SUA SPONTE ACTIONS IN THE APPELLATE COURTS: THE "GORILLA RULE" REVISITED

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> The appellate judges returned an order su[a] sponte, or without request from either party, to remove Judge Scheindlin from the case. Legal experts couldn't recall another case in which a federal judge was removed without a request from the litigants.[1]

I. INTRODUCTION

This article illuminates the problems associated with sua sponte appellate court actions and provides some suggested solutions to the issues they create. A recent high-profile example of sua sponte action occurred in 2013, when the Second Circuit removed Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases[2] because Judge Scheindlin

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1. Sean Gardiner, *Judge Fights Back against Fellow Judges*, WALL ST. J., Nov. 7, 2013, at A21 (referring to proceedings in stop-and-frisk case heard by Judge Shira Scheindlin of the United States District Court for the Southern District of New York).

2. Ligon v. City of N.Y., 538 F. App'x 101 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014); Floyd v. City of N.Y., 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The plaintiffs in *Floyd* challenged the constitutionality of the New York City Police Department's stop-and-frisk policy on the grounds that it violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Floyd*, 959 F. Supp. 2d at 557. Judge Scheindlin ruled in August 2013 that the City and the NYPD were "liable for

> ran afoul of the Code of Conduct for United States Judges, Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all activities.") . . . and . . . the appearance of impartiality surrounding this litigation was compromised by the District Judge's improper application of the Court's "related case rule," . . . and by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court.[3]

According to her lawyers' motion for leave to appear on the judge's behalf, that statement was the "functional equivalent of a judicial finding that [Judge Scheindlin] behaved improperly,"[4] while the order itself "completely blind-sided" Judge Scheindlin.[5] By acting sua sponte, the Second Circuit deprived Judge Scheindlin of the protections granted to trial judges by Rule 21 of the Federal Rules of Appellate Procedure, which provides that trial judges accused of judicial misconduct must be given both notice of the charges against them and an opportunity to be heard before the appellate court.[6] Indeed, the Second Circuit's behavior was not only "a breach of the norms of collegiality and mutual respect that should characterize interactions between District and Circuit judges, [but] an affront to the values underlying the Fifth Amendment's guaranty of procedural due process of law."[7]

Moreover, as the amici curiae in *Ligon* and *Floyd* pointed out, the Second Circuit's rationale regarding Judge Scheindlin's "appearance of partiality" was based on an inaccurately reported 2007 colloquy between Judge Scheindlin and plaintiffs' counsel

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violating plaintiffs' Fourth and Fourteenth Amendment rights." *Id.* at 562. *Ligon* was a related case challenging a "narrow subset" of the policy on the ground that it violated the Fourth Amendment. *Ligon*, 288 F.R.D. at 77.

3. *Ligon*, 538 F. App'x at 102–03 (footnote and citations omitted).

4. Req. for Leave to File Mot. to Address Order of Disqualification at 6, *Ligon v. City of N.Y. and Floyd v. City of N.Y.*, http://www.clearinghouse.net/chDocs/public/PN-NY-0014-0009.pdf (2d Cir. Nov. 5, 2013) (No. 13-3088 & No. 13-3123) [hereinafter *Neuborne Request*].

5. *Id.* at 9.

6. *See id.* at 6–8; *see also* Fed. R. App. P. 21(a)(1) (providing that "[a] party petitioning for a writ of mandamus or prohibition directed to a court . . . must also provide a copy to the trial-court judge"); Fed. R. App. P. 21(b)(4) (providing that "[t]he court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so," and that "[t]he trial court judge may request permission to address the petition").

7. *Neuborne Request*, *supra* note 4, at 9.

from a related case, and on statements reported in three news articles but never actually made by Judge Scheindlin.[8] Although the Second Circuit later clarified that it did not mean to imply that Judge Scheindlin had engaged in misconduct, it upheld the reassignment, and reiterated its belief that "there [was] no barrier to our reassigning the cases *nostra sponte*."[9]

The high-profile nature of the case, and of the stop-and-frisk policy in general, meant that Judge Scheindlin's sua sponte removal was widely reported in the press.[10] In effect, newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it.

The chain of events surrounding Judge Scheindlin's removal represents only a subcategory of the problems surrounding sua sponte actions in the appellate courts.[11] In addition to being freely able to question the ethics of a respected judge without a complaint from any of the parties, appellate courts are free to decide cases on principles that were never

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8. *See id.* at 10–14; Br. for Six Retired U.S. Dist. Ct. Judges and Thirteen Professors of Legal Ethics as Amici Curiae Supporting Plfs-Appellees' Mot. for Recons. by the *En Banc* Ct. at iv–vi, *In re Reassignment of Cases (*Ligon *and* Floyd*)*, http://www.ccrjustice.org/sites/default/files/assets/files/Retired%20Fed%20Judges%20Amicus%20Br%20ISO%20of%20Mot%20for%20En%20Banc%20Reconsid.pdf (2d Cir. Nov. 18, 2013) (showing that the *amici* included Judges Cindrich, Coar, Fergeson, Gertner, Holwell, and Sporkin, and Professors Bernstein, Buckler, Freedman, Gershman, Green, Harrison, Klein, Lynk, Margulies, Raful, Rhode, Roiphe, and Wendel).

9. *In re Reassignment of Cases*, 736 F.3d 118, 129 (2d Cir. 2013), *vacated in part sub nom Ligon v. City of N.Y.*, 743 F.3d 362 (2d Cir. 2014).

10. *See, e.g.*, Benjamin Weiser & Joseph Goldstein, *Federal Panel Softens Tone on Judge It Removed From Stop-and-Frisk Case*, N.Y. TIMES, Nov. 14, 2013, at A28; Gardiner, *supra* note 1; Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html; Josh Saul, *Scheindlin Could Face Reprimand after Stop-Frisk Rebuke*, N.Y. POST (Nov. 1, 2013), http://nypost.com/2013/11/01/scheindlin-could-face-reprimand-after-stop-frisk-rebuke/; Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), http://www.newyorker.com/news/news-desk/the-preposterous-removal-of-judge-scheindlin; *see also* Katherine Macfarlane, *Analyzing the Southern District of New York's Amended "Related Cases" Rule: The Process for Challenging Nonrandom Case Assignment Remains Inadequate*, 69 N.Y.U. ANN. SURV. AM. L. 699, 701 n.2 (2014) (listing editorials criticizing Judge Scheindlin's removal).

11. The authors use the phrase "sua sponte action" to refer to instances in which an appellate court raises an issue, decides an issue, or grants relief on its own motion. This article focuses primarily on sua sponte actions related to substantive issues.

argued and grant relief that was not sought by any litigant.[12] Commentators have criticized sua sponte actions on multiple grounds,[13] most notably on the basis that they deprive litigants of their right to procedural due process.[14]

This article builds on prior scholarship by arguing that allowing an appellate court to reach out and grant relief not requested, based on arguments not made, both disserves the litigants and exercises a power that appellate courts should be loath to use, and by focusing attention on recent cases which highlight the continuing problem. Part II of this Article discusses the historical development of American appellate procedure, including how sua sponte actions derived from equity rather than the common law. Part III reviews current Supreme Court and state court jurisprudence regarding appellate court sua sponte actions. Part IV considers the negative consequences of appellate court sua sponte actions, examining some particularly striking cases and the due process implications of courts making sua sponte decisions. Part V considers some practical reforms to appellate court procedure, designed to mitigate the negative consequences of sua sponte actions.

