("The absence of a consistent principle [for raising issues sua sponte] leaves courts open to the accusation that ignoring the adversary process is a political action, where a court reaches out to legislate instead of following judicial norms.").

69. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 535 (1992) (noting that the Court has "on occasion rephrased the question presented by a petitioner or requested the parties to address an important question of law not raised in the petition for certiorari"); Payne v. Tennessee, 498 U.S. 1080, 1080 (1991) (granting the certiorari petition and "request[ing]" that the parties "brief and argue whether *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), should be overruled"); Patterson v. McLean Credit Union, 485 U.S. 617, 617 (1988) (ordering the parties to address whether 42 U.S.C. § 1981 affords a remedy against private employers); Paris Adult Theatre I v. Slaton, 408 U.S. 921, 921 (1972) (ordering the parties to brief an additional question); Neely v. Strubs Constr. Co., 382 U.S. 914, 914 (1965) (granting the certiorari petition and asking the parties to address whether the appellate court's power pursuant to Federal Rule of Civil Procedure 50 and the Court's own precedent to issue a judgment notwithstanding the verdict justified the ruling below).

70. *Yee*, 503 U.S. at 535 (quoting Stone v. Powell, 428 U.S. 465, 481 n.15 (1976)). In *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971), the

Court has retained seemingly standardless discretion to violate the norm of party presentation whenever it wishes to do so.

4. *Amicus Curiae*. The widespread participation of amicus curiae at all stages of litigation is also in tension with the party presentation principle.[71] Although many amicus briefs simply underscore the petitioners' and respondents' arguments, some stake out new territory, and no rule forbids them from doing so. To the contrary, the rules of procedure governing amicus filings in the U.S. Supreme Court state that amicus briefs should discuss aspects of the case given short shrift or entirely overlooked by the parties, and discourage amicus briefs that simply reiterate the litigants' arguments.[72]

Studies have shown that amicus briefs filed in the Supreme Court are effective, in that they increase the chances of the Court granting certiorari and improve the likelihood of success on the merits.[73] Furthermore, and of relevance to this Article, their value comes not just from the show of support but from the new arguments and information they provide to the Court in favor of one party or the other. Political scientist Paul Collins devised a study to determine whether the value of amicus briefs came from the number of people supporting a position, or whether judges gained additional legal and factual material from these briefs that assisted them in reaching a

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Supreme Court stated that the rule "does not limit our power to decide important questions not raised by the parties," and went on to describe "well-recognized exceptions" to the rule. *Id.* at 320 n.6.

71. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 671 (2008) (reporting that amicus participation in the Supreme Court increased 800 percent during the last half of the twentieth century); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 680 (2005) (reporting that amicus participation in the courts of appeals increased 14.6 percent from 1992 through 2002).

72. *See* SUP. CT. R. 37.1; *see also* Simard, *supra* note 71, at 691 (noting that "amici are criticized if they merely duplicate the information presented by the parties"). In the words of Supreme Court Rule 37.1: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." SUP. CT. R. 37.1.

73. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988) ("[T]he addition of just one amicus curiae brief in support of certiorari increases the likelihood of plenary review by 40%–50%."); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 830 (2000).

decision, and concluded that they were effective for both reasons.[74] Another recent article summarizing a nationwide survey of federal judges concluded that "judges at all three levels of the federal bench find amici curiae helpful in offering new legal arguments that are absent from the parties' briefs," though the author was careful to note that amici "may not stray too far from the agenda as set by the parties."[75]

So it is not surprising that the Supreme Court has based some of its most important holdings on arguments raised only in amicus briefs. In *Teague v. Lane*,[76] the Court addressed the retroactivity of the petitioner's Sixth Amendment claim on habeas review, even though that issue was raised only in an amicus brief.[77] Likewise, the parties in *Mapp v. Ohio*[78] did not argue that the Fourth Amendment's exclusionary rule should apply to the states, and yet the Court adopted that argument after noting that it had been raised in an amicus brief.[79] More recently, in *Romer v. Evans*,[80] the Court struck down an amendment to the Colorado state constitution that prohibited legal protections for gay people, relying on the arguments in an amicus brief by Professor Laurence Tribe.[81]

Most remarkable in light of the party presentation norm, the Supreme Court occasionally appoints amicus curiae to argue a position that *no* party to the case supports, even when those issues are not jurisdictional. For example, in *Bob Jones University v. United States*,[82] the Supreme Court appointed William Coleman as amicus curiae to argue that institutions that discriminate on the basis of race are not entitled to tax-exempt status after the United States abandoned that position.[83] More recently, in *Irizarry v. United States*,[84]

74. Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 *passim* (2004).

75. Simard, *supra* note 71, at 690–92.

76. Teague v. Lane, 489 U.S. 288 (1989).

77. *Id*. at 300.

78. Mapp v. Ohio, 367 U.S. 643 (1961).

79. *Id*. at 646 n.3.

80. Romer v. Evans, 517 U.S. 620 (1996).

81. Kenji Yoshino, *Tribe*, 42 TULSA L. REV. 961, 966 (2007).

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

83. Goldsboro Christian Schs., Inc. v. United States, 456 U.S. 922, 922 (1982) ("William T. Coleman, Jr., Esquire, of Washington, D.C., a member of the Bar of this Court, is invited to brief and argue [this case and *Bob Jones University*], as *amicus curiae* in support of the judgments below.").

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

the Court assigned Professor Peter Rutledge to defend the Eleventh Circuit's decision holding that Federal Rule of Criminal Procedure 32(h) does not require that a trial court give notice in advance of imposing a criminal sentence that departs from the sentencing guidelines after both the United States and the defendant agreed that such notice must be provided.[85]

Relying on arguments made by amici is a clear transgression of the norm of party presentation, but it cannot be described as straightforward judicial issue creation. Judges who turn to amici are not setting their own agenda, as judges who raise issues sua sponte can be accused of doing. Furthermore, the parties may respond to arguments by amici, and thus provide the judge with an adversarial exchange on the new issues raised. Even though participation by amici is not equivalent to judicial issue creation, the prevalence of amicus participation nonetheless emphasizes the shaky foundation of the party presentation norm.

C. Issue Creation in Practice

Below are descriptions of a few significant cases in which the Supreme Court has raised an issue that went unmentioned by the parties. Part II will return to these examples to illustrate the rationales supporting judicial issue creation.

1. Erie Railroad v. Tompkins. *Erie Railroad v. Tompkins* has long been considered one of the most important cases in American legal history for its holding that federal courts lack the power to create federal common law—a question that the parties never raised.[86] Erie Railroad was sued by Tompkins, a pedestrian injured by a passing train while walking near Erie's railroad tracks in Pennsylvania. The railroad's liability turned on whether Tompkins was to be treated as a licensee, in which case the railroad would be liable for its negligence, or whether he was a trespasser to whom the railroad could be liable only if its conduct amounted to "wanton or willful" negligence. Tompkins argued that under the precedent of *Swift v. Tyson*, the federal court must develop its own common law

85. *Id.* at 2202.

86. *See, e.g.*, CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 378 (6th ed. 2002) ("It is impossible to overstate the importance of the Erie decision." (footnote omitted)); Justice Hugo Black, Address at the Sixty-Second Annual Meeting of the Missouri Bar Association (Sept. 25, 1942), *in* 13 MO. B.J. 173, 174 (1942) (declaring *Erie* "one of the most important cases at law in American legal history").

rule regarding the appropriate standard of care, and urged the Court to consider Tompkins a licensee. The railroad did not question the holding in *Swift v. Tyson*, and thus did not contest the federal courts' power to create federal general common law. Instead, the railroad made the narrower claim that *Swift* applied only when the relevant state court had yet to speak clearly on the matter. Because Pennsylvania state courts had held that a railroad owed no duty of care to a pedestrian using a path near the railroad, the railroad claimed that the federal court must adopt this standard. Even though neither party questioned the validity of *Swift*, the Court overturned that precedent and ruled that federal courts sitting in diversity jurisdiction had no power to create "federal general common law" and must instead apply the common law rules of the relevant state.[87]

2. Washington v. Davis. In *Washington v. Davis*, a group of unsuccessful African-American applicants for positions on the police force in Washington, D.C., sued the city, claiming that a written personnel test administered as part of the application process disproportionately excluded blacks but had no relationship to job performance, and therefore violated the Constitution's Equal Protection Clause. The plaintiffs did not claim that they were victims of intentional discrimination, but argued instead that the Equal Protection Clause prohibits government conduct that has a disparate impact based on race. The defendant agreed that the plaintiffs could prevail on their constitutional claim without demonstrating that the defendant was motivated by discriminatory animus, but argued that the personnel test was related to job performance and thus was permissible despite its disparate impact on black applicants. Despite the defendant's concession, the Supreme Court held that the Equal Protection Clause prohibited only intentional discrimination, not conduct having a disparate impact based on race.[88]

3. Dickerson v. United States. Judicial power to raise a new legal claim sua sponte came up most recently in *Dickerson v. United States*. The government had appealed from a district court decision granting Charles Dickerson's motion to suppress his confession on the ground that he had not been read his *Miranda* rights. Although a federal statute enacted in 1968, 18 U.S.C. § 3501, purported to override

87. Erie R.R. v. Tompkins, 304 U.S. 64, 78–80 (1938).

88. Washington v. Davis, 426 U.S. 229, 238–39 (1976).

Miranda and set a more lenient standard for the admission of confessions, the government had a longstanding policy of refusing to rely on the statute, believing it to be unconstitutional, and thus argued only that Dickerson's confession should be admitted against him because he had waived his *Miranda* rights before confessing.[89] The Fourth Circuit nonetheless raised the statute sua sponte, concluding that it was obligated to determine whether § 3501 displaced *Miranda* despite the parties' refusal to brief and argue the question. The panel then held that the statute was constitutional, and thus that Dickerson's confession should be admitted without regard to whether he had been read his rights. The Supreme Court appointed an amicus to argue in favor of the Fourth Circuit's decision, and then reversed without addressing whether the lower court should have raised the statute on its own motion.

These are just three prominent examples of judicial issue creation among many instances. Even though judges widely agree that they should decide cases as framed by the parties, these cases demonstrate that they are also willing to raise new issues when they believe that litigants have mischaracterized the law they have asked the courts to apply.[90] These cases carve out important exceptions to the norm of party presentation, but there has been little attempt by courts and commentators to articulate a theory of judicial power that justifies deviation from the norm.

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89. The United States had raised 18 U.S.C. § 3501 in the district court, but then had abandoned the argument in accordance with the United States Department of Justice's longstanding policy of refusing to rely on the statute for the admission of confessions. *See* Devins, *supra* note 19, at 252 n.6 (citing Pretrial Rehearing Brief for the United States at 2 n.1, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999)).

90. *See, e.g.*, U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 445–48 (1993) (stating that a court may raise sua sponte an issue that is "antecedent to . . . and ultimately dispositive of" the dispute before it because litigants cannot "extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles" simply by stipulating as to matters of law that are not in fact certain); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); United States v. Leon, 468 U.S. 897, 905 (1984) (noting that even though the United States had not asked the Court to review the lower court's determination that probable cause was absent, it nonetheless had the "power" to decide the case on this ground if it wished to do so).

II. DEFENDING JUDICIAL ISSUE CREATION

Lacking a clear rationale, judicial issue creation is widely viewed as judicial overreaching. Those few scholars who have noted the dichotomy between rhetoric and practice depict judges who raise new issues as "policy entrepreneurs," and express concern that issue creation erodes the distinction between judicial and legislative power.[91] And when the practice occasionally comes to the attention of the popular press—such as it did in *Dickerson v. United States*—judges are criticized for overstepping their role to further their ideological agendas.[92]

Although this criticism is to be expected, at least in some cases it is misplaced. Concededly, the norm against issue creation is an important limit on judicial power that should be honored in the typical case. But condemning judicial issue creation as equivalent to legislating from the bench ignores the many valid reasons why courts raise issues that have been overlooked or ignored by the parties, as well as the ways in which issue creation can serve to limit, rather than expand, judicial power. This Part defends the occasional use of judicial issue creation as an essential tool with which the courts can protect the integrity of judicial decisionmaking and the law itself.

A. Issue Creation and the Judicial Power to "Say What the Law Is"

Article III has very little to say about how federal courts should go about deciding cases.[93] Nonetheless, some basic principles derived from the content of that article, as well as from the structure of government created by the Constitution as a whole, support judicial power to craft new legal claims and arguments in some cases.

First, it is long established that federal courts have the power to "say what the law is," and thus must be able to take notice of legal

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91. Kevin T. McGuirre & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691, 699 (1995).

92. *See, e.g.*, Devins, *supra* note 19, at 252 & n.12 (citing articles criticizing the Fourth Circuit for sua sponte raising a new issue in *Dickerson*).

93. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1877–78 (2001) ("Article III invokes but does not define the 'judicial Power.' Nor does it specify which procedures federal courts should use to decide cases or controversies." (footnote omitted)); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (stating that Article III "is itself spare and unhelpful" on the meaning of judicial power); Adrian Vermeule, Essay, *Judicial History*, 108 YALE L.J. 1311, 1335 (1999) ("Article III . . . says nothing about the procedures by which courts vested with the judicial power must or may consider and decide cases . . . .").

sources, arguments, and claims omitted by the parties when necessary to avoid issuing inaccurate or incomplete statements of law. Second, as a related matter, courts must retain control of the interpretive process and thus cannot cede to the parties the sources and arguments that will be used to interpret statutory or constitutional texts, particularly when doing so could expand the judicial role beyond its constitutional parameters. And third, the Constitution guarantees federal judges life tenure and salary protection to ensure that they can issue pronouncements on legal questions without interference from the political branches or the public. An inflexible norm against party presentation would threaten this judicial independence by giving the parties, and not the courts, control over judicial pronouncements.

1. *Law Pronouncement*. Since *Marbury v. Madison*,[94] federal courts have the recognized authority to "say what the law is."[95] That phrase is usually cited in support of the judiciary's power to strike down state and federal laws that conflict with the federal Constitution.[96] But federal judges are responsible for establishing the meaning of contested law, not simply invalidating it, and this is the task that occupies far more of their time. If two parties with a stake in the matter disagree over the interpretation of a statute, regulation, or constitutional provision, courts resolve that conflict by publicly stating not only who wins the case but also what the law means.[97]

Locating the answer to disputed questions of law is one of the federal judiciary's essential functions. Although Congress and the president take the lead by enacting statutes and promulgating regulations, their formal role in establishing the meaning of law ends when courts are asked to determine how a law passed by the political branches applies to a specific case or controversy. Members of

94. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

95. *Id.* at 177.

96. Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 5 (2003) ("*Marbury* not only represents the fountainhead of judicial review, but also furnishes the canonical statement of the necessary and appropriate role of courts in the constitutional scheme.").

97. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . .").

Congress may file amicus briefs or publish postenactment legislative history, but those statements customarily are given no more weight than any other party's opinion.[98] Judicial decisions are not open to revision either by Congress or the president, no matter how strongly the political branches disagree with courts' conclusions about the meaning of law.[99] The political branches can, of course, override a judicial decision with which they disagree through the constitutional mechanisms for enacting new law. Unless and until they do so, however, judicial pronouncements *are* the law for all the citizens to follow.

When the parties fail to fully and accurately describe applicable legal standards, the norm against judicial issue creation comes into conflict with the judiciary's law pronouncement power. Because judicial decisions are objective statements about the meaning of law, not statements about how the parties subjectively interpret the law, courts must be able to take notice of legal arguments that the parties fail to see. If litigants could constrain courts through their own truncated or inaccurate depictions of the meaning of statutes, constitutional provisions, and the like, they could effectively wrest this task away from the courts, putting federal judges in the impoverished role of picking and choosing from among the *litigants'* interpretations of the law, rather than their own.[100]

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98. *See, e.g.*, Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("[P]ost-enactment legislative history is . . . entitled to little weight.").

99. Plaut v. Spendthrift Farms, 514 U.S. 211, 218–19 (1995) (holding that Congress cannot revise final judgments by Article III courts); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (holding that the executive branch cannot revise judgments by Article III courts).

100. Some scholars contend that the Supreme Court has already transferred the judicial branch's exclusive authority to interpret law to the executive branch by establishing *Chevron* deference. Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), courts must defer to reasonable agency interpretations of ambiguities in the statutes they administer even when the judges themselves would have reached a different conclusion, *id.* at 845, leading some scholars to characterize *Chevron* as the "counter-*Marbury* for the administrative state." Cass Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006).

Chevron grants the executive branch, through agencies, a great deal of authority over what had once been solely the judiciary's domain. But *Chevron* deference is highly constrained. Deference is granted only when agencies are interpreting a statute that Congress has assigned them to administer, and only after a court finds that the statute is ambiguous and the agency's interpretation is reasonable. Most important for the discussion here, agency interpretations will be awarded deference only when announced through formal procedures, such as notice-and-comment rulemaking and formal adjudication, rather than through informal channels such as letters, guidance documents, or briefs. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). Applied under these conditions, *Chevron* deference is justified on the grounds that

Some of the exceptions to the party presentation rule discussed in Part I.B can be understood as judicial efforts to avoid issuing erroneous statements of law, though the courts did not describe them this way. By the time *Erie* reached the Supreme Court, a majority of Justices had concluded that federal courts lacked statutory and constitutional authority to craft federal common law. The Court thus chose to sua sponte overrule *Swift v. Tyson* rather than continue to apply its misguided precedent. Likewise, in *Washington v. Davis*, the Court disagreed with the parties' assumption that the Equal Protection Clause prohibited disparate treatment even in the absence of an intent to discriminate, and thus was forced to raise the issue on its own motion rather than decide the case on the parties' terms. Similarly, the Fourth Circuit applied 18 U.S.C. § 3501 sua sponte in *Dickerson v. United States* because it believed (mistakenly) that the statute provided the correct standard for determining the admissibility of confessions. In all of these cases, courts were faced with a dilemma: The court could either decide the case on the parties' terms, applying the law in accordance with the parties' inaccurate representations, or it could raise sua sponte what it believed to be the correct legal standard.

Admittedly, the courts could have issued decisions in these cases in accordance with the parties' view of the law, but then could have noted that the parties had failed to raise key issues that might have produced a different holding. Judges regularly insert such qualifications into their decisions to avoid establishing precedent on a question not fully briefed by the parties, and perhaps to signal to future litigants to be sure to argue the point. Such qualifications put those who read the decision on notice that the court's view of the law

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Congress has delegated to agencies the authority to fill gaps in ambiguous statutes, and that the combination of agency expertise and political accountability makes them better suited than courts to do so.

Therefore, however much a step back *Chevron* takes from *Marbury*, it does not suggest that the scope of judicial decisions can be limited by the parties' interpretation of the law. To the contrary, the carefully crafted constraints on *Chevron* deference expose the flaws in an unyielding rule in favor of party presentation. Such a rule would require courts to adopt interpretations proposed by parties who have not been delegated interpretive authority by Congress, who have no claim to expertise or public accountability, and who cannot demonstrate that their views have been vetted through formal deliberative procedures. Indeed, it would be extremely odd if courts were required to adopt legal positions agreed upon by parties to litigation even as the courts were prohibited from deferring to agency interpretation that did meet all the requirements of *Chevron* and its progeny. This practice cannot be squared with the judiciary's constitutional role to state the meaning of contested federal law.

might change in a future case, and thus alleviates some of the harm that would arise from inadequate party presentations.[101]

However, issuing this type of qualified opinion—a one-shot, nonprecedential statement about the law that applies to one set of litigants only—is not a satisfying solution to the problem. When a court couches its opinion in such tentative terms, it has abandoned its law-pronouncement function in favor of resolving the dispute on the parties' terms. While this may be the best solution in some cases, it should not be viewed as the only option available to courts facing this problem. If it were, parties could regularly force courts to decide cases on grounds of the parties' invention that are at odds with existing law, in the form of decisions that apply *only* to the parties. In short, the parties would transform the federal courts from the third branch of government responsible for declaring the meaning of law into a private arbitration service working for the parties and no one else.[102] To retain their role in the constitutional structure, judges must have the ability to raise new issues when failing to do so would result in an inaccurate statement of the law that applies solely to the parties before the court.

Critics of issue creation would likely argue that the judiciary's law-pronouncement function should not be given priority over competing values. They would agree that courts should of course strive to get the law right, but they would note that this goal is often trumped by various institutional limits on judicial power. For example, illegal conduct goes uncorrected anytime a party fails to bring a lawsuit challenging the erroneous application of law, or is barred from doing so by constitutional or prudential limits on federal jurisdiction. Furthermore, a number of judicial doctrines—such as stare decisis, law of the case, res judicata, and the requirement that lower courts adhere to superior court precedent—require judges to accept flawed legal determinations and incorporate them into current decisions.[103] Finally, the waiver doctrine, which bars a party from

101. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 100 n.5 (1991) (stating that when the parties fail to fully and accurately describe the law, courts should be careful to avoid "issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided").

102. *See, e.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the United States*, 56 STAN. L. REV. 1435 *passim* (2004) (criticizing unpublished decisions on these grounds).

103. Stare decisis is the judicial policy in favor of adhering to past precedent. Law of the case is the principle followed by appellate courts of refusing to alter a previous appellate

raising a new argument on appeal, suggests that courts are willing to place administrative concerns such as finality above accuracy in legal decisionmaking. These rules all suggest that getting the law right sometimes takes a back seat to other priorities.[104]

Aside from the doctrine of waiver, however, none of these rules of practice requires courts to base their decisions on erroneous statements of law by *nonjudicial* actors, and thus do not pose the same threat to judicial power. For example, if an illegal practice is never challenged in court, then the judiciary is never put in the position of having to sanction that conduct. Judicial *inaction* simply does not raise the same concerns as judicial *decisions* premised on inaccurate statements of the law.

Likewise, although doctrines such as stare decisis, res judicata, and law of the case may require a court to affirm what it believes to be an incorrect statement of the law, the source of the flawed legal analysis in such cases is another *court*, not a nonjudicial actor. Thus, these doctrines do not deprive courts of their control over law pronouncement. Allowing the first-in-time decision to stand seems reasonable as a matter of policy because it allows citizens to rely on the first judicial pronouncement on a question of law, but does so without undermining the authority of the judicial branch.[105] In contrast, if courts were forced to decide cases based on the parties' inaccurate descriptions of the law, these non-judicial actors could co-opt courts into issuing decisions affirming their erroneous view of the law.[106]

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determination made in the same case in an earlier appeal. Res judicata is the policy that a final judgment rendered by a court with competent jurisdiction is conclusive on the questions involved between the parties and their privies. All three doctrines thus require, or at least strongly encourage, courts to adhere to previous decisions with which they may disagree.

104. *See, e.g.*, LANDSMAN, *supra* note 43, at 34–37 (stating that none of the faults attributed to the adversarial system are so serious as to warrant the abandonment of adversary procedure).

105. Furthermore, it is worth noting that stare decisis is not an unyielding doctrine. If a reviewing court concludes that a prior decision is truly wrong, it has the power to overrule that precedent. And if a lower court believes that an intervening line of Supreme Court cases or a new Act of Congress overrules a higher court's earlier ruling, then it can refuse to follow what it concludes is a now-defunct precedent. Thus, these doctrines will give way at times to the need for accurate legal opinions.

106. There are additional good reasons to require lower court obeisance to the decisions reached by reviewing courts. Our hierarchical federal court system is premised, in large part, on the assumption that higher courts are more likely to get the law right. Higher courts sit in multijudge panels that allow for the benefit of deliberation and discussion; these courts have more time to decide each case; and these judges are (supposedly) superior legal intellects. *See* Evan H. Caminker, *Why Must Lower Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 837–49 (1994).

Admittedly, the doctrine of waiver is closely related to the party presentation rule, in that it appears to sacrifice accuracy in legal opinions for the benefits of finality. Appellate courts regularly declare that new claims and even new legal arguments raised for the first time on appeal are waived, regardless of their merits, resulting in judicial opinions that do not address a relevant question of law. One important purpose of the waiver rule is to prevent parties from raising arguments at the appellate stage that require development of new facts not already in the record. Remanding for a new round of discovery would be time consuming, and deciding the case without a full record on the issue would be unfair to both parties. Thus, for purposes of judicial economy and to avoid prejudice, courts apply the waiver rule to bar new arguments that require factual development on appeal.

A strictly applied rule of waiver, like a strictly applied rule of party presentation, sacrifices accuracy in judicial decisionmaking, potentially undermining the courts' law-pronouncement function. Thus, the arguments presented here in favor of judicial issue creation would also support a relaxation of the waiver doctrine. It is not surprising, then, that just as courts violate the party presentation rule to avoid issuing inaccurate statements of law, they are also willing to overlook waiver when the new argument goes to the heart of the claims on which they must rule. Courts apply waiver stringently when the parties come up with a whole new legal claim or theory. But when the new argument recharacterizes an existing claim or adds new sources or a new spin on an existing argument, courts are less rigid in their application of that rule. This Article suggests that courts have good reasons to relax the waiver doctrine, just as they should make exceptions to the party presentation rule, when failing to do so would undermine their law-pronouncement function.

2. *The Interpretive Process*. Courts not only have the power to declare the meaning of law; they also have the discretion to choose *how* to interpret it. Neither task should be taken over by nonjudicial actors. To maintain control over the interpretive process, judges must step in at times and add to or alter the parties' arguments.

Of course, there is no single accepted method of interpretation. When asked to determine the meaning of a provision of the United

States Constitution, some judges approach the task as textualists,[107] others as originalists,[108] and some as proponents of a "living Constitution."[109] When it comes to interpreting statutes, judges differ over whether to look to the intentions of the legislature and the broader purpose of the legislative enactment, or to limit their analysis to the statute's plain language. Judges disagree over when and whether to apply countless canons of construction, in part because these canons embody policy choices and "reflect constitutionally inspired values"[110] over which they also part ways.[111] Each judge has the authority to employ the interpretive approach she thinks is best.