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12. *See* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1280–86 (2002) (listing fifteen grounds on which appellate courts act sua sponte, including a category called "For No Reason at All"). Other types of sua sponte actions on appeal have only recently attracted attention. In particular, nine of the thirteen federal courts of appeals have used a procedure known as "mini" or "informal" en banc review, wherein one panel submits an opinion to the full court for acquiescence in place of formal en banc review. Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 725–28 (2009); *see also* Steven M. Witzel & Samuel P. Groner, *Mini-En Banc Review in the Second Circuit*, N.Y.L.J., Jan. 7, 2016, at 5, 8. This procedure effectively allows a panel to overrule circuit precedents with no opportunity for the litigants to be heard, and without anyone's knowledge that the practice is even occurring. Sloan, *supra* this note, at 758–59. Informal en banc review is often used in the Second and Seventh Circuits, where the procedure is more common than formal en banc rehearing. *Id.* at 727–28 (noting that, from 1966 to 2007, the Second Circuit employed informal en banc review seventy-one times, and formal en banc review only fifty-two times, and that from 1969 to 2007 the Seventh Circuit used informal en banc review 272 times, and formal en banc review only 196 times).

13. *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 262–90 (2002) (providing three criticisms of sua sponte decisions by appellate courts); Miller, *supra* note 12, at 1288–96 (arguing that sua sponte decisions violate due process).

14. *See e.g.* Milani & Smith, *supra* note 13, at 262–71 (arguing that appellate court sua sponte decisions are "inconsistent with fundamental principles of due process"); Miller, *supra* note 12, at 1288–96.

II. SUA SPONTE ACTIONS IN HISTORICAL CONTEXT

Modern appellate courts derive their power to take actions sua sponte from equity.[15] In the ancient English legal system, the House of Lords, which served as the appellate court in equity, had the power to review any issue of law or fact regardless of whether it was in the record,[16] and could "render any type of judgment it thought justice demanded."[17] By contrast, the principal procedure for appellate review at common law, known as the "writ of error," limited the appellate court's authority to questions of law raised and decided at the trial court level and prevented the appellate court from ruling on any question not reflected in the record.[18] "Appellate courts were not free to raise new issues sua sponte; issues not assigned as error were waived."[19] Trials under the writ of error ultimately reflected the idea of the "adversary process," under which the litigants rather than the court controlled the issues in the case.[20]

The writ of error became the primary basis for appellate review early in United States history. Multiple sections of the federal Judiciary Act of 1789 provided for appellate review by writ of error, and Congress later provided that appeals in equity were to be "subject to the same rules, regulations, and restrictions" as writs of error.[21] Thus, "appellate procedure in this country became set in the mold of procedure on writ of error at common law."[22]

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15. *See* Miller, *supra* note 12, at 1263–64 (discussing traditional separation between law courts and courts of equity).

16. ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 5 (1983). *See also* Miller, *supra* note 12, at 1263 (noting that "equity developed flexible procedures to meet the needs of individual cases," including "the device of rehearing, which allowed the court to address new facts or law not originally raised by the parties").

17. Martineau, *supra* note **, at 1027 (discussing historic powers of courts of equity).

18. *Id.* at 1026–28. A related device called a "bill of exceptions" was used if an appellant wanted to raise an issue in the appellate court that was not contained within the trial record. *Id.*

19. Miller, *supra* note 12, at 1263.

20. *See* Miller, *supra* note 12, at 1262–63; *see* Martineau, *supra* note **, at 1026–28.

21. ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 108 (1941) (citation omitted).

22. *Id.*

Although law and equity have been merged in the federal system and in most state courts, current American appellate procedures still are "overtly based on the principles of writ of error review at common law, rather than the appeal in equity," and therefore emphasize the adversary process.[23] Sua sponte actions, derived as they are from equity, accordingly are incongruous with current principles of appellate review.[24]

III. JURISPRUDENTIAL APPROACHES TO SUA SPONTE ACTIONS IN THE UNITED STATES SUPREME COURT AND IN STATE COURTS

A. The Supreme Court's Approach

The Supreme Court has thus far refrained from placing direct limitations on appellate courts' discretion to act sua sponte, although it has provided some loose guidelines for appellate courts to follow. Perhaps the Court is unwilling to criticize or circumscribe this approach because the Court itself routinely raises issues sua sponte.[25] *Singleton v. Wulff*[26] encapsulates the Court's approach towards sua sponte actions in the federal courts of appeals: applying the Gorilla Rule.[27] In *Singleton*, the Court addressed the question of when new issues could be raised and decided in an appellate court, first noting that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."[28]

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23. Miller, *supra* note 12, at 1264; *see also* Hormel v. Helvering, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact.").

24. Appellate courts are "confused about the power to raise and decide issues *sua sponte*" because of the conflict between law and equity. Miller, *supra* note 12, at 1262–63.

25. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., ___ U.S. ___, 133 S. Ct. 1659 (2013); Nat'l Fed'n of Indep. Bus. v. Sebelius, ___ U.S. ___, 132 S. Ct. 2566 (2012).

26. 428 U.S. 106 (1976).

27. The term was coined by Professor Martineau, based on the riddle asking "Where does an eight-hundred pound gorilla sleep?" and answering "Anywhere it wants." As Professor Martineau noted, "[t]he judicial application of this rule would be: 'When will an appellate court consider a new issue?'" and "[t]he response is: 'Any time it wants.'" Martineau, *supra* note ⁎⁎, at 1023 n.⁎.

28. *Singleton*, 428 U.S. at 120. Sua sponte actions are a subgroup of this broader category, which also includes new issues raised on appeal by one of the litigants. *Cf.* Martineau, *supra* note ⁎⁎, at 1054 n.121 ("If a court can consider a question *sua sponte*, the

However, the Court then acknowledged that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," and that a court may be "justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where 'injustice might otherwise result.'"[29]

Within the space of two paragraphs, the Supreme Court therefore announced its general rule and abrogated it in favor of the Gorilla Rule: An issue can be raised and decided for the first time on appeal if the answer is beyond doubt, or—reflecting the influence of equity—an "injustice might otherwise result."[30] And the Court recently upheld the Gorilla Rule in *Exxon Shipping Co. v. Baker*,[31] stating that "[w]e have previously stopped short of stating a general principle to contain appellate courts' discretion . . ., and we exercise the same restraint today."[32]

Supreme Court cases addressing sua sponte actions on appeal have been squarely within *Singleton*'s framework. The Supreme Court has held, for instance, that appellate courts deciding pure questions of law may consider relevant precedent not cited by any party at trial.[33] The Court has also ruled that the federal courts of appeals have broad discretion to raise new issues sua sponte. In *United States National Bank of Oregon v. Independent Insurance Agents of America*,[34] for example, although both parties assumed the validity of a particular statute,

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question can, of course, be raised by a party. The reverse, however, is not necessarily true.").

29. *Singleton*, 428 U.S. at 121.

30. *Id.*; *see also* Miller, *supra* note 12, at 1278–79 (discussing Gorilla Rule).

31. 554 U.S. 471 (2008).

32. *Id.* at 487 (citation omitted). The Ninth Circuit had decided that one of Exxon's claims should not have been treated as waived, even though Exxon had raised its argument almost thirteen months after a stipulated motions deadline. The Supreme Court disagreed with the Ninth Circuit's rationale, but agreed with its decision because the Ninth Circuit had discretion under *Singleton* to make it. *Id.* at 485–87.

33. *See Elder v. Holloway*, 510 U.S. 510, 511–12 (1994) ("This case presents the question whether an appellate court . . . must disregard relevant legal authority not presented to, or considered by, the court of first instance. We hold that appellate review . . . is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the district court.").

34. 508 U.S. 439 (1993).

the D.C. Circuit sua sponte raised the issue of whether the statute had been repealed, asked the parties to address the issue at oral argument, and ordered supplemental briefing.[35] When neither party took a position on whether the statute was still valid, the D.C. Circuit sua sponte decided that it was no longer in force.[36] The bank argued on certiorari that the D.C. Circuit "lacked the authority to consider whether [the statute] remain[ed] the law and, alternatively, that it had abused its discretion in doing so."[37]

Although the Supreme Court reversed the D.C. Circuit on the merits,[38] it held that "a court may consider an issue 'antecedent to . . . and ultimately dispositive of' [a] dispute before it, even an issue the parties fail to identify and brief."[39] Indeed, the Court held that the federal courts of appeals have the ability sua sponte to reframe the issues presented by the parties.[40]

The *National Bank of Oregon* Court also approved the D.C. Circuit's deciding the issue sua sponte because it gave the parties "ample opportunity to address the issue."[41] Similarly, in *Trest v. Cain* the Court indicated a preference for ordering supplemental briefing when a new issue is raised sua sponte, but

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35. *Id.* at 444. The relevant statute had been enacted in 1916 and had been included in the United States Code editions of 1934, 1940, and 1946. However, it was omitted from the 1952 edition, with a note that it had been repealed by Congress in 1918. Despite the apparent repeal, Congress had assumed that the statute remained in force, and amended it in 1982. *Id.* at 441–42.

36. *Id.* at 444–45.

37. *Id.* at 445.

38. *See id.* at 462–63.

39. *Id.* at 447 (quoting Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990)) (alterations in original).

40. *Id.* at 447 (asserting that "[t]he contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory"); *see also* Miller, *supra* note 12, at 1277–78 (analyzing *National Bank of Oregon*).

41. *National Bank of Oregon*, 508 U.S. at 448. Professors Milani and Smith argue that the holding in *National Bank of Oregon* is "Supreme Court authority for the proposition that an appellate court abuses its judicial discretion when it not only *raises* an issue sua sponte but *decides* that issue without giving the parties an opportunity to address it." Milani & Smith, *supra* note 13, at 290 (emphasis in original). However, it is difficult to reconcile this proposition with cases in which the Court declined to restrict appellate courts' general discretion to raise and decide issues sua sponte. *See* Trest v. Cain, 522 U.S. 87, 92 (1997); *Exxon Shipping*, 554 U.S. at 487.

stopped short of making supplemental briefing a requirement.[42] In line with *Trest*, the Supreme Court often requests supplemental briefs and additional oral argument when it raises an issue sua sponte.[43] Recent examples can be found in *Kiobel v. Royal Dutch Petroleum Co.*,[44] and *National Federation of Independent Business v. Sebelius*,[45] in which the Court raised a jurisdictional issue sua sponte, directed the parties to brief and argue it,[46] and appointed an amicus to advance it when none of the parties indicated support.[47]

Some of the Supreme Court's most important cases have been decided on issues raised sua sponte. The *Erie* Court[48] overturned nearly 100 years of precedent—and eliminated an entire category of federal law—without either being asked to do so or giving the parties an opportunity to brief or argue the issue.[49] The Court acted comparably in *Mapp v. Ohio*,[50]

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42. *See Trest*, 522 U.S. at 92 ("We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home."); *see also* Miller, *supra* note 12, at 1298–1300. Coincidentally, the holding in *Trest* was that an appellate court is not required to raise the issue of "procedural default" sua sponte. *Trest*, 522 U.S. at 89; *see also* Milani & Smith, *supra* note 13, at 295–96 (analyzing *Trest*).

43. *See* Milani & Smith, *supra* note 13, at 298 n.291 (collecting and describing cases in which the Court raised an issue sua sponte, and proceeded to request supplemental briefing, additional oral argument, or both); Miller, *supra* note 12, at 1298 ("[T]he Court itself often directs supplemental briefing on issues it raises sua sponte, either when issuing the order accepting questions for oral argument, or after argument." (footnotes omitted)).

44. ___ U.S. ___, 133 S. Ct. 1659 (2013).

45. ___ U.S. ___, 132 S. Ct. 2566 (2012). For the most recent example, see the order in *Zubik v. Burwell* directing the parties to file supplemental briefs, which states the issues to be analyzed, sets forth hypothetical questions to be answered, and invites the parties "to address other proposals." Order, *Zubik v. Burwell*, http://www.supremecourt.gov/orders/courtorders/032916zr_3d9g.pdf (U.S. Mar. 29, 2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191); *see also* Zubik v. Burwell, 578 U.S. ___, 136 S. Ct. 1557, 1560 (2016) (noting that "[i]n light of the positions asserted by the parties in their supplemental briefs," the Court vacated the judgments below and remanded the case).

46. Dep't of Health and Human Servs. v. Fla., ___ U.S. ___, 132 S. Ct. 604 (2011) (mem.) (directing the parties to brief and argue the question of "[w]hether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act").

47. *National Federation*, 132 S. Ct. at 2582.

48. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938) (overruling Swift v. Tyson, 41 U.S. 1 (1842), and characterizing it as having invaded rights "reserved by the Constitution to the several states").

49. *See* Milani & Smith, *supra* note 13, at 255–56 (discussing in detail the history of the case and the Court's decision); *see Erie*, 304 U.S. at 82 (Butler, J., dissenting) ("[A]s a general rule, this Court will not consider any question not raised below and presented by

applying the exclusionary rule to the states without any briefing or argument on the issue.[51] Similarly, in *Kiobel*, which "involved one of the most important, contentious, and dynamic aspects of U.S. foreign relations law,"[52] the Court raised an entirely different issue sua sponte during oral argument, called for further briefing, held the case over to the next term, and ultimately decided it on the basis of that new issue.[53]

It bears noting, however, that the Court stated in *Hohn v. United States*[54] that decisions in which "the opinion was rendered without full briefing or argument"—a category that includes decisions on issues raised sua sponte in which the court does not request supplemental briefing—have a lower precedential value.[55] And Justice Souter once suggested that sua sponte decisions should be treated as dicta.[56]

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the petition. Here it does not decide either of the questions presented, but, changing the rule of decision in force since the foundation of the government, remands the case to be adjudged according to a standard never before deemed permissible.") (citations omitted).