Academics debate the degree to which Congress could enact legislation that purported to control the judiciary's interpretive methodology, especially its interpretation of legislative enactments. Some argue that Congress has significant leeway to tell the courts how to interpret its statutes, while others contend that the Constitution prohibits legislative interference in the judicial process.[112]

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107. *See, e.g.*, Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1409 (2009) (quoting an interview in which Justice Scalia stated that he is a textualist).

108. *See, e.g.*, Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 562–68 (2006) (discussing and criticizing originalism).

109. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (discussing the interpretive philosophy premised on the idea of a "living Constitution").

110. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 652 n.308 (1995); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992) (noting that courts attempt to construct congressional acts so as to avoid constitutional questions).

111. The Court's presumption against the preemption of state law, for example, is rooted in respect for state sovereignty. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). The rule of lenity, which requires a court to give a criminal defendant the benefit of any ambiguity within a statutory text, is a quasi-constitutionally based rule of construction derived from the notion that citizens must be given fair warning before they can be punished and that Congress, not courts, should make the moral judgments behind criminal sanctions. William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1475 (2008). The absurdity doctrine enables even textualists to deviate from the plain language of a statute if such a reading would produce an absurd result. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419 (2003) (noting that the absurdity doctrine is viewed as a "qualification to textual interpretation").

112. *Compare* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (arguing that Congress has the authority to create federal rules of statutory interpretation), *and* John Harrison, Essay, *The Power of Congress over the*

The issue is complicated, and the answer likely depends on whether Congress is using control over interpretation to further its role as policymaker, or whether it is seeking to manipulate judicial power and displace the judiciary's interpretive function (and that is a hard line to draw). But whatever one's views on *Congress's* power over judicial interpretation, the claim here is that *litigants* cannot manipulate the interpretive process through their litigation choices.

Accordingly, if two committed textualist litigants present their divergent views of the plain meaning of a statutory text to an intentionalist judge, that judge can explore the legislative history and issue a decision that turns on that history.[113] That proposition is relatively uncontroversial, because there is no new issue created here, and thus no transgression of the norm against judicial issue creation. But what if the litigants fail to argue that the court must go beyond the plain text of the statute to avoid an absurd result? Or neglect to cite another provision of the statute containing similar language that sheds light on the disputed provision?[114] Or refuse to argue that the court adopt an interpretation that would avoid a constitutional question?[115] The answer must be that the party presentation principle gives way when the litigants' interpretive philosophy differs from that of the judge, for otherwise litigants could force judges to apply the interpretive methodology that the litigants prefer.

Concededly, the issue rarely arises because litigants typically adopt *any* interpretive philosophy that allows them to prevail, and will usually claim they win under alternative readings of a statute. A plaintiff challenging the government's interpretation of a statute would likely argue that the statute's text clearly supports her position, *and* that the legislative history confirms the text, *and* that various canons of construction support the plaintiff's reading. But occasionally litigants will neglect an important line of reasoning,

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Rules of Precedent, 50 DUKE L.J. 503, 505 (2000) (arguing that Congress can abrogate stare decisis), *with* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194–95 (2001) (asserting that "Congress does not have the power to tell the federal courts how to go about their business of deciding cases").

113. *See, e.g.*, Phillips/May Corp. v. United States, 524 F.3d 1264, 1270 n.3 (Fed. Cir. 2008) (noting that neither party cited legislative history that the court found dispositive of a legal question in the case).

114. *Cf.* United States *ex rel.* Totten v. Bombardier, 380 F.3d 488, 497 (D.C. Cir. 2004) (noting that the court has the authority to remedy errors sua sponte when the parties' failure to plead a particular issue seriously affects "the fairness, integrity, or public reputation of judicial proceedings").

115. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454, 457 (1960).

either through oversight or due to their litigation agenda. For example, in *Gonzales v. Carhart*,[116] Planned Parenthood Federation of America chose not to argue that the partial birth abortion statute was an unconstitutional regulation of interstate commerce even though that argument would have appealed to at least a few Justices, presumably because Planned Parenthood disagreed with that conclusion as a matter of both law and policy.[117] Institutional litigants, including the federal government, will avoid citing and relying on doctrines they dislike and lines of precedent they hope will be overturned. In such cases, judges should have the discretion to go beyond the arguments in the parties' briefs, because failure to do so would let litigants control an essential aspect of the judicial function.

The problem is particularly acute when parties fail to adhere to the constitutional avoidance doctrine, which requires that judges adopt conservative interpretations of statutes and regulations to steer well clear of constitutional lines. The doctrine serves important institutional interests: it ensures that courts do not needlessly strike down legislative enactments, allowing judges to evade conflict with the other branches of government; it leads to interpretations that best accord with Congress's intentions, since Congress presumably does not wish to enact constitutionally suspect legislation; and it enables courts to avoid issuing near-immutable pronouncements on the meaning of the Constitution.[118]

Litigants will not always share the judiciary's interest in promoting the values underlying the constitutional avoidance doctrine, however. If a litigant prefers the constitutionally suspect interpretation, then that party has no incentive to argue for the alternative, constitutionally sound construction. Indeed, sometimes litigants turn to the courts precisely because they distrust the political branches and believe that their interests can best be served by independent judges, who they hope will declare the scope of their constitutional rights in the broadest possible terms. Nor will litigants have any particular interest in avoiding conflict between the courts

116. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

117. *See, e.g.*, *id.* at 1640 (Thomas, J., concurring) ("I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.").

118. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202–08 (2006) (describing the rationales for the constitutional avoidance canon). *But see id.* at 1208–09 (critiquing the rationales for the constitutional avoidance canon).

and the political branches, or in cabining judicial decisions about the meaning of the Constitution.[119] For all of these reasons, sometimes no party will argue in favor of the most constitutionally conservative interpretation, forcing judges to do so on their own motion.

In the past, the Supreme Court has resolved cases on grounds outside the questions presented to avoid a constitutional issue, though usually without providing much explanation for doing so. For example, in *Boynton v. Commonwealth of Virginia*,[120] the Court agreed to hear the case of an African-American interstate bus passenger who was arrested after refusing to leave the whites-only section of a bus terminal restaurant. The petition presented two constitutional questions: "first, whether the conviction of petitioner [was] invalid as a burden on commerce in violation of Art. I, § 8, cl. 3 of the Constitution; and second, whether the conviction violate[d] the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[121] Writing for the majority, Justice Black admitted that "[o]rdinarily we limit our review to the questions presented in an application for certiorari," but decided that it was "appropriate" for the Court to conclude that the discrimination against African-American passengers violated the Interstate Commerce Act so as to avoid petitioner's "two broad constitutional questions."[122] Likewise, in *Neese v. Southern Railway Co.*,[123] the Supreme Court refused to decide whether an appellate court had jurisdiction to reverse a trial court's denial of a motion for a new trial. The Court instead reversed the appellate court on the ground that, even assuming it had such power, its decision was an abuse of discretion.[124] The Court explained: "We need not consider respondent's contention that only the jurisdictional question was presented by the petition for certiorari" because "we follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties."[125]

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119. *Id.* at 1220–21 (stating that the executive branch does not share the judiciary's institutional limitations (such as its countermajoritarian status), and thus does not need to employ the constitutional avoidance canon in the same way a court would).

120. Boynton v. Virginia, 364 U.S. 454 (1960).

121. *Id.* at 457.

122. *Id.*

123. Neese v. S. Ry. Co., 350 U.S. 77 (1955.)

124. *Id.* at 77.

125. *Id.* at 78.

As these examples demonstrate, issue creation can be a method by which courts *constrain* judicial power in response to litigants who would prefer to expand it. When judges inject new issues into litigation, they are often accused of acting as legislators—that is, of overstepping boundaries on judicial power to implement their personal ideological agenda.[126] But ceding to the parties control over the issues presented in a case could just as easily undermine well-established doctrines by which courts seek to *limit* the breadth of their decisions. In short, issue creation can be an act of judicial restraint.

Likewise, the philosophy of judicial minimalism requires that judges be able to modify or supplement the parties' arguments. Minimalists favor incremental steps over sweeping changes in legal norms because they fear that broadly worded decisions will undermine democratic processes, lead to unintended consequences, and put in place rigid rules that leave no flexibility for the future.[127] Minimalists advocate a profoundly modest role for the courts out of a belief that the political branches, and not the countermajoritarian courts, should make most of the important policy decisions for the country.

At first glance, judicial issue creation appears to be the antithesis of minimalism. Allowing judges to transgress the limits of the parties' arguments gives them the power to set their own agendas—a power normally reserved for the political branches. Judges might abuse that discretion by raising issues that are unnecessary to resolve the parties' dispute, enabling them to engage in policymaking through advisory opinions. But judges might also raise new issues to *narrow* the scope of their decisions, thwarting litigants who would prefer a maximalist judicial decision over a minimalist one.[128] In an era in which litigation, especially appellate litigation, can be as much about establishing precedent as resolving individual disputes, litigants may seek court

126. *See, e.g.*, Chemerinsky, *supra* note 19, at 291; Milani & Smith, *supra* note 58, at 285–90; Miller, *supra* note 68, at 1256–58, 1261.

127. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (describing the minimalist philosophy).

128. Here I disagree with Professor Chad Oldfather, who argues that if judges avoid broad, rule-based decisions, they can avoid the problem of going beyond parties' arguments. Oldfather, *supra* note 22, at 137–38 & n.51. He assumes that deficiencies in the parties' case presentation will prevent the court from adopting the appropriate broad rule of general application, but overlooks the possibility that the opposite problem will occur. That is, the parties might present only the broad-brush arguments to the courts, omitting case-specific claims that would narrow the scope of the court's decision.

rulings on questions that could easily be avoided.[129] Institutional litigants in particular may ask courts to pronounce on new questions of constitutional law, overturn long-established precedent, or make sweeping statements about the meaning of a statute or treaty, when a much narrower and less significant legal issue could resolve the case. The judiciary's best method of narrowing decisions may be to alter the questions posed by the parties.

3. *Judicial Independence*. Article III courts can only meaningfully realize their power to "say what the law is" and to employ their preferred interpretive methods because they are insulated from political pressure by Article III's life tenure and salary guarantees.[130] These protections allow judges to issue decisions that conflict with the political branches' preferences, or with public opinion, without fear of reprisal. Judicial decisions lack some of the legitimacy enjoyed by the political branches because federal judges are not elected, and thus not accountable, to the people subject to their rulings.[131] By the same token, however, judicial articulations of the law have greater credibility than those of the political branches precisely because courts are not beholden to interest groups and other political actors.[132] Whatever biases federal judges bring to the table, the public knows that their decisions are not crafted to curry favor with political parties or special interests.[133]

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129. *Cf.* Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 9–15 (2000) (analyzing empirical evidence demonstrating that institutional litigants seek to manipulate precedent); *id.* at 22 (describing individual litigants' "sociotropic goal of setting a precedent that would assist others who may be similarly situated future plaintiffs"); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–103 (1974) (noting that repeat players are concerned about the effects of litigation beyond the immediate case).

130. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.").

131. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 354 (1998) (describing the "countermajoritarian criticism" as "a challenge to the legitimacy or propriety of judicial review on the grounds that it is inconsistent with the will of the *people*, or a majority of the people, whose will, it is implied, should be sovereign in a democracy").

132. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty*: *Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 708 (1995) ("[T]he federal judiciary's independence is widely thought to enhance its authority . . . .").

133. The possibility of elevation to a higher court, however, could influence judicial decisions. Jonathan Remy Nash, Essay, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2196 n.83 (2006).

Judicial independence, and the respect for judicial decisionmaking that accompanies it, would be compromised if courts were required to rule on the law as it is presented to them, rather than as they believe it to be. Life tenure and salary protection ensure that federal judges cannot be threatened or coerced by litigants who want them to ignore specific statutes or interpret constitutional provisions as the litigants prefer. Yet litigants could accomplish the same result simply by omitting sources, claims, and arguments if courts were not free to raise overlooked statutes or adopt new interpretations of the law they are asked to apply.

Furthermore, if judges are not permitted to question litigants' articulation of the law, then courts can be co-opted by litigants seeking to benefit from the credibility of a judicial decision that describes the law as they see it. The cases discussed in Part I.B illustrate the point. For instance, a judicial decision in *Dickerson v. United States* discussing *Miranda* and not 18 U.S.C. § 3501 would have bestowed legitimacy on the executive's claim that § 3501 did not displace *Miranda*, and yet the executive's independent conclusion that § 3501 is unconstitutional would never have been tested. Likewise, in *Washington v. Davis*, the Court made clear that the Equal Protection Clause prohibited only intentional racial discrimination, and thereby avoided an opinion affirming the parties' view that it applied to conduct having a disparate impact only. Granted, the Court could have issued decisions in each case stating explicitly that it was not deciding these issues because the parties had failed to raise them. But judges should have the discretion to object to the parties' flawed descriptions of the law when failing to do so would put courts in a position of implicitly affirming the parties' views.