50. 367 U.S. 643, 654 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949), and holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

51. *See Mapp*, 367 U.S. at 672–73 & nn. 4–6 (Harlan, J., dissenting) (discussing the search-and-seizure issue, noting that it was neither the "central" nor "controlling issue in the case, indicating that it had been raised only as a "subordinate" point, and referring to counsel's statement at oral argument that he was not asking the Court to overrule *Wolf*); *see also* Milani & Smith, *supra* note 13, at 257–59 (discussing the history of the case); Miller, *supra* note 12, at 1255 & n.3. Neither party requested that the Supreme Court overrule *Wolf*; an amicus brief filed by the ACLU in support of Mapp included a concluding paragraph requesting that the Court overrule *Wolf*, but did not argue the point. *Mapp*, 367 U.S. at 673 n.5 (Harlan, J., dissenting).

52. Eugene Kontorovich, Kiobel *Surprise: Unexpected by Scholars but Consistent With International Trends*, 89 NOTRE DAME L. REV. 1671, 1672 (2014). The issue in question was "the ability of foreigners to sue in U.S. courts for extraterritorial violations of customary international law . . . under the Alien Tort Statute (ATS)." *Id.*

53. *Kiobel*, 133 S. Ct. at 1663 (Roberts, C.J.) (explaining that "[a]fter oral argument, we directed the parties to file supplemental briefs addressing an additional question: 'Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States,'" and that after hearing oral argument a second time, the Court would affirm the judgment below "based on [its] answer to the second question").

54. 524 U.S. 236 (1998).

55. *Id.* at 251 (characterizing the Court as "less constrained to follow precedent" in these situations); *accord* Miller, *supra* note 12, at 1292.

56. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572–73 (1993) (Souter, J., concurring) ("I think a rule of law unnecessary to the outcome of a case, especially one not put into play by the parties, approaches without more the sort of 'dicta . . . which may be followed if sufficiently persuasive but which are not controlling.'"

In a related phenomenon, individual Justices will sometimes use their opinions to send signals about the sorts of cases that they want to hear in the future.[57] For example, Justices Breyer and Ginsburg signaled recently that they wished to consider the constitutionality of the death penalty, while Justice Kennedy asked to hear a case about solitary confinement,[58] and the Court heard a case in the 2015 term brought in response to a 2012 signal from Justice Alito.[59] This signaling process is analogous to the Court's raising an issue sua sponte and requesting briefing on that issue, the main difference being that cases brought in response to signals have to make their way to the Court through the usual channels.

B. Approaches in the State Courts

State high courts have taken divergent positions on sua sponte actions by intermediate appellate courts. Some states parallel the Supreme Court and give appellate courts wide discretion to raise issues sua sponte. For example, in *City of Seattle v. McCready*,[60] the Washington Supreme Court noted that it had "the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision."[61] Other states, in contrast, have preserved the general rule that an appellate court should not raise or decide issues that

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(quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935)). Justice Souter was criticizing a previous rule announced in Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), which had been decided sua sponte. *See Lukumi Bablu Aye*, 508 U.S. at 572 ("[N]either party squarely addressed the proposition the Court was to embrace [in *Smith*].").

57. *See, e.g.*, Adam Liptak, *With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear*, N.Y. TIMES, July 7, 2015, at A14.

58. *Id.*

59. *Id.* (referring to Friedrichs v. Cal. Teachers Ass'n, 578 U.S. ___, 136 S. Ct. (2016) (per curiam). Filing *Friedrichs* in response to that signal did not prove to be a winning strategy. *See* Adam Liptak, *Justices' 4–4 Tie Gives Unions Win in Labor Lawsuit*, N.Y. TIMES, Mar. 30, 2016, at A1 (referring to the equally divided Court's affirming of the decision below after Justice Scalia's then-recent death).

60. 868 P.2d 134 (Wash. 1994) (en banc).

61. *McCready*, 868 P.2d at 138–39 (citations omitted); *see also* State v. Holmes, 315 N.W.2d 703, 707 (Wis. 1982) ("That a court should raise issues sua sponte is the natural outgrowth of the court's function to do justice between the parties. . . . [I]t is well recognized that courts may sua sponte consider legal issues not raised by the parties.") (citation omitted).

were not litigated in the trial court.[62] Indeed, the Pennsylvania Supreme Court recently stated that "when a court decides issues sua sponte, it exceeds its proper appellate function and unnecessarily disturbs the process of orderly judicial decisionmaking."[63] Still others either strongly favor or overtly mandate providing an opportunity for supplemental briefing when a court raises an issue sua sponte.[64]

In general, though, it is difficult to know when a state appellate court (or, for that matter, a federal appellate court) acts sua sponte absent a reference in either the majority opinion or a dissenting opinion noting that it occurred.[65] When this is not the case, evidence often can be found only in motions filed by

62. *See, e.g.*, Kalil Bottling Co. v. Burroughs Corp., 619 P.2d 1055, 1058 (Ariz. Ct. App. 1980) ("The general rule that an appellate court will not review a question not raised during the trial . . . also applies when the appellate court raises, sua sponte, an issue not litigated below") (citation omitted); People v. Hunt, 914 N.E.2d 477, 480 (Ill. 2009) ("'It is established that the theory under which a case is tried in the trial court cannot be changed on review.' . . . This limitation is applicable to both the parties and the reviewing court.") (citation omitted); *but see* Clark A. Donat, Case Note, *Every Attorney Deserves a Second Chance: Consideration of Issues Not Raised at the Trial Court Level in* Jones v. Flowers, 62 ARK. L. REV. 831, 831 (2009) ("Despite the general rule that arguments addressed on appeal must have been raised below, in *Jones v. Flowers* the Arkansas Supreme Court considered an argument that had not been raised and developed at the trial-court level. . . . [T]his action . . . directly conflict[ed] with numerous prior rulings." (footnotes omitted)).

63. Steiner v. Markel, 600 Pa. 515, 527 (2009).

64. *See e.g.* State v. Curry, 931 P.2d 1133, 1136–37 (Ariz. Ct. App. 1996) (rejecting state's argument that court "should not ask for assistance from the parties" when it raises an issue sua sponte because "the state's argument runs so counter to notions of procedural due process and the status of counsel as officers of the court"); People ex rel. T.D., 140 P.3d 205, 215 (Colo. Ct. App. 2006) (noting that a then-new state appellate rule explicitly allows court to request supplemental briefing when it raises an issue sua sponte, but that practice of requesting supplemental briefs was itself not new), *overruled on other grounds*, People ex rel. A.J.L., 243 P.2d 244 (Colo. 2010) (en banc); Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc., 84 A.3d 840, 867–69 (Conn. 2014) (laying out conditions under which an appellate court can raise an issue sua sponte, and stating that when a court does so, it must provide for supplemental briefing).