Were it otherwise, litigants could manipulate judicial power to obtain policy outcomes they desire without changing underlying legal standards—a result that courts forbid in other contexts. For example, although Congress has great latitude over federal jurisdiction, it would be on shaky ground if it attempted to strip federal courts of jurisdiction whenever it feared the court would issue a decision it did not like. Congress attempted something akin to this in a Reconstruction-era statute providing compensation for "loyal" southerners whose property had been seized by the Union during the Civil War. Courts began awarding compensation to southerners who had supported secession, but had subsequently been pardoned by President Lincoln. Unhappy with that result, Congress amended the statute to eliminate Supreme Court jurisdiction over any case in

which a former "rebel" asserted a presidential pardon as the basis for his claim for compensation. In *United States v. Klein*,[134] the Supreme Court struck down that statute as unconstitutional.[135] Although the Court's reasoning was murky, some federal courts scholars have suggested that the real problem with the statute was that it was making a substantive policy choice (no compensation for pardoned southerners), but did so behind the guise of a policy-neutral jurisdictional question.[136] Thus, Congress sought to benefit from judicial decisions denying southerners compensation without changing the substance of the federal policy.[137] Likewise, when parties obtain judgments on manufactured questions of law, they acquire the approval of an apolitical, independent court for policy choices that were never enacted into law.

The judiciary's independence is also essential to avoid the concentration of lawmaking and law-exposition powers in the hands of one branch of government—a goal that could be undermined if courts never reframed issues presented by the executive branch acting as litigant.[138] Members of the political branches know that judicial decisions may shape statutes, and thus these lawmakers are well aware that issues left unaddressed in legislation will be resolved by the independent courts, who may interpret statutes in ways these lawmakers dislike. The judiciary's independence from these two branches guards against attempts by the political branches to control law at the back end—that is, when it is being applied to specific individuals. The political branches would be tempted to apply the law differently in cases in which it would be politically expedient to do so;

134. United States v. Klein, 80 U.S. (13 Wall) 128 (1872).

135. *Id.* at 146–48.

136. *See, e.g.*, Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437, 450 (2006) ("The end result was that while the controlling substantive law purportedly remained the same, in reality the essence of that law had been effectively transformed into something very different.").

137. Lawrence Sager stated the "first principle" of *Klein* as follows: "The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees." Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2529 (1998).

138. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 645–54 (1996) (discussing the importance of the separation of lawmaking from law exposition).

only the judiciary is insulated from such pressures through its life tenure and salary protections. Judicial independence ensures that laws are applied fairly, and that like cases are treated alike (or at least not treated differently to curry political favor). The judiciary thus protects against the abuses that occur when the same branch of government has the power to both make the law and apply it in specific cases.[139]

If courts were required to let the parties control case presentation, then the executive, acting as litigant, could adopt different interpretations of statutes and constitutional provisions in different cases. For example, the executive branch conceivably could choose whether to argue for admission of evidence under either *Miranda* or 18 U.S.C. § 3501, selecting one or the other depending on its preference in each case (until the statute was found unconstitutional, of course). Litigants could even rely on statutes that had been repealed, or seek the benefit of broader interpretations of constitutional rights than had been recognized, making case-by-case decisions as to which version of the law to present to the courts. Such cases are unusual, because normally one party or the other will assert the correct legal standard. But there are nonetheless plenty of cases on the books in which parties either inadvertently or intentionally omitted the relevant legal claim.[140] Courts must have the power to prevent litigants—and in particular the executive branch—from picking and choosing their preferred legal interpretations on a case-by-case basis. If courts did not have this authority, litigants could undermine the Framers' intention to insulate law declaration from outside influence.

B. Issue Creation and Limits on Government Power

The Framers intended for the federal courts to enforce constitutional restrictions on governmental power. As Alexander Hamilton explained it, the

> complete independence of the courts of justice is peculiarly essential in a limited Constitution [because] . . . . [l]imitations of this kind can be preserved in practice no other way than through the medium of

139. *Cf.* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 143, at 76 (C.B. MacPherson ed., 1980) (1690) ("[I]t may be too great a temptation to human frailty, apt to grasp at power for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make . . . .").

140. *See supra* notes 3–17 and Part I.C.

> courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[141]

To serve this purpose, courts must be free to take notice of constitutional transgressions by the government even when the litigants would prefer not to raise those issues.

Of course, even the most blatantly unconstitutional laws and practices will proceed unimpeded by judicial review if no one has standing to raise them, or if those with standing choose not to bring their case to a court. Courts are not charged with enforcing the Constitution in the abstract, and may do so only in the context of specific cases and controversies.[142] Constitutional violations often occur outside the purview of courts. Thus, one could argue that judges similarly have no authority to enforce constitutional limitations in the context of specific cases in which the parties fail to raise them.

There is a significant difference, however, between a constitutional violation that does not form the basis of a justiciable case or controversy, and one that arises within a case that a court is required to hear and resolve. Pursuant to Article III, federal courts may only decide "Cases" or "Controversies," and thus cannot address constitutional issues in the abstract. Courts were not intended to serve as roving commissions, seeking out constitutional errors and correcting them even when no individual has standing to seek judicial review. But that restriction on judicial power does not justify a court's refusal to raise a constitutional question that goes to the heart of a case before it, and which the court is required to decide. If the parties ask the court to issue an order that is itself unconstitutional, or that is based on a constitutionally suspect legislative or executive command, courts certainly have the *power*, if not the obligation, to raise a constitutional infirmity overlooked or ignored by the parties. In short, the fact that courts cannot set their agenda does not mean that litigants can co-opt them into applying unconstitutional laws to achieve unconstitutional purposes.

Judicial power to raise constitutional infirmities sua sponte finds further support in well-established doctrine requiring federal judges

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141. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

142. U.S. CONST. art. III, § 2.

to satisfy themselves of their jurisdiction to preside over a dispute.[143] A lawyer must always be ready to respond to a federal judge's queries regarding the court's jurisdiction to hear the case, even if neither party raised the question. Litigants may not, through their mutual consent, obtain a judicial opinion on a matter outside of the subject matter headings listed in Article III. If courts could preside over cases beyond the limits of their constitutional and statutorily assigned authority whenever the parties wanted them to, they would impinge on the power of the political branches and usurp the role of state courts[144]—structural and institutional interests not always shared by the individual litigants. Accordingly, judges are required to satisfy themselves of their own jurisdiction no matter what the parties may think.

These same rationales suggest that judges should also take notice of nonjurisdictional constitutional questions in cases in which they are asked to play a role in enabling one of the other branches to transgress the limits on its authority. If Congress has enacted a clearly unconstitutional statute—for instance, a statute that goes beyond its power under the Commerce Clause, or that establishes an unconstitutional condition on federal funding—then a judicial decision applying that statute permits Congress to exceed its constitutional authority. Why should judges be required to police the boundaries of their own power, and yet be helpless to check overstepping by the political branches simply because the parties fail to raise the matter? Likewise, if the parties misconstrue the Constitution, the Court should have the power to correct their mutual error rather than compound it by issuing a decision based on the parties' misreading of the Constitution's text.

Several of the cases discussed in Part I.B illustrate this principle. In *Washington v. Davis*, the Court concluded that intentional discrimination is a necessary element of an equal protection violation, even though neither party raised that question. The Court chose to deviate from the norm against issue creation to avoid writing a decision that it believed incorrectly characterized constitutional limits on government action. Likewise, in *Mapp v. Ohio*, the Court held that the Constitution's exclusionary rule applied to the states despite the fact that neither party made that argument, again choosing constitutional accuracy over the norm of party presentation.

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143. *See supra* Part I.A.

144. CHEMERINSKY, *supra* note 42, at 42.

C. Issue Creation as a Safeguard of Legislative Power

Judicial issue creation can safeguard legislative power by preventing the parties from ignoring or misrepresenting statutes. An incompetent lawyer can all too easily overlook or misconstrue a statute. Alternatively, a party might purposefully choose to avoid citing a relevant statute, or ignore a reasonable interpretation of a statute, for any number of reasons: the party might want the court to address a constitutional issue that could be avoided were a statute on point, or the relevant statute might be at odds with other aspects of a party's litigation agenda, or the party might conclude that the statute is unconstitutional and thus cannot be relied upon. *Dickerson* is an example of the last possibility: the Department of Justice had a longstanding policy against asserting 18 U.S.C. § 3501 as a basis for the admission of confessions because it believed that the statute was unconstitutional. Courts can only ensure that statutes are applied accurately by questioning litigants' interpretations and searching out relevant statutes that the litigants have ignored.

The problem is exacerbated in cases involving the executive branch. The executive is the most frequent litigator before the federal courts, it has long-term interests that are at times opposed to those of Congress, and it has a constitutional obligation to determine independently both the meaning and constitutionality of the laws it enforces. Under Article II, the president takes an oath to "preserve, protect and defend the Constitution,"[145] and has the power and duty to "take Care that the Laws be faithfully executed,"[146] which of necessity requires first locating the correct meaning of a legal text. Furthermore, the executive has prosecutorial discretion to prioritize its enforcement of the laws enacted by Congress.[147] Thousands of law review pages have been devoted to defending the executive's independent authority to determine the constitutionality of the statutes it administers, its right to refuse to enforce statutes when it

145. U.S. CONST. art. II, § 1, cl. 8.

146. *Id.* art. II, § 3.

147. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 875–86 (2001) ("As part of the execution of the law, the Executive must decide whether to litigate and what legal positions the Administration will advance." (footnote omitted)).

concludes they are unconstitutional, and its power to interpret laws as it sees best.[148]

Under even the broadest conception of executive power, however, there are limits on the executive's independent authority to interpret and apply the law. Scholars generally agree that the executive has to obey Supreme Court pronouncements about the meaning of the Constitution, even when the executive disagrees with the Court.[149] And the executive cannot simply ignore laws, treaties, and regulations it dislikes when those sources of law require that the executive take specific action. Finally, the Constitution itself limits the executive's interpretation and implementation of the law. For example, the executive cannot selectively enforce laws against some racial groups but not others, nor can it use its power to target its political enemies for disfavored treatment.

A stringently applied rule against judicial issue creation would give the executive the option to ignore these limits on its authority to interpret and implement the law, and would do so at the expense of both legislative and judicial power. If a court cannot correct an executive misinterpretation of federal law, or raise a statute or treaty that the executive has chosen to ignore, then it enables the executive to displace the legislative and judicial roles in lawmaking and law pronouncement, respectively.

Again, *Dickerson* provides an example of the problem. Congress enacted a statute that purported to override *Miranda*. As the Court described it, the validity of the statute turned on whether the *Miranda* Court "announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[150] If the former, then the statute was unconstitutional and *Miranda* governed; if the latter, the statute would displace *Miranda* and set the standard for the admission of confessions. The executive branch concluded that the statute was unconstitutional, and thus refused to rely on it as a basis for the admission of confessions—a decision well within the prosecutor's discretion. But if courts were bound to decide cases solely on the

148. *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 321–43 (1994).

149. Morrison, *supra* note 118, at 1224 ("The conventional view . . . is that the executive branch is indeed bound by the Supreme Court's determination that a given statute or governmental action is unconstitutional.").

150. Dickerson v. United States, 530 U.S. 429, 437 (2000).

parties' terms, then the executive's litigation position would in essence repeal the statute. Rigid adherence to the norm against issue creation would give the executive branch authority to ask courts to decide laws on the executive's terms, and not the legislature's, upending the constitutionally assigned roles for these branches.

Even more worrisome, the executive would have the power to establish the meaning of the law at the back end, when the law is being applied to individuals before the courts. As previously discussed, permitting the political branches to interpret the law in individual cases is troubling because their very political accountability raises the fear that they will apply the law unfairly to gain political advantage.[151] The Framers provided judges with life tenure and salary protection in part to ensure that law is applied impartially in individual cases, a role that judges can only fulfill if they have the power to raise issues ignored by the parties when necessary.

These concerns arise whenever *any* litigant misrepresents the law and a judge decides the case on that litigant's terms. But the problem is particularly acute when it comes to the executive branch because of the frequency with which that branch appears before the federal courts, and because it is often the only entity able to litigate about the meaning of specific statutes, treaties, and constitutional provisions.[152] In light of its dominant role in federal litigation, the executive could systematically alter the meaning of federal law absent judicial intervention in case presentation. Finally, unlike a private litigant, the executive can combine its power to shape law as a litigant with its broad authority to interpret and enforce the law, thereby exercising extraordinary influence over the application of the law in individual cases.[153]

Congress is well aware of the problem of executive infidelity to its statutory commands, and has passed legislation attempting to protect its legislative enactments when the executive refuses to do so. By statute, the Attorney General must inform Congress when the Attorney General or any other officer of the Department of Justice adopts a policy of refusing to enforce or defend a federal statute, rule, program, or policy, and in such cases Congress may submit amicus

151. *See supra* text accompanying notes 138–39.

152. *See* Devins, *supra* note 19, at 272–79.

153. *Cf.* Manning, *supra* note 138, at 680–85 (asserting that deference to agency interpretation of agency rules violates the separation of powers principle that lawmaking should be kept separate from law exposition).

briefs and make arguments to the courts about why executive nonenforcement is misguided.[154] Unfortunately, there is no similar means of protection when the executive branch adopts an interpretation of a federal statute that is at odds with Congress's intent.[155] In these cases, the judiciary serves as guardian of the integrity of statutory commands that might otherwise go unheeded.