65. *See* Milani & Smith, *supra* note 13, at 313–14 (pointing out that "most courts that raise issues sua sponte neither declare that they are doing so nor attempt to justify making a decision without input from the parties"); Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 497–98 (1958). Recently, a spirited dissent asserted that an Arkansas Supreme Court holding broke from the "clear precedent" providing that the court would not raise an issue sua sponte unless it involved subject-matter jurisdiction in the trial court, and in doing so "overrule[d] a line of cases dating back nearly thirty years." Moore v. Moore, 2016 Ark. 105 at 18 (Wynne, J., dissenting); *see also id.* at 16 (noting that "without the aid of briefs and without having been requested to act, this court overrules itself and reverses the circuit court, which properly followed our longstanding precedent") (Brill, C.J., dissenting).

litigants aggrieved by the court's action.[66] For example, in *Clark v. Clark*,[67] the appellee filed a motion for reargument complaining that she was "blindsided" when the court sua sponte remanded three cases to a different court and county for trial.[68]

IV. THE CONSEQUENCES OF SUA SPONTE ACTIONS ON APPEAL

The circumstances surrounding Judge Scheindlin's removal, and the outpouring of criticism it prompted,[69] reinforce the conclusion that "sua sponte decision of new issues has been subject to the gorilla rule of unbridled discretion."[70] This section examines sua sponte actions by intermediate appellate courts in order to show the consequences of the Gorilla Rule: wasted judicial resources, the appearance of untested and erroneous rules of law, and deprivation of litigants' rights to procedural due process.

66. *Cf.* Vestal, *supra* note 65, at 497 ("Unless there is a dissenting opinion noting the fact, only the attorneys for the litigants will be aware that the court has decided the case on issues not argued to the court.") (footnote omitted).

67. 93 A.D.3d 812 (N.Y. App. Div. 2012).

68. *Id.* at 815 (discussing reasons for change of venue to be effected on remand); Amended Notice of Motion for Reargument, or, in the Alternative, for Leave to Appeal to the Court of Appeals at 20 n.4, 25, Clark v. Clark (N.Y. App. Div. 2012) (Nos. 2010-2634 & 2010-8959) (on file with author Offenkrantz, who represented the defendant/appellant in *Clark*); *see also* Misicki v. Caradonna, 909 N.E.2d 1213, 1218 (N.Y. 2009) ("For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play. We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made.").

69. *See supra* notes 1–10 and accompanying text.

70. Miller, *supra* note 12, at 1288 (footnote omitted).

A. Appellate Courts Acting Sua Sponte Can Waste Resources, Cause Confusion, and Create Bad Law

1. Anastasoff v. United States[71]

One argument against sua sponte actions is that they are "an inefficient use of judicial resources,"[72] as exemplified by *Anastasoff*, in which a taxpayer sought a refund for overpayment of federal income taxes. The IRS denied the claim as untimely under *Christie v. United States*,[73] an unpublished opinion in which the Eighth Circuit had earlier "rejected precisely the same legal argument."[74] Anastasoff contended that *Christie* was not binding because unpublished opinions were not precedential under Eighth Circuit Rule 28A(i).[75]

The Eighth Circuit sua sponte declared that the relevant portion of Rule 28A was unconstitutional,[76] applied *Christie* to the facts of *Anastasoff*, and affirmed the district court's denial of the claim.[77] The *Anastasoff* court noted that *Weisbart v. Department of the Treasury*,[78] a then-recent Second Circuit decision "appear[ed] to conflict with *Christie*,"[79] but declined to take a stance on whether it would follow *Weisbart* if "not for the

71. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

72. Milani & Smith, *supra* note 13, at 286 n.213 (quoting Eric D. Miller, Note, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?* 65 U. CHI. L. REV. 1029, 1050 (1998)). Milani & Smith provide an excellent detailed analysis of the *Anastasoff* case and its subsequent history. *Id.*

73. 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20. 1992) (per curiam).

74. *Anastasoff*, 223 F.3d. at 899. The relevant statute limited refunds to taxes paid within the three years prior to the filing of a claim. Although Anastasoff mailed her claim within the three-year period, it "was received and filed three years and one day after she overpaid her taxes." *Id.*

75. *Id*.

76. *Id.* at 899–900 (noting that the law as declared in the decisions made by federal courts "must be applied in subsequent cases to similarly situated parties," and that Rule 28A(i) "purport[ed] to expand the judicial power beyond the bounds of Article III," making it unconstitutional); *see* Milani & Smith, *supra* note 13, at 286 n.213 (noting that the constitutionality of the rule had not been raised by either side).

77. *Anastasoff*, 223 F.3d at 905.

78. 222 F.3d 93 (2d Cir. 2000).

79. *Anastasoff*, 223 F.3d at 905 n.15.

conclusive effect of *Christie*."[80] The *Anastasoff* court never asked for briefing on the potential impact of *Weisbart*.[81]

On rehearing en banc, the Eighth Circuit vacated its decision as moot after the IRS paid Anastasoff's claim and announced its "acquiescence . . . in the rule of *Weisbart* . . . and . . . abandonment of its previous position based on *Christie*."[82] Thus, "[t]o put it bluntly, the Eighth Circuit's sua sponte decision on the precedential value of unpublished opinions in *Anastasoff* was an enormous waste of judicial resources."[83]

2. R & J Holding Co. v. Redevelopment Authority of County of Montgomery[84]

Another sua sponte appellate court action appears in *R & J Holding*, which arose out of a vacated eminent domain proceeding first filed in 1996[85] and eventually settled in 2014.[86] R & J successfully resisted the condemnation in state court, asserting that the Authority had unlawfully delegated eminent domain power to a developer.[87] R & J and a related party later

80. *Id.*

81. *See* Milani & Smith, *supra* note 13, at 286 n.213.

82. Anastasoff v. United States, 235 F.3d 1054, 1055–56 (8th Cir. 2000) (en banc).

83. Milani & Smith, *supra* note 13, at 286 n.213. Milani and Smith argue that "*Anastasoff* shows that courts should consider the efficient use of judicial resources before issuing sua sponte decisions." *Id.* It should be noted, however, that some types of sua sponte actions, such as those on jurisdictional grounds, can help conserve judicial resources. *See* Baker v. Director, U.S. Parole Comm'n, 916 F.2d 725, 726 (D.C. Cir. 1990) (suggesting that "enforce[ing] a strict notice requirement with regard to sua sponte dismissals . . . and mandate[d] reversal for noncompliance with procedural steps dictated by the court" if the plaintiff has failed to state a valid claim "can only lead to a waste of judicial resources"); *but cf.* Hogan v. Consolidated Rail Corp., 961 F.2d 1021, 1027 (2d Cir. 1992) (Pratt, J., dissenting) (opining that dismissal of appeal on jurisdictional grounds wasted judicial resources because it would "likely require two full, virtually identical trials in the district court").

84. 670 F.3d 420 (3d Cir. 2011).

85. *Id*. at 423–24 (summarizing history and characterizing case as "the latest action in a long series of disputes").