D. Issue Creation and the Common Law System

The presumption against introducing new issues into litigation is also incompatible with the power of precedent in a common law system. The federal courts of appeals issue decisions that apply not only to the parties before the court but that also bind all the judges on that court and the district courts within that circuit. Lower courts have no choice but to obey even wrongheaded decisions of their superiors. Although a court's obligation to follow its own precedent is not unyielding, stare decisis is nonetheless a hard doctrine to overcome.[156] Every circuit court has adopted a rule mandating that a panel cannot overturn the decision of a previous panel absent an intervening decision by the U.S. Supreme Court that changes the law.[157] Even those courts with the authority to overrule precedent, such as courts of appeals sitting en banc and the U.S. Supreme Court, rarely upset settled law. Precedent that is viewed as mistaken will nonetheless be followed by these courts absent "special justification."[158]

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154. 28 U.S.C. § 530D (2006). When signing the most recent version of this statute into law, President Bush issued a statement that the executive branch would construe the statute "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 2 PUB. PAPERS 2010, 2010 (Nov. 2, 2002). Presumably, then, the Bush administration envisioned circumstances under which it would *not* inform Congress of its refusal to enforce a federal statute or rule. *See* Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, 107 COLUM. L. REV. SIDEBAR (2007), http://www.columbialawreview.org/articles/executive-branch-avoidance-and-the-need-for-congressional-notification.

155. *See* Morrison, *supra* note 154.

156. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017 (2003) ("[P]recedent does operate to preclude litigants in the mainstream of cases.").

157. *Id* at 1017–18.

158. For example, in *Dickerson*, the Supreme Court reaffirmed its *Miranda* decision, concluding there was no "special justification" for overturning a longstanding precedent. Although *Dickerson* did not affirmatively embrace *Miranda*'s rationale, the majority

The power of precedent can be undermined by litigants in two ways. First, if litigants fail to fairly, completely, and accurately describe the law, judicial opinions may themselves contain flawed statements of law that will bind all who come after. Second, if litigants fail to cite and discuss binding precedent, they may evade its application unless the court raises the precedent sua sponte. In either case, allowing the parties' incomplete presentations to taint judicial decisions is troubling in a common law system in which precedent controls the results in subsequent litigation.

1. *Creating Precedent*. A judicial decision that misstates the law because the parties passed over important arguments or failed to cite relevant statutes and legal opinions nonetheless stands as the last word. The conscientious lawyer advising a client on her legal obligations should note that a particular precedent is poorly reasoned, overlooks key issues, and might be overruled or at least distinguished upon a convincing reargument. But it would be imprudent for a lawyer to suggest that the decision may be blithely ignored.

Particularly troubling is when the parties raise all the relevant legal claims, but fail to make the most compelling arguments in support of those claims, which may lead to the creation of flawed precedent by the court. The Supreme Court has been sensitive to this problem in the past. In *Kamen v. Kemper Financial Services*,[159] the Court concluded that it could turn to state law standards to fill gaps in a federal statute, even though the parties had not timely raised the applicability of state law.[160] The Court explained: "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."[161] The Court noted in a footnote that judges are never *obligated* to raise a legal argument waived by a party, but cautioned that if a court of appeals "undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law, the court should refrain from issuing an opinion that could

nonetheless refused to abandon it, citing stare decisis as its primary justification: "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." Dickerson v. United States, 530 U.S. 428, 443 (2000).

159. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991).

160. *Id.* at 99.

161. *Id*.

reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided."[162] In short, *Kamen* defended a court's power to raise a new legal argument to avoid issuing an opinion containing erroneous statements of law, in part to prevent the creation of flawed precedent.

As discussed in Part I, the norm against issue creation is often defended on grounds specific to the parties before the court. For example, judges will assert that the parties have waived an issue, or failed to adequately brief it, and thus a court will penalize the party by refusing to consider the question. But these litigant-specific rationales for the norm cannot justify issuing incorrect statements of law that will bind, or at least affect, all those similarly situated to the parties before the court. If appellate courts were akin to private arbitrators, issuing decisions that were relevant only to the parties before them, then it would make sense for the court to impose harsh consequences on those who failed to adhere to the rules. But in light of the precedential nature of judicial decisionmaking, the personal failings of the parties before the court do not provide a sufficient rationale for overlooking compelling and relevant arguments that the parties failed to raise. In short, an inflexible norm of party presentation is more appropriate for a system of private dispute resolution than one that combines dispute resolution with public law declaration.

2. *Protecting Precedent*. Just as it is important for courts to respect stare decisis, it is essential that litigants not be allowed to slip its bonds simply by refusing to cite established precedent. Stare decisis is an important limit on judicial discretion, providing stability and predictability in the interpretation of law.[163] The United States inherited an English legal tradition in which judges were guided by prior decisions and canons of construction, and at least theoretically were not free to make unconstrained pronouncements on the meaning of the law. Alexander Hamilton explained that like their English counterparts, federal judges would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[164] As one legal

162. *Id.* at 100 n.5.

163. Molot, *supra* note 28, at 72 (discussing how stare decisis serves as a constraint on judicial discretion).

164. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 141, at 471.

historian put it, "the doctrine of precedent" was "viewed [by the Framers] as a means of controlling judges' discretion and restraining their possible arbitrary tendencies."[165]

No one would argue that a court is free to ignore a binding precedent simply because the parties fail to cite it.[166] Likewise, even when litigants agree on misstatements of law, courts must be free to articulate the correct legal standard when deciding their cases. If stare decisis is to serve as a meaningful constraint on judicial discretion, neither litigants nor judges can be given the freedom to create new legal standards, unfettered by either past precedent or existing law, that may then mislead all those who must comply.

Indeed, it is anomalous that common law countries operate within an adversarial system that rejects judicial issue creation while civil law countries follow an inquisitorial model that allows for it. In a common law system, judicial decisions have the weight of law and are binding on all those who follow; in civil law systems, judicial decisions are "merely evidence of the law" and therefore do not carry the same legal force.[167] Accordingly, issue creation would seem to be most valuable in a common law system, where judges are responsible not just for resolving a dispute but for settling a question of law for all time, and thus where incomplete or inaccurate litigant articulations of the law are all the more problematic. Part III contends that the solution to this anomaly is to adopt a more flexible conception of adversarialism that makes room for judicial issue creation without abandoning the dialectical exchange at the core of the adversary process.

III. ISSUE CREATION AND THE ADVERSARIAL SYSTEM

In the typical case, the federal judiciary's law-pronouncement function is perfectly compatible with adversarial theory. Under an adversarial system as usually defined, the parties frame and argue the case before a passive judge, who then decides the dispute on the parties' preferred terms.[168] When the parties are well matched, and when they both have an interest in presenting all the arguments in favor of their position, adversary process will produce the best

165. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 20–21 (1975).

166. *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 511–12 (1994) (holding that an appellate court should take notice of legal precedent overlooked by the parties).

167. *See supra* note 24.

168. *See supra* note 42 and accompanying text.

possible judicial decision to guide society about the meaning of law. The system breaks down, however, when the parties have either intentionally or accidentally overlooked a legal argument relevant to the dispute, forcing judges to choose between resolving the dispute on the parties' terms or issuing an inaccurate statement of law. In this Part, this Article contends that these two functions can be reconciled by adopting a more flexible conception of adversary process that permits judges to step in to augment party presentations while maintaining the opportunity for an adversarial exchange on the new issues they raise.

A. Incorporating Issue Creation into Adversary Theory

Party presentation of the facts and legal arguments in a dispute is a central tenet of the adversarial system of justice, and the adversarial system itself is widely acknowledged to be a fundamental feature of the American adjudicatory process.[169] Accordingly, judicial power to raise new legal claims and theories, and then to decide cases on grounds that the parties did not identify and perhaps do not wish to assert, is seemingly at odds with the judicial role in the American legal system. The many exceptions to the party presentation norm discussed in Part I.B thus seem incompatible with the prevailing model of adjudication in the United States.

But perhaps the problem is with adversary theory itself, at least in its purest form. First, it appears best suited to a judicial system that is focused on dispute resolution, and seems less relevant for a legal system in which the judiciary is also charged with issuing accurate pronouncements about the meaning of law that bind future litigants. Second, even as a method of dispute resolution, adversary theory falls short if the parties are mismatched, or if both simply fail to grasp the essential legal and factual questions at the heart of their case. These defects have been widely noted before, and perhaps for that reason the U.S. legal system has never been perfectly adversarial (as this Article demonstrates).[170] Nonetheless, the adversary system as an ideal type has a strong hold on jurists' conceptions of their role.[171]

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169. STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 20 (1984).

170. *See, e.g.*, Langbein, *supra* note 1, at 824 (describing flaws in the adversarial system); *id.* at 843 (discussing the problem of "poor quality of legal representation"); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1867–68 (2002) (noting that the adversary system breaks down when the parties are not evenly matched);

The contrasting theories of Lon Fuller, Abram Chayes, and Owen Fiss illustrate the tension between dispute resolution and law pronouncement, and may also provide the key to resolving that tension. Professor Fuller is closely associated with the dispute resolution model of adjudication, defined as one in which two private parties resolve their disputes through an adversarial presentation to an impartial and passive decisionmaker. Professors Chayes and Fiss critiqued this traditional account of adjudication.[172] They argued that modern adjudication was (and should be) primarily focused on articulating norms that extended far beyond the parties. Chayes noted that under the "traditional" model described by Fuller, adjudication is "a vehicle for settling disputes between private parties about private rights," which he contrasted with the "public law" model in which "the object of litigation is the vindication of constitutional or statutory policies."[173] Likewise, Fiss asserted that while "dispute resolution may be one *consequence* of" adjudication, he argued that the "*function* of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values."[174]

Consistent with their conception of adjudication as an opportunity for law pronouncement affecting many, Professors Chayes and Fiss both asserted the need for a more proactive judicial role in the framing of litigation. Chayes argued that in the public law litigation model, the judge has "responsibility . . . for organizing and shaping litigation to ensure a just and viable outcome."[175] Fiss noted how easily a court could "be led into error" by the parties, who "wittingly or unwittingly" could compromise the interests of others, and he concluded that it is "almost absurd [for a court] to rely exclusively on the initiatives of those persons or agencies who

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Sward, *supra* note 42, at 312 (stating that "the parties may be quite unequal in resources or skill" and that "[a]dversary theory tends to ignore this inequality").

171. Sklansky, *supra* note 48, at 4 (noting that the vast majority of American judges believes that the inquisitorial role played by judges in civil law systems should be avoided).

172. *See* Fiss, *supra* note 22, at 39 ("The most sustained effort to build a case for dispute resolution on the basis of moral axioms is Lon Fuller's essay, *The Forms and Limits of Adjudication*.").

173. Chayes, *supra* note 28, at 1282–84.

174. Fiss, *supra* note 22, at 30; *see also id.* at 29 ("I doubt whether dispute resolution is an adequate description of the social function of courts. To my mind courts exist to give meaning to our public values . . . ."); Fiss, *supra* note 28, at 1085 (stating that the "job" of a judge "is not to maximize the ends of private parties . . . but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes").

175. Chayes, *supra* note 28, at 1302*; see also id.* at 1298 (describing the judge's "active role in shaping, organizing and facilitating the litigation").

happened to be named plaintiff and defendant."[176] Although neither scholar challenged the party presentation rule specifically, both sought to transform the judge from passive recipient of the parties' arguments to proactive participant in the framing of litigation.

At first glance, there appears to be an unbridgeable gap between Professor Fuller's dispute resolution model of adjudication, which corresponds with an adversarial system of party presentation, and Professors Fiss and Chayes's public law model, which requires a more active, and thus inquisitorial-like, judicial role. This gap is mirrored in the disjunction between law pronouncement and dispute resolution. But perhaps there is a middle ground that allows law pronouncement and dispute resolution to occur in the same process, and to do so without sacrificing the goals of the adversarial system. Indeed, upon closer inspection, Fiss's, Chayes's, and Fuller's conceptions all allow for procedures that integrate dispute resolution and law pronouncement, belying the sometimes monochromatic portrayal of their respective views.[177] An examination of these scholars' approaches to the problem provides some guidance on how courts might integrate the dispute resolution and law pronouncement functions.

To start, Professor Fuller's view of adjudication left room for more active judicial participation than is commonly assumed.[178] Fuller understood the adversarial system as intent "on keeping distinct the function of the advocate, on the one hand, from that of the judge . . . on the other,"[179] which allowed for the possibility that the judge could introduce new arguments into the adjudication as long as he did not give up his judicial role for that of advocate. Although Fuller asserted that the system works best when the decisionmaker "rests his decision wholly on the proofs and argument actually presented to him by the parties," he acknowledged that "[i]n practice . . . it is not always possible to realize this ideal."[180] Fuller

176. Fiss, *supra* note 22, at 25–26.

177. *Cf.* Molot, *supra* note 28 (describing how the traditional forms of adjudication described by Fuller provided useful guides to judges overseeing class actions and other types of modern, "public law" adjudication).

178. *Id.* at 35 n.17; *see also* Bone, *supra* note 22, at 1275 (arguing that Fuller's work has been misconstrued, and claiming that in fact "Fuller's theory lies somewhere between the public law and dispute resolution poles").