86. *See* Order at 1, *R & J Holding Co. v. Redev. Auth.* (E.D. Pa. Sept. 30, 2013) (No. 06-1671) (directing mediation on remand after appeal). Author Offenkrantz was counsel to the developer defendants in *R & J Holding*, which was settled after this order sent the parties to mediation.

87. *Id.* at 424–25 (noting that agreements between Authority and developer "provided that Authority could initiate condemnation proceedings . . . only when directed to do so," and referring to state-court finding that Authority had given developer "power to determine whether and when to condemn").

unsuccessfully sued the developer and the Authority in federal court, asserting a Fifth Amendment takings claim that was dismissed on jurisdictional grounds as not yet ripe.[88] In further proceedings seeking damages against only the Authority, they filed inverse-condemnation proceedings in state court,[89] but purported at trial and on appeal to "reserve" their Fifth Amendment takings claims for federal court.[90] After nearly ten years of litigation, the state court eventually held that R & J was not entitled to compensatory damages.[91]

R & J brought the reserved takings claim to federal court, where the defendants asserted that it was barred and moved to dismiss.[92] R & J argued that good-faith reliance on *England v. Louisiana State Board of Medical Examiners*[93] should allow the claim to survive,[94] but the court noted that R & J knew that the claim could have been raised in state court, and granted the motion to dismiss.[95] On appeal, a sharply divided Third Circuit conducted its own research into claim splitting under state law instead of either certifying the question to the Pennsylvania Supreme Court or requesting supplemental briefs, and held that the plaintiffs' attempted *England* reservation "provided notice to

88. R & J Holding Co. v. Redev. Auth., No. Civ.A. 02–CV–09530–L, 2003 WL 22387034, at *3–*6 (E.D. Pa. 2003 Oct. 15, 2003).

89. *See* Brief of Appellees and Cross Appellants at 2, R& J Holding Co. v. Redev. Auth., 885 A.2d 643 (Pa. Commw. Ct. 2005) (Nos. 0217 CD 2005 & 0352 CD 2005) [hereinafter Appellee/Cross Appellant Brief]. They lost again. *See R & J Holding*, 885 A.2d at 647 (holding that "[p]laintiffs are not entitled to the damages they seek").

90. *See, e.g.*, Appellee/Cross Appellant Brief, *supra* note 89, at *3 n.1 ("Plaintiffs reserve their right . . . to pursue any claims under the Takings Clause . . . in the federal court.").

91. *R & J Holding*, 670 F.3d at 426 (noting that the state court "held that the [state statute] does not entitle a prevailing condemnee to compensatory damages").

92. *Id*.

93. 375 U.S. 411 (1964).

94. R & J Holding Co. v. Redev. Auth., 2009 WL 4362567, at *6–*7 (E.D. Pa. Dec. 1, 2009) (acknowledging R & J's reliance on *England*, but characterizing federal takings claim as indistinguishable from takings claim raised and decided in state court), *rev'd*, *R & J Holding*, 670 F.3d 420, 433 (holding plaintiffs "entitled to a federal forum for their federal claims").

95. *R & J Holding*, 2009 WL 4362567 at *6, *7 n.6 (stating that "[p]laintiffs are attempting to re-litigate their takings claim under the federal Constitution—a claim that is not distinct from that litigated under Pennsylvania's state Constitution—by claiming an *England* reservation," and characterizing purported *England* reservation as a "nullity" because "[a]bsent . . . underlying jurisdiction in federal court, there was no basis upon which to invoke a reservation").

Defendants of Plaintiffs' intent to split their state and federal claims"; that "Defendants' failure to object constitute[d] implied consent under Pennsylvania law";[96] and that privity bound the developer defendants to the Authority's silent acquiescence in that action.[97]

This sua sponte action by the Third Circuit had real-life consequences. It endorsed second-bite proceedings likely to "deplete the already scarce . . . resources available to cash-strapped state and local governments," which is likely to "frustrate government planning efforts and community development" and "chill appropriate land-use regulation by states, counties, and local municipalities."[98]

3. Poyner v. Loftus[99]

Appellate courts acting sua sponte and without the benefits of the adversarial system can and do make serious errors about their jurisdiction's own laws too, as typified by *Poyner*. The plaintiff, a legally blind man, suffered injuries when he fell from

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96. *R & J Holding*, 670 F.3d at 428–29.

97. *Id.* at 428 n.5 (concluding that "[e]ither they are in privity and are bound by the Authority's implied consent, or they are not in privity and lack standing to assert the defense of claim preclusion"), 428–29. Yet the plaintiffs' opening appellate brief did not assert that the R & J defendants consented to a reservation and no developer defendant was a party to any proceeding in which an *England* reservation was claimed. *See* Brief for Appellants at 29–30, R & J Holding Co. v. Redev. Auth., 670 F.3d 420 (3d Cir. 2011) (No. 10-1047), 2010 WL 3048269, at *29–*30; Appellee/Cross Appellant Brief, *supra* note 89, at *3 n.1, *4–*5 (reserving federal takings claim and describing procedural history); *see also* Robert H. Thomas, *Recent Developments in Regulatory Takings*, 45 URB. LAW. 769, 798 (2013) (critiquing decision).

98. Motion for Leave to File Brief and Brief for Natl. League of Cities, et al. as Amici Curiae Supporting Petitioners at 11, Redev. Auth. v. R & J Holding Co., ___ U.S. ___, 132 S. Ct. 2792 (2012) (No. 11-1234). It also created a circuit split. *Compare R & J Holding*, 670 F.3d at 428 ("Regardless of whether Plaintiffs' statement was valid as an *England* reservation, it provided notice to Defendants of Plaintiffs' intent to split their state and federal claims." (citation omitted)), *with, e.g.*, Edwards v. City of Jonesboro, 645 F.3d 1014, 1020 (8th Cir. 2011) ("Edwards did not avoid claim preclusion through the reservation of federal rights . . . filed in the state-court action [because] there is no exception to the full faith and credit statute under which property owners may reserve their federal rights for a later federal suit. . . . [A]nd it follows that Edwards's claims are precluded." (citations omitted)).

99. 694 A.2d 69 (D.C. 1997). Milani and Smith discuss this case in detail, using it as an example of the sort of mistake that can occur when an appellate court decides an issue sua sponte. *See* Milani & Smith, *supra* note 13, at 259–61.

an elevated walkway.[100] The plaintiff was using neither a seeing-eye dog nor a cane.[101] The defendants moved for summary judgment, arguing among other things that the plaintiff "had been contributorily negligent as a matter of law."[102] The trial court granted the defendants' motion, "conclud[ing] that this was one of those rare cases in which contributory negligence—a defense with respect to which the defendants had the burden of proof—had been established as a matter of law."[103]

On appeal, the plaintiff argued that "it is reasonable *for a legally blind person* . . . as a response to his name being called, [to] turn towards the direction of his caller, reach for the handle and continue his step towards the door."[104] The D.C. Court of Appeals sua sponte broadened this specific question of reasonable behavior into the more general question of whether "on account of [the plaintiff's] visual impairment, his conduct should be tested against a different standard of care."[105] Examining the issue sua sponte and finding no controlling caselaw,[106] the court applied a rule from other jurisdictions holding a blind person contributorily negligent as a matter of law if he was not walking with either a guide dog or a cane, and consequently affirmed the defendants' motion for summary judgment.[107] But the court completely ignored the fact that the District of Columbia had passed a "white cane law," stating that a blind person's failure to use a cane or guide dog could not be

100. *Poyner*, 694 A.2d at 69–70 (summarizing facts).

101. *Id.* at 70, 73.

102. *Id.* at 70.

103. *Id.* at 71 (paraphrasing conclusions of trial court).

104. *Id.* (quoting the appellant) (emphasis in original).

105. *Id.*; Milani & Smith, *supra* note 13, at 260 (reporting that, "[f]rom this argument, the appellate court raised a more general issue that was neither raised nor argued by the parties"). The court noted that "[t]he parties have cited no authority on this issue." *Poyner*, 694 A.2d at 71.

106. *Poyner*, 694 A.2d at 71 ("The parties have cited no authority on this issue, and we have found no applicable case law in the District of Columbia.").

107. *Id.* at 72–73 (considering Smith v. Sneller, 26 A.2d 452 (Pa. 1942), a case in which the Supreme Court of Pennsylvania addressed a situation similar to that in *Poyner*); *accord* Milani & Smith, *supra* note 13, at 260.

used as evidence of contributory negligence, in 1972—a full twenty-five years before *Poyner* was decided.[108]

B. Courts Making Sua Sponte Decisions Can Also Deprive Litigants of Procedural Due Process

The due process implications of sua sponte appellate court decisionmaking have been discussed at length by others.[109] However, the importance of procedural due process to litigants, especially those who fall subject to the Gorilla Rule, means that the topic warrants further discussion here. This section thus provides an overview of the issue that will support a discussion of reforms intended to protect procedural due process when courts act sua sponte.

Procedural due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[110] The Supreme Court has held that, in most cases, "a meaningful opportunity to be heard requires that the hearing occur before the decision is made."[111] Appellate court actions are "governmental actions that are subject to these due process guarantees."[112]

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108. Milani & Smith, *supra* note 13, at 260–61 (describing the history of white-cane laws, quoting the relevant statute, and noting that the statute "is not discussed or even cited in the *Poyner* opinion, which suggests that the court completely overlooked it").

109. *See, e.g.*, Milani & Smith, *supra* note 13, at 262–71; Miller, *supra* note 12, at 1289–96.

110. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *accord.* Milani & Smith, *supra* note 13, at 263; Miller, *supra* note 12, at 1289–90; *see also* Lachance v. Erickson, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard." (citation omitted)); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." (citations omitted)).

111. Miller, *supra* note 12, at 1289. The Court has in fact "put the judicial thumb firmly on the side of predeprivation court hearings before a seizure." *Id.* at 1290 (discussing United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993)).

112. Milani & Smith, *supra* note 13, at 263; *see also* Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930) ("The violation [of the Due Process Clause of the Fourteenth Amendment] is none the less clear when [a] result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial . . . branch of government." (citation omitted)); *cf.* Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot., 560 U.S. 702, 714 (2010) (plurality opinion) (noting, in a takings-clause case, that "[o]ur precedents provide no support for the proposition that takings effected by the judicial

Appellate courts contravene due process protections when they decide substantive issues sua sponte, because in doing so they can deprive a party of life, liberty, or property without giving notice or allowing a meaningful opportunity to be heard on the dispositive issues.[113] Indeed, many commentators,[114] as well as state[115] and federal courts,[116] take this position. The Supreme Court has not directly addressed the issue of whether sua sponte appellate court decisions violate due process,[117] but it has addressed related points.[118]

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branch are entitled to special treatment, and in fact suggest the contrary" (citation omitted)).

113. Milani & Smith, *supra* note 13, at 263; *see* Miller, *supra* note 12, at 1290.

114. *See, e.g.*, Milani & Smith, *supra* note 13, at 262–71 (arguing that appellate court sua sponte decisions are "inconsistent with fundamental principles of due process"); Miller, *supra* note 12, at 1297 ("The Court's analyses in *Mathews v. Eldridge* and *United States v. James Daniel Good Real Property* are fully applicable to sua sponte appellate decisions."); Douglas L. Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653, 694 (2006) ("Deciding 'new' issues not briefed and fully argued is inconsistent with guaranteeing fundamental due process and fairness to litigants and interested parties." (citation omitted)); *see also* D. Scott Crook, *Affirming the Untested—Affirming a Trial Court Based on Issues Raised Sua Sponte*, 14 UTAH B.J. 10, 12 (Oct. 2001) (arguing that appellate courts should "unequivocally prohibit *sua sponte* consideration of issues not raised below" outside of limited exceptions); Vestal, *supra* note 65, at 493 ("When the appellate court considers a matter sua sponte for the first time, it means that the litigants have not been given an opportunity to consider the matter and urge arguments in support of and against the position adopted by the reviewing court.").

115. *See, e.g.*, *Blumberg Assocs*., 311 Conn. at 848 (stating that a threshold requirement when a reviewing court raises an issue sua sponte is that "the parties are given an opportunity to be heard on the issue"); Turner v. Flournoy, 594 S.E.2d 359, 362 (Ga. 2004) ("[T]he parties are blind-sided when an appellate court reaches an issue on its own motion. They have no inkling that the court even thought about such an issue until they receive and read the court's opinion. That is not fair."); *Curry*, 931 P.2d at 1136–37.

116. *See, e.g.*, Perez v. Ortiz, 849 F.2d 793, 798 (2d Cir. 1988) (holding that district court committed reversible error when it dismissed claims sua sponte "without giving plaintiffs notice and an opportunity to be heard"); Stewart Title Guar. Co. v. Cadle Co., 74 F.3d 835, 836 (7th Cir. 1996) (per curiam) ("We have found that *sua sponte* dismissals without [notice of the court's intent to do so and an opportunity to respond] conflict with our traditional adversarial system principles by depriving the losing party of the opportunity to present arguments against dismissal and by tending to transform the district court into a proponent rather than an independent entity." (citations and internal quotation marks omitted)).

117. Milani & Smith, *supra* note 13, at 263–64; Miller, *supra* note 12, at 1290. *Brinkerhoff-Faris* may be the case that "most closely addresses" this issue, and it "did not hold that sua sponte decisions by appellate courts generally violate due process." Milani & Smith, *supra* note 13, at 264 n.99.

118. *E.g.*, Miller, *supra* note 12, at 1290–93 (discussing cases).

In *Mathews v. Eldridge*,[119] the Court laid down a three-factor test for determining the amount of due process required in a particular situation. The factors are (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[120]

Applying the *Mathews* factors to sua sponte appellate court decisions compels the conclusion that they can violate due process. Parties have a strong private interest in the result of litigation, and a sua sponte decision denies them the opportunity to pursue this interest.[121] As *Poyner* demonstrates, a court acting sua sponte has a higher probability of reaching an erroneous result because it must make a decision without the benefit of the litigants' views.[122] Providing notice and an opportunity to be heard when raising an issue sua sponte—by, for example, ordering supplementary briefing—would not substantially increase the fiscal and administrative burden on the court. Indeed, cases like *Anastasoff* suggest that it might lead to a decreased use of judicial resources.[123]

Also apposite is *Nelson v. Adams USA, Inc.*,[124] in which the Court held that a district court violated due process when it "added a defendant and entered judgment without giving the defendant an opportunity to file a responsive pleading."[125] The Court further stated that the "opportunity to respond" is

119. 424 U.S. 319 (1976).