179. LANDSMAN, *supra* note 169, at 1 (quoting Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34, 34–35 (Harold J. Berman ed., 1961)).

180. Fuller, *supra* note 19, at 388.

noted that judges could raise new arguments without abandoning party participation or judicial neutrality by seeking reargument or issuing a tentative decree.[181] In other words, Fuller himself recognized that judges can raise legal issues without transforming themselves into advocates.

Likewise, Professors Chayes and Fiss's divergence from the traditional forms of adjudication described by Professor Fuller has been overstated. Chayes and Fiss asserted that judges should take a more active role in framing cases, but sought to find ways for judges to do so without jeopardizing their neutrality. Fiss observed that it would be "foolish for the judge to assume a representational role himself," which could sacrifice judicial impartiality, and thus he suggested that the judge should instead expand opportunities for interested persons representing diverse viewpoints to participate in cases to which they are not parties.[182] Similarly, Chayes did not expect the judge to both raise and argue new legal issues, noting that a judge can "appoint guardians *ad litem* for unrepresented interests" and should "employ experts and amici to inform himself on aspects of the case not adequately developed by the parties."[183] Thus, Chayes and Fiss's conceptions of adjudication maintained the distinct roles for advocates and judges defended by Fuller even while promoting judicial power to reframe litigant disputes.[184]

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181. *Id.* at 389.

182. Fiss, *supra* note 22, at 26.

183. Chayes, *supra* note 28, at 1312.

184. Although the standard definition of the adversarial system is one in which opposing parties present facts and legal arguments to a mostly passive and entirely impartial decisionmaker, a few scholars have taken a broader view. Professor John Langbein considered the core characteristic of an adversarial system to be advancement of partisan positions through a dialectical exchange, but he rejected an understanding of the adversarial system that left judges sitting passively on the sidelines. In his article promoting the West German dispute resolution system, Langbein argued that United States judges could become more involved in factual investigation without eliminating adversarialness from the system. As Langbein described it, even systems traditionally understood as inquisitorial, such as that existing in West Germany in the 1980s, have many adversarial components. Indeed, Langbein argued that the West German system *is* an adversarial system. *See* Langbein, *supra* note 1, at 824. West German judges take the lead in factual investigations, but they give the parties opportunities to suggest lines of inquiry and sources of evidence, to supplement judicial questioning of witnesses, and to argue inferences from the facts elicited. Although Langbein acknowledged that the traditional view of an adversarial legal system was one in which the parties, and not the judge, were charged with factfinding, he nonetheless argued that the essential adversarial character could be maintained even if judges were given the lead role in factual investigation. *Id.* at 824–25. This Article does not take a position on this question, but makes a more modest suggestion along the

Accordingly, all three scholars seem to acknowledge that the American adversarial system has enough play in the joints to allow judges (as well as third parties, such as amici) to raise arguments overlooked by the parties without compromising the essentially partisan nature of dispute resolution in the United States. The next Section explores how judicial issue creation, carefully managed, can be faithful to the goals of adversarial theory.

B. Issue Creation and the Goals of the Adversarial System

Judicial issue creation is consistent with the rationales cited in support of the adversarial system, discussed in detail in Part I.[185] Issue creation can enhance truth seeking without sacrificing a judge's impartiality or undermining litigant autonomy. Indeed, permitting a judge to introduce legal issues might answer, at least in small part, the most persistent criticism of adversarial procedure—that it fails when the parties' skills and resources are not evenly matched. The pages that follow seek to justify issue creation on adversary theory's own terms by demonstrating that the adversarial nature of dispute resolution can be maintained, along with the benefits that are claimed to arise from it, even when judges play a role in developing legal arguments.

1. *Enhancing Truth Seeking*. The adversarial system has been touted as the best method of determining the truth of the matter in dispute, and thus of reaching the right result in each case.[186] The basic characteristics of adversary procedure—such as notice, a hearing, and an opportunity to present evidence and test an opponent's evidence—

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same lines. Judges may identify legal arguments overlooked by the parties without violating the central tenets of adversary theory.

185. As a threshold matter, it is worth noting that the claimed benefits of the adversarial system discussed below are themselves disputed, particularly of late, when adversary process has come under sustained attack. *See, e.g.*, Molot, *supra* note 28, at 31 (noting that "the traditional adversarial process has come to be viewed with considerable skepticism" (citing Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 12–24 (1996))). I do not seek to prove that these benefits in fact accompany adversarial procedures—that is a separate debate that has been the subject of numerous other articles. Rather, this Part argues that sua sponte decisionmaking is compatible with adversarial theory in that it promotes many of the same goals.

186. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 73 (1998) ("[T]he adversary system is the method of dispute resolution that is most effective in determining truth . . . .").

are lauded as essential to reaching the correct outcome.[187] As the Supreme Court declared: "[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."[188]

And yet to achieve this goal, there must be at least a rough equality in the resources and presentation skills of the advocates for either party—what Professor Frank Michelman, among others, refers to as "equipage equality"—that all too often does not exist. As one legal scholar observed,

> [o]ur adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their proofs and arguments.[189]

Without equipage equality, "the stronger case might not necessarily be the better case."[190] When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results. The wealthier, sophisticated, repeat-player litigants will usually win; the poorer, outgunned, one-shot litigants will lose, regardless of the merit of their cases.[191] Indeed, critics cite this problem as one of the adversarial system's major flaws, and note that the other claimed benefits of adversarial presentation—the dignity and participation values, for example—are small compensation for the inevitable losses suffered by the weaker party.[192] As one prominent critic of the adversarial system commented: "The simple truth is that very little in our adversary system is designed to match

187. This view is under significant strain today, however. Even vigorous proponents of the adversary system are willing to concede that the ascertainment of truth is not its forte. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 505 (1986) (commenting that John Wigmore's description of cross-examination as the "greatest legal engine ever invented for the discovery of truth" is likely to generate "chuckles").

188. Mackey v. Montrym, 443 U.S. 1, 13 (1979); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) ("[O]ur adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests . . . .").

189. Rubenstein, *supra* note 170, at 1867–68.

190. *Id.* at 1873–74.

191. Stephan Landsman, a strong proponent of the adversarial system, nonetheless acknowledged that "[i]f the lawyers fail to carry out their duty, development of the case will be impeded, and the adversary process may be undermined." LANDSMAN, *supra* note 169, at 4.

192. Sward, *supra* note 42, at 312 (observing that "the parties may be quite unequal in resources or skill" and that "[a]dversary theory tends to ignore this inequality").

combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation."[193]

By raising overlooked issues and legal authority, a judge can ameliorate the imbalances that undermine the adversarial system. For that very reason, judges have a tradition of assisting pro se litigants with case presentation. The same rationale that permits judges to depart from the party presentation rule in pro se cases should apply in cases in which one lawyer is clearly outgunned. This exception to the principle of party presentation should be viewed not as a deviation from adversary theory, but rather as a means of promoting adversarialism by ensuring that it works as best it can. The judge can make the adversary system more efficient at reaching just and accurate outcomes by helping to right the imbalance in opposing lawyers' skills and resources.

Allowing judges to raise issues is not equivalent to transforming the judge into an advocate for one side or the other. An advocate finds facts and legal precedents that help only the one party he has been charged to represent, and then uses them to make arguments on that party's behalf. But judges need not go so far to correct an imbalance in the system. If a judge realizes that there is an important legal argument that has been overlooked, or valuable precedent that has gone uncited, the judge does not act as advocate if she points out the missing information and provides *both* parties with an opportunity to address the issues she has identified. If neither party chooses to do so, the court can obtain guidance from an amicus assigned to make the relevant arguments. In short, the line between judge and advocate can be firmly maintained even when a judge takes on a more active role in framing the case.

2. *Maintaining the Impartial Decisionmaker*. By requiring that judges remain passive and reactive, adversarial process supposedly protects judges from forming prejudgments and developing biases that are claimed to be a drawback of the inquisitorial system.[194] Professor Fuller concluded that "in the absence of an adversary presentation, there is a strong tendency by any deciding official to reach a conclusion at an early stage and to adhere to that conclusion

193. Langbein, *supra* note 1, at 843.

194. Resnik, *supra* note 39, at 383 n.41 (noting that the adversarial system "emphasize[s] judges' disengagement as the means of achieving impartiality").

in the face of conflicting considerations later developed."[195] Fuller noted that a committee of the American Bar Association (which he chaired) had recently reached the same conclusion: "An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[196]

The fear is that judges will be unable to remain impartial when deciding legal questions that they themselves have inserted into the litigation. Furthermore, the appearance of justice might suffer because the litigants and the general public might conclude that the judge is now a partisan player in the litigation rather than a detached observer to the dispute.[197] Erwin Chemerinsky made this very point when criticizing the Fourth Circuit's decision in *Dickerson*. He argued that the Fourth Circuit invoked the federal statute over the parties' objections "precisely because it wanted to reach a particular result: upholding its constitutionality,"[198] and he concluded that courts should not raise issues sua sponte to avoid the appearance of bias.[199]

The concern is a serious one, and thus worth closer scrutiny. If a judge were to advocate for one of the parties by investigating facts and researching legal arguments to assist *only* that party, the judge would be tainted. But there is no reason to think that a judge who notes an overlooked issue and asks the parties to investigate and brief it will review that issue any differently than a question raised by the parties themselves. Indeed, if simply raising a legal issue sua sponte were enough to jeopardize judicial impartiality, then presumably due process would require that judges never do so. Yet judges regularly raise on their own motion threshold procedural questions, such as subject matter jurisdiction and res judicata.[200] Indeed, judges are *required* to ascertain their own jurisdiction before hearing a case—an

195. Fuller, *supra* note 179, at 43; *see also* LANDSMAN, *supra* note 169, at 37 ("If the judge is assigned the task of making factual inquiry, both theoretical analysis and empirical data suggest that his biases are likely to be intensified and his decisions opened to prejudicial influence."); Freedman, *supra* note 186, at 75–80 (1998) (contrasting adversarial and inquisitorial judicial models).

196. Fuller, *supra* note 179, at 44 (quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958)).

197. *See* LANDSMAN, *supra* note 169, at 44–45 ("Because the judge seldom takes the lead in conducting the proceedings, he is unlikely to appear to be partisan or to become embroiled in the contest. His detachment preserves the appearance of fairness as well as fairness itself.").

198. Chemerinsky, *supra* note 19, at 302.

199. *Id.* at 291.

200. *See supra* Part I.B.

issue about which judges arguably are self-interested because at least some would prefer to clear their dockets and avoid the extra work. Courts usually seek supplemental briefing on these questions, and sometimes conclude that their concerns were unfounded. If judges are capable of both raising and deciding these questions impartially, why should they forgo raising issues that go to the very heart of the dispute?

Moreover, judges are forced into far more conflicted positions on a regular basis. Appellate courts routinely require district court judges to reconsider recently issued judgments, reduce sentences they have just handed down, vacate convictions they have just presided over, or apply a new legal standard after being reversed. Trial judges for the most part faithfully follow appellate court mandates even when they must repudiate their own view of the law and apply a new standard of the appellate court's choosing.[201] As Professor Chayes observed, judges are "governed by a professional ideal of reflective and dispassionate analysis of the problem before [them]," which enables them to apply law with which they disagree.[202] Distrust of judicial power to reframe legal questions impartially is at odds with a system that makes such demands on its judges.

To be sure, judges should be careful to avoid putting themselves into the shoes of an advocate. As Professors Fiss and Chayes both argued, judges should not take on the task of representing any party's interest, but rather should seek out amici, experts, and guardians ad litem to do so for them when the parties themselves are unable or unwilling to brief and argue a point of law the judge thinks relevant.[203] But with these safeguards in place, judges are perfectly capable of resolving legal questions they raise in the first instance without bias.[204]

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201. Resnik, *supra* note 39, at 428 ("Many current practices assume that trial judges can compartmentalize their minds, disregard inappropriate evidence, and reconsider past decisions in light of new information.").

202. Chayes, *supra* note 28, at 1308.

203. *See supra* notes 182–83 and accompanying text.

204. Unfortunately, the judiciary's reputation for impartiality has suffered under the status quo, in which courts make ad hoc exceptions to the norm of party presentation without articulating a rationale for doing so. Judges who introduce new issues are viewed with suspicion, especially when the issue they raise accords with their perceived ideological bias—such as when the notably conservative Fourth Circuit concluded sua sponte that *Miranda* had been overridden by statute. Dickerson v. United States, 166 F.3d 667, 695 (4th Cir. 1999). As one critic of judicial issue creation observed, the "absence of a consistent principle leaves courts open to the accusation that ignoring the adversary process is a political action, where the court reaches out to legislate instead of following judicial norms." Miller, *supra* note 68, at 1260.

More worrisome is the possibility that judges will end up raising arguments to favor the party that they would prefer to win the case. If judges felt free to raise new legal issues, they might look for legal arguments that benefit one category of litigant or interest over another. But this concern is really about judicial bias generally. If a judge is not truly impartial, she will likely interpret the facts and law to the benefit of one party and the detriment of the other, regardless of whether she raises a new issue sua sponte. In other words, issue creation may *reflect* bias, but is not likely to *lead* to bias. In fact, permitting issue creation might improve matters. If the parties are given an opportunity to respond to any new issue raised by the judge, as adversarial theory requires, they can counter any subconscious judicial bias by describing the flaws in the judge's legal analysis. Indeed, if the judge is inhibited from raising an overlooked legal argument, the issue of law he identified might influence him more than if it is fully ventilated and found to be irrelevant to the case before him.

3. *Preserving Litigant Autonomy*. A noninstrumentalist argument in favor of the adversarial system is that parties are more satisfied with the decisionmaker's result when they are given an opportunity to be heard on their own terms.[205] Party control "focuses the litigation upon the questions of greatest importance to the parties, making more likely a decision tailored to their needs," whereas a "judge-dominated procedure increases the likelihood that the needs of the litigants will not be fully appreciated or satisfied."[206] Giving litigants control over case presentation is thus claimed to lead to more accurate and better-received decisions than a judge-dominated system of dispute resolution.

Furthermore, legal commentators observe that party presentation is well suited to the American national character. As Professor Landsman describes it, party presentation ensures that the dispute resolution process will center on the interests of the individual "rather than those of his attorney, of the court, or of society at large."[207] Proponents claim that the opportunity for individuals to be heard—to have their day in court—promotes respect for human

205. LANDSMAN, *supra* note 169, at 44 ("Adversary theory holds that if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not.").

206. *Id.* at 4.

207. *Id.* at 46.

dignity and places a human face on abstract disputes.[208] The United States is a highly individualistic society that values personal choice and expression above membership in groups.[209] Generally speaking, most Americans place a greater value on individual freedom and express a greater distrust of centralized governmental authority than most Europeans.[210] Accordingly, Americans prefer a system that gives private parties, rather than governmental actors such as judges, control over the presentation of evidence and the framing of litigation.

Judicial issue creation need not undermine litigant autonomy, however. Litigants are still able to frame the case as they see best, and the court must still read and respond to their legal arguments. Although a judge may ask the litigants to provide supplemental briefs on issues the judge raised sua sponte, a party is always free to respond that it does not believe the argument raised by the court is one on which it should prevail. In *Dickerson*, for instance, the government informed the Fourth Circuit that it believed 18 U.S.C. § 3501 was unconstitutional, and thus refused to rely on that statute as a basis for admitting Dickerson's confession.[211] Although courts have the last word on the meaning of the law, they have no power to force any litigant, including the executive branch, to defend a statute it has

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208. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 67–103 (1988); Sward, *supra* note 42, at 317 (noting that as the adversary system's ability to locate truth has come under attack, its supporters have cited its ability to promote human dignity as its primary rationale); *see also* LANDSMAN, *supra* note 169, at 37 (stating that party control of litigation results in more complete information).

209. *See* LANDSMAN, *supra* note 169, at 24 ("The element of party control of proceedings apparent in English procedure from the earliest times was also attractive to the intensely individualist polity of the eighteenth and nineteenth centuries. The English and American judicial process made increasing allowances for each party to run his lawsuit as he saw fit, to voice his claims and to select his evidence. The judicial decision was directly tied to the presentations of the parties. It is not surprising that these facets of procedure were accentuated in an age preoccupied with the establishment of individual political and economic rights.").

210. Langbein, *supra* note 1, at 855 ("Americans will long remain uncomfortable at the prospect of a more bureaucratic judiciary. . . . Some observers point to that elusive construct, national character. Europeans in general and Germans in particular are thought to be more respectful of authority, hence better disposed toward the more bureaucratic mode of justice that judicialized fact-gathering entails.").

211. Dickerson v. United States, 166 F.3d 667, 672 (4th Cir. 1999). Likewise, in *Pearson v. Callahan*, 128 S. Ct. 1702 (2008), the Court asked the parties to address whether its precedent in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled, but neither party was compelled to argue that precedent should fall (and, in fact, both claimed that it should be upheld in modified form). *Pearson*, 128 S. Ct. at 1702–03; *see infra* text accompanying notes 228–29.

concluded is unconstitutional, or which it believes does not apply to the case at hand.[212]

Courts have readily available alternatives in those rare cases in which litigants refuse to defend the constitutionality of a statute—they can assign an amicus to argue in favor of the statute. Indeed, in *Dickerson*, Paul Cassell had already submitted an amicus brief in defense of the statute, and the Fourth Circuit granted him argument time as well. He ably played the same role in the U.S. Supreme Court. Turning to an amicus is a perfectly acceptable solution to a breakdown in the adversarial process, as it maintains the dialectical, partisan exchange essential to adversarial theory. In short, a litigant's power to control the case he presents to the court remains unchanged even in a system in which judges are encouraged to raise issues sua sponte.

4. *Protecting Institutional Competence.* Adversary process is praised for its compatibility with judges' core institutional competences. Judges are well suited to resolving disputes initiated by the parties, but lack the institutional capacity to frame cases themselves. Judges do not have the staff or funds to personally investigate the facts of the cases that come before them, nor do they share the parties' incentives to uncover all the information that could assist them in making their case.[213] Judges are politically insulated and unaccountable, making them especially inept at identifying the pressing social problems most in need of resolution.[214] In contrast,

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212. The Fourth Circuit was highly critical of the government, claiming that the Department of Justice had "elevat[ed] politics over law." *Dickerson*, 166 F.3d at 672. Although I defend the Fourth Circuit's discretion to raise the statute sua sponte, I believe that the court erred in criticizing the executive branch for refusing to argue that § 3501 displaced *Miranda*. I agree with Professor Chemerinsky, who argued that the "Fourth Circuit falsely attributed a political motive to the Justice Department to pave the way for it to consider § 3501 sua sponte." Chemerinsky, *supra* note 19, at 290. As Chemerinsky noted, "[t]here is no imaginable political benefit to the incumbent administration from not using § 3501." *Id.*

213. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 n.10 (1974) ("[The judicial process] is in sharp contrast to the political processes in which the Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves."); Miller, *supra* note 30, at 1050 ("[S]ua sponte consideration of issues is an inefficient use of judicial resources. . . . [R]elying on litigants to present arguments in cases [enables courts to] focus their energies on evaluating these arguments.").

214. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037 (1968) ("The court, not being a

private litigants will bring those cases most important to them, and are well situated, and highly motivated, to unearth the facts and sources of law that will support their case.[215]

These institutional competence arguments are good reason to assign fact investigation and agenda setting to the litigants rather than to the judge, but they do not support the conclusion that judges should similarly play no role in identifying overlooked legal issues. To the contrary, federal judges are ideally suited to raise overlooked legal issues sua sponte. Most federal judges practiced law for several decades before taking the bench, and many were selected for a federal judgeship precisely because they were unusually successful lawyers.[216] Federal judges are conditioned to think about the case as an advocate, and thus to formulate the best legal arguments for each side.[217] A rigid rule of party presentation squanders this trove of judicial expertise by muzzling the best lawyer in the room.

To be sure, judges do not have the time or resources to investigate new lines of argument in each case before them, and this Article does not advocate that judges go so far. The point here is only that when judges do stumble upon a new legal claim, source of law, or line of reasoning, they should not be discouraged from noting that issue and asking the parties to address it.

Writing for a Seventh Circuit panel that refused to raise an overlooked (and winning) issue for a party whose lawyer dropped the ball, Judge Posner argued that "we cannot have a rule that in a sympathetic case an appellant can serve us up a muddle in the hope

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representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution.").

215. CHEMERINSKY, *supra* note 42, at 40 ("Because federal courts have limited ability to conduct independent investigations, they must depend on the parties to fully present all relevant information to them. It is thought that adverse parties, with a stake in the outcome of the litigation, will perform this task best."); *see also* Molot, *supra* note 28, at 59–63 (arguing that judges are institutionally suited to rely on parties to frame issues).

216. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 34 (2d ed. 1985) ("[Judges] have successful careers either in private practice or in government . . . . They are appointed or elected to judicial positions on the basis of a variety of factors, including success in practice, their reputation among their fellow lawyers, and political influence."); Resnik, *supra* note 39, at 426 ("Many [judges] have been trial lawyers . . . .").

217. *But see* Resnik, *supra* note 39, at 426 ("[J]udges may well overestimate the extent of their wisdom. Many have been trial lawyers; they have some appreciation for which litigant tactics are well founded and which are dilatory. But because few have practiced in all of the diverse areas of federal court jurisdiction, they may reach ill-founded conclusions in cases about which they really know very little.").

that we or our law clerks will find somewhere in it a reversible error."[218] But it is hard to see why not. Federal judges are public servants, appointed by elected officials and paid in taxpayers' dollars. If the lawyers have failed to perform their function effectively, and the wise and experienced judge is aware of important legal arguments overlooked by one or the other, there is no reason for the judge to turn a blind eye to the winning arguments he identified. Although Judge Posner feared that judicial issue creation might diminish lawyers' incentives to locate all of the best arguments,[219] that concern seems farfetched. No one contends that judges should affirmatively search out the best arguments for one side or the other—as discussed, judges lack the time and resources for such a task. Rather, the claim is only that if judges do see an argument missed by the parties, they should be free to raise it on the condition that it is closely related to the legal question before them, and the parties are given a chance to voice their views on the issue.[220] Accordingly, no reasonable lawyer would slack off on the assumption that the judge would catch whatever issues she missed.

Judge Posner seems to view his role entirely as a dispute resolver in the adversarial tradition, rather than also as a law pronouncer in the common law tradition. Perhaps the harsh results of his rule of judicial passivity are justified in a system in which the only parties that suffer are those who failed to put forward the strongest case in their favor. But in the United States federal courts, where decisions by appellate judges bind all in that jurisdiction, and *all* judicial decisions are intended to serve as accurate statements about the meaning of law to guide others, a poorly reasoned legal decision harms many more than just the party before the court.[221]

IV. ISSUE CREATION IN PRACTICE

Part II of this Article discussed the arguments in favor of issue creation—arguments that have been missing from the discussion thus far or that have been drowned out by the rhetoric of adversarialism. Part III described how the values of adversarialism could be

218. Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1214 (7th Cir. 1993).

219. *See id.*

220. *See infra* Part IV for further discussion of when and how courts should engage in issue creation.

221. *See supra* notes 175–76 (discussing Chayes's and Fiss's arguments in support of judicial issue creation).

preserved even in a system in which courts raised arguments overlooked or ignored by the parties. This Part takes these rationales for issue creation and attempts to make practical use of them by developing a typology of cases in which issue creation is appropriate, and describing the circumstances under which it is not. Drawing these lines is not easy, and I do not claim to provide a definitive set of criteria for when such determinations may be made. Nonetheless, I hope this Part will provide some guidance by translating the rationales for issue creation into a more concrete set of factors governing the exercise of judicial discretion to raise new issues.

A. Factors Favoring Issue Creation

Certain case-specific factors favor the use of issue creation. Courts should raise new issues when failing to do so would result in erroneous statements of precedent-setting law. They should also supplement the parties' arguments when necessary to maintain control over interpretative methods. Finally, courts may need to engage in issue creation to give voice to legislative enactments disfavored or ignored by the parties, especially when no other litigant can vindicate those rights.

1. *Protecting Law Pronouncement.* As discussed in Part II.A.1, the rationale for issue creation is at its most powerful when the parties, either intentionally or by mistake, misrepresent the law and ask the court to decide the case on those grounds. Indeed, the very reason to give Article III judges life tenure and salary guarantees is to ensure that they determine the meaning of law free from outside influence. Accordingly, courts should not sacrifice that independence by deciding cases on the parties' terms. Furthermore, judicial opinions set precedent that either binds the lower courts or serves as a guide for judges addressing the question in the future. Thus, courts must on occasion eschew the party presentation rule to avoid issuing decisions containing erroneous statements of law.

In contrast, a court has no reason to raise issues that are tangential to or distinct from the claims that the parties have asked the court to decide, because in these cases its opinion will not mislead others or create flawed precedent. For example, even if a party could have challenged a federal statute on commerce clause grounds—as Justice Thomas suggested might be grounds for striking down the

partial birth abortion legislation at issue in *Gonzales v. Carhart*[222]—the Court did not need to raise this issue sua sponte because its opinion did not risk establishing an erroneous rule of law or misleading precedent on that question. Moreover, questions that are truly independent from those that the parties have already briefed and argued would likely require the development of facts not already in the record, which is unfair to litigants who are beyond the discovery stage—thus providing good reason for courts to ignore those issues as well.

2. *Controlling Interpretive Methods*. As explained in detail in Part II.A.2, issue creation is also justified in cases in which the parties seek a decision on grounds that undermine judicial control over its interpretive methods. Choosing an interpretive method is an essential component of judging that cannot be ceded to the parties. Furthermore, many interpretive practices are closely related to prudential limits on judicial power. For example, courts have adopted various canons of interpretation to avoid conflict with the other branches of government, such as the constitutional avoidance doctrine and the presumption against preemption of state law. Thus, courts have good reasons to raise new arguments and legal sources when necessary to maintain these constraints on judicial decisionmaking.[223]

3. *Preserving the Integrity of Legislative Enactments*. Courts are also justified in engaging in issue creation if they believe that the parties' positions ignore or undermine the integrity of legislative enactments.[224] In such cases, the parties have essentially asked the court to disregard the law and decide the case on their terms. The problem is of particular concern when the executive branch has adopted a policy of refusing to assert a statutory standard that no other party would have reason to raise. Oftentimes the "case or controversy" limitation on judicial power will prevent a court from addressing a party's refusal to rely on a statutorily created standard or right, and thus the problem can be resolved only by the political branches. But when the parties fail to raise a statute that is relevant to

222. *See supra* note 117.

223. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454, 457 (1960) (applying the doctrine of constitutional avoidance to decide the case on statutory grounds, rather than on the constitutional questions raised by the petitioner); *supra* text accompanying notes 113–29.

224. *See supra* Part II.C.

the resolution of their dispute, there is no constitutional prohibition against a court taking notice of the overlooked statute and raising it sua sponte.[225]

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In any of the situations described above, courts raising new issues must be careful to preserve the benefits of the adversarial structure. As discussed in Part III, in keeping with the principles of the adversarial system, the parties should be given notice and an opportunity to respond. If the parties do not wish to address the issue, stakeholders should be allowed to intervene, or amici invited to participate, so that they can serve this purpose. Using these methods, courts can protect the judicial function without sacrificing the benefits of an adversarial exchange on the new issue.

B. Issue Creation and the Judicial Hierarchy

The need for issue creation may also vary with the tier of court asked to decide the matter. Issue creation comes with a slightly different set of costs and benefits at each level of the federal court system, and thus the place of the court in the judicial hierarchy should be factored into a court's decision of whether to raise an issue sua sponte.

1. *District Courts*. District courts do not set precedent, suggesting that issue creation is less vital at this lowest level of the federal court system. District court decisions receive significantly less press and popular attention than those of higher level courts, and thus are less likely to mislead the public about the meaning of the law. Even so, district courts have an obligation to state the law accurately. Every Article III court plays the dual role of deciding cases while declaring the meaning of law. The district court's statements about

225. *Dickerson* is an example of just such a case. The executive refused to raise 18 U.S.C. § 3501, relying instead on the stricter standard for admission of confessions provided in *Miranda*, and yet Congress had intended that statutory standard to displace *Miranda*. No criminal defendant would argue that the statute set the relevant standard for admission of confessions, of course, because it purported to establish a more lenient rule for admitting confessions. Without a court's intervention, the statute would lie dormant. Thus, issue creation was appropriate in *Dickerson* to protect Congress's legislative role. The need for issue creation in such cases is particularly important because otherwise the executive branch could co-opt courts, benefitting from legal decisions by politically insulated courts that appear to sanction the executive's view of the law.

the meaning of law are not limited to the individuals specifically before it, but are intended to describe the law as it applies to all. The fact that the district court's decision binds only the parties at hand makes it no less a statement of "law" than a Supreme Court opinion, thus justifying issue creation in some cases. In addition, district courts have the same interest as appellate courts in protecting legislative enactments and preserving their interpretive role.

Furthermore, as a practical matter, district courts are in the best position to raise new issues because they need not be as concerned about finality, or the possibility of prejudice, as an appellate court considering whether to raise a new issue sua sponte. At the pretrial stage, the parties can explore factual questions essential to the new legal issue, and there is far less disruption to settled expectations than when an issue is injected by a court further down the line.

Thus, while district courts have slightly less compelling reasons to raise new issues than appellate courts, doing so comes with fewer costs to the litigants. Furthermore, by raising overlooked issues early on, district court judges can avoid putting appellate courts into the difficult position of choosing whether to insert a new legal question into litigation at the eleventh hour.

2. *Courts of Appeals*. Appellate courts have yet another set of considerations to keep in mind when deciding whether to engage in issue creation. Circuit court decisions create precedent binding on all future three-judge panels and district courts in that circuit, and create persuasive precedent for judges outside the jurisdiction. Most appellate decisions will stand as the final word on a legal question in light of the rarity of either en banc or Supreme Court review.[226] Thus, it is exceedingly important that appellate courts get decisions right. Furthermore, like district courts, circuit courts have no choice but to hear and decide the cases brought before them—no matter how inadequately presented—and thus they cannot simply avoid addressing a poorly briefed legal question as can the United States Supreme Court. Issue creation would thus seem most justified at the circuit court level.

226. *See, e.g.*, Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 266 (2002) ("As infrequently as the D.C. Circuit heard cases en banc [during fiscal years 1997–99], at .58% of total case dispositions it had the highest en banc percentage of all the circuits.").

Nonetheless, there are good reasons for appellate judges to be cautious about raising new legal questions at this late stage of the litigation. An issue that turns on facts that are not in the record or not fully developed would be better left unmentioned for fear of prejudice to the parties. Moreover, any question of law that requires development of new facts would likely be tangential to the questions the court is asked to resolve, and thus would not qualify as a case in which issue creation was essential to avoid erroneous statements of law.[227] Furthermore, raising new questions on appeal may delay resolution and put litigants to additional expense. As described in Part III, to preserve the adversarial structure, the parties must be given time to submit supplemental briefs, or at the very least be put on notice that they will be asked to address the new issue at oral argument. If the parties do not take opposing positions on the question, the panel should consider assigning an amicus to address it. Finally, if the parties have argued the case for months or years before a district court on one set of issues, they will likely feel ambushed by an appellate court that injects a brand new set of legal questions into the case. Thus, appellate courts should be aware of these costs of issue creation and should weigh them carefully against the benefits.

3. *Supreme Court.* The Supreme Court seems to have the least reason of any court to engage in issue creation because it retains nearly complete control over its docket, and thus can avoid deciding cases in which the parties fail to raise relevant legal questions. If the parties fail to present the issue accurately at the certiorari stage, the Court should simply deny certiorari and await a case in which at least one of the parties articulates what the Court believes is the correct legal issue. In contrast, the district and appellate courts have no discretion to remove cases from their dockets, and thus would have greater reason to supplement the parties' arguments from time to time.

Furthermore, most cases before the Supreme Court have been litigated for years before several tribunals, and thus it is particularly unfair to the parties to inject a new issue into litigation that has been framed and argued consistently on different grounds. Likewise, the factual record will have been developed to respond only to those legal questions that were raised initially, and the Court cannot resolve a legal issue that turns on facts not already in the record. Finally, the

227. *See supra* text accompanying note 222.

delay and disruption created by a remand to uncover new facts would be hard on the parties, who are seeking resolution of their case. For these reasons, the Court should have less cause than lower courts to engage in issue creation, and should be sensitive to the hardship on the parties were it to do so.

Nonetheless, there will be occasions on which the Supreme Court has very good reasons to hear a case in which the parties have failed to brief an issue. For example, the Court might conclude that an especially important or disruptive lower court decision on questions of pressing national importance demands immediate Supreme Court review even when the parties are not up to the task of adequately briefing the case. Or a party may have abandoned an argument below, as sometimes happens when a change in the administration leads to reversals of the executive branch's litigating position, and the Court may conclude that it is essential to pass on the lower court's resolution of the issue even though no party to the case defends that ruling.[228] In addition, the Court may need to engage in issue creation to reverse one of its own precedents. The parties will often hesitate to challenge a precedent directly, preferring to distinguish it from their case, and thus the Court may be forced to raise the issue on its own motion.[229] Finally, the Justices may not be fully cognizant of all the legal questions implicated in a case until the Court receives the briefs on the merits, and thus only at this late stage may the Court recognize that the parties have avoided a question that it thinks is essential to issuing an accurate statement of law.

When these situations arise, the Supreme Court has particularly good reasons to raise the overlooked legal question. Due to its position atop the federal court hierarchy, it is essential that the Court get the law right. The Court's decisions are binding on all courts, state and federal, and constitute high-profile statements on the meaning of

228. *E.g.*, Goldsboro Christian Schs., Inc. v. United States, 456 U.S. 922, 922 (1982) (inviting William Coleman to brief and argue the case as an amicus after the United States abandoned the position it had taken below); *see also supra* notes 82–83 and accompanying text.

229. In a few of the cases discussed in Part I.B, the Court overturned precedent that the parties had not thought to question. *E.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 79–80 (1938) (disapproving the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)); *see also, e.g.*, Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (overruling an aspect of *Wolf v. Colorado*, 338 U.S. 25 (1949), as that case had been interpreted up to that time). A more recent example is *Pearson v. Callahan*, in which the Court granted the petition on the two questions presented and then asked the parties to address the additional question of "[w]hether the Court's decision in *Saucier v. Katz* should be overruled." Pearson v. Callahan, 128 S. Ct. 1702, 1702–03 (2008) (citation omitted).

law. Moreover, the Court's opinions carry weight that other courts' decisions lack. Supreme Court opinions that implicitly sanction unconstitutional conduct by the executive or legislative branches can mislead the nation about the limits on governmental power, establishing precedent-by-practice that may be hard to undo later.[230] The imprimatur of a Supreme Court opinion upholding a specific practice—and thus implying that the practice at issue is constitutional—could establish a new legal rule even if that was far from the Court's intention. Furthermore, the Court would undermine its own legitimacy if it ruled one way in a poorly briefed case, only to quickly reverse itself in a future case in which the issue was squarely presented. Thus, at the Supreme Court level, getting the law right is more important than at any other.

For many of the same reasons, it is particularly important that the Court retain control over its interpretive methods. The Court is the standard bearer in this realm as well, and can serve as a guide to the lower courts. Many of the Court's interpretive choices are based on its views regarding the appropriate judicial role—which is most evident in the constitutional avoidance doctrine, but can also be seen in various clear statement rules and presumptions about the meaning of legislation. The parties should not be allowed to disrupt this exercise of judicial discretion, forcing the Court to issue decisions that transgress these self-imposed boundaries.

* * *

This Article does not contend that judges should be given the power to set their own agenda—a role for which politically insulated judges are ill suited. Judges should limit issue creation to situations in which the parties' arguments misstate the law, undermine legislative enactments, or deprive the court of its preferred interpretive methodology. In these circumstances, issue creation is necessary to prevent litigants from undermining the judiciary's role in the constitutional structure.

The cases discussed in Part I satisfy these criteria. In *Erie Railroad v. Tompkins*, the question of whether the federal courts had the authority to create federal common law was a necessary precursor

230. *See* Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 745–53 (2008) (discussing the limited scope of judicial review of the actions of nonjudicial actors that implicate constitutional issues).

to the dispute over whether Tompkins should be treated as a licensee or trespasser.[231] In *Washington v. Davis*, the Court rejected the parties' interpretation of the Constitution in the course of determining whether the defendant had violated the Equal Protection Clause.[232] In *Dickerson v. United States*, the Court asked whether a statute displaced the judicially established rule for admission of confessions, which would then affect its conclusion about whether Dickerson's confession could be admitted against him.[233] In all three cases, the Court reasonably concluded that its obligation to issue accurate pronouncements of law, to protect legislative enactments, and to preserve its preferred interpretive methodology justified deviation from the party presentation norm.

To be sure, the Court did not handle these situations perfectly. In both *Erie* and *Washington*, the Court did not ask the parties to brief the question, nor did it assign an amicus to do so, depriving itself of the benefits of an adversary presentation and the parties of a fair hearing on the matter. Perhaps it is these violations of form, rather than the act of issue creation, that has given issue creation its bad name.

CONCLUSION

Despite the strong norm in favor of party presentation, in practice judges regularly engage in judicial issue creation. Courts raise legal arguments, claims, and sources overlooked by the parties, and their rules permit active participation by amici. On occasion, courts will even assign an amicus curiae to argue a position that no party to the case supports. These practices are in tension with the rhetoric in favor of party presentation—rhetoric grounded on the longstanding view that judicial issue creation is antithetical to adversarial theory.

Rather than condemn these practices, this Article demonstrates that the judicial role in the constitutional structure and common law tradition justifies giving courts the discretion to raise new legal claims and arguments when failure to do so would lead to inaccurate or misleading statements of law. Federal courts are charged with the task

231. *See Erie*, 304 U.S. at 78–80 (holding that federal courts have no power to create "federal general common law").

232. *See* Washington v. Davis, 426 U.S. 229, 238 (1976) (reversing the lower court's decision on a ground not presented by the parties).

233. *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding that Congress could not supersede a constitutional ruling of the Supreme Court by statute).

of expounding on the meaning of law, and they are provided with life tenure and salary protection to ensure they do so without interference from the other two branches or the public. In the common law tradition, decisions by federal courts of appeals create binding precedent that must be followed in subsequent litigation within that jurisdiction. To preserve their role in law exposition, judges must maintain control over case presentation when the parties fail to fully and accurately describe the meaning of legal standards.

Moreover, and contrary to conventional wisdom, this Article has shown that judicial issue creation is compatible with the values underlying the adversarial tradition. Adversarialism requires that the parties have an opportunity for a dialectical exchange on the questions at issue in the case, allowing the judge to avoid becoming an advocate for one party or interest, but it does not demand judicial passivity in the face of litigants' mischaracterization of legal standards. As long as courts provide an opportunity for the parties to respond to new issues (or allow amici or intervenors to do so when the parties decline), then courts can simultaneously protect their power to pronounce on legal questions and preserve the benefits of the adversarial system.