120. *Id.* at 335 (citation omitted).

121. Miller, *supra* note 12, at 1290.

122. *Id.*; *see supra* notes 99–108 and accompanying text; *see also Turner*, 594 S.E.2d at 362 ("[W]hen we decide an issue sua sponte, we invite error because the issue has not been fleshed out fully; it has not been researched, briefed and argued by the parties.").

123. *See generally supra* notes 71–83 and accompanying text (discussing *Anastasoff*).

124. 529 U.S. 460 (2000).

125. Miller, *supra* note 12, at 1291–92 (analyzing *Nelson*); *see also Nelson*, 529 U.S. at 471 (pointing out that "judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated").

"fundamental to due process,"[126] and that "a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served."[127] Appellate courts' sua sponte decisions are analogous to the district court's amended judgment in *Nelson* and therefore also violate due process,[128] because,

> [j]ust like the defendant in *Nelson*, the losing party in an appeal decided sua sponte only learns of the legal theory deemed controlling by the court when judgment is entered and never has an opportunity to rebut the court's reasoning on whether, or how, that theory should apply.[129]

V. RECOMMENDED CHANGES

Something must be done in order to both mitigate the negative consequences associated with sua sponte decisions and provide litigants with stronger due process protections. At the same time, any solution must take into account the fact that there are instances in which sua sponte actions may be warranted.[130]

The authors first propose, in the interest of aiding accountability, that courts should state when they act sua sponte. Courts very rarely reveal in their opinions when they act sua sponte.[131] Indeed,

> [w]hen an appellate court decides a case upon matters not urged by the litigants in that court, it may simply avoid mention of the shift in the basis . . . . Unless there is a dissenting opinion noting the fact, only the attorneys for the

126. *Nelson*, 529 U.S. at 466.

127. *Id.* at 467.

128. Milani & Smith, *supra* note 13, at 270.

129. *Id.* at 270; *see also* Vestal, *supra* note 65, at 493 (pointing out that sua sponte action "means that the litigants have not been given an opportunity to consider the matter and urge arguments in support of and against the position adopted by the reviewing court").

130. It is, for example, widely accepted that courts have the power to raise sua sponte subject matter jurisdiction and similar "prudential issues that are related to the courts' power to act and related issues such as standing, capacity, and ripeness." Miller, *supra* note 12, at 1280.

131. Milani & Smith, *supra* note 13, at 313–14 (noting that "most courts that raise issues sua sponte neither declare that they are doing so nor attempt to justify making a decision without input from the parties," and that "a study of 112 decisions issued by a state supreme court during a one-year period showed that sixteen of the opinions ruled on issues not raised by the parties, but only three of the cases (two majority and one dissenting opinion) mentioned this") (footnote omitted).

> litigants will be aware that the court has decided the case on issues not argued to the court.[132]

This raises a serious conundrum in light of both the Court's indication in *Hohn* that decisions reached without full briefing and argument have a lower precedential value than others and Justice Souter's concurrence in *Church of the Lukumi* suggesting that such decisions may not be fully precedential.[133] Parties (or, indeed, courts raising an issue sua sponte) will have trouble arguing that a sua sponte decision should be entitled to less precedential weight if they have no indication that the decision was made sua sponte.[134] This article's first recommendation therefore is that appellate courts should explicitly note in their opinions when they decide an issue sua sponte.[135]

Because there are serious procedural due process concerns when a court raises and decides issues sua sponte, the parties must receive notice and an opportunity for comment when it occurs. Yet *Singleton* and *Exxon Shipping* indicate the Supreme Court's continued desire to give courts broad discretion to raise issues sua sponte. The authors believe that the best way to provide stronger due process protections to parties, reduce the frequency of errors, and keep the judicial system operating squarely within the adversarial model without overly cabining appellate courts' discretion, would be amending the Federal Rules of Appellate Procedure[136] to provide that

> [n]o Judgment or Order of a District Court appealed to a Court of Appeals shall be reversed, affirmed, or modified by the Court of Appeals on grounds other than those

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132. Vestal, *supra* note 65, at 497 (footnote omitted).

133. *Supra* notes 44–56 and accompanying text.

134. *See* Milani & Smith, *supra* note 13, at 307, 313 (urging litigants to assert that sua sponte decisions should be given lesser deference, and noting that "[c]ounsel will only be able to argue that a sua sponte decision is entitled to less weight as precedent if they know the case was decided in that manner").

135. Milani and Smith argue that, if appellate courts do not do so, then "dissenting and/or concurring judges and justices should indicate this in their opinions." Milani & Smith, *supra* note 13, at 314–15.

136. *Cf.* Fed. R. App. P. 32.1, advisory comm. note (indicating that Rule 32.1, which had no predecessor in the Rules, was adopted to "address[] the citation of judicial opinions . . . that have been designated by a federal court as 'unpublished'"). That Rule replaced inconsistent local standards regarding the citation of unpublished or non-precedential opinions. *Id.* The addition proposed here would encourage uniformity among the federal courts of appeals by filling a similar gap in the Federal Rules of Appellate Procedure.

> briefed or argued by the parties, without affording the parties the opportunity to address the issue in such manner as the Court of Appeals deems appropriate.[137]

A court could satisfy a rule of this type, and thus safeguard due process, in one of several ways. One widely endorsed method is to require supplemental briefing. The Supreme Court indicated in *Trest* a preference for supplementary briefing when an appellate court raises a new issue sua sponte.[138] Numerous state courts and federal appellate courts have endorsed the use of supplemental briefing as well.[139]

Ordering supplemental briefing when raising an issue sua sponte should be the norm, as it would provide significantly stronger due process protections than would an appellate court simply issuing a decision sua sponte. By definition,

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137. Professor Martineau proposed a more general rule that "an issue not originally raised in the trial court [should] be raised on appeal if, under the law of the jurisdiction, the issue could be a basis for relief long after the judgment is final." Martineau, *supra* note **, at 1060. That proposed rule has influenced some courts considering when to raise an issue sua sponte. *See, e.g.*, Essinger v. Liberty Mut. Fire Ins. Co., 534 F.3d 450, 453 (5th Cir. 2008) ("We do not adopt [Martineau's] rule here, but we find a proposed requirement for such a system to be useful in our evaluation: the matter upon which relief is sought was not known and could not reasonably have been known in time to be raised at trial." (internal quotation marks and citation omitted)). It may be argued that, in the absence of a rule or a definitive decision, there would be nothing to prevent a federal appellate court from acting sua sponte. *See generally* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014) (discussing sua sponte action in context of assessing relative power of parties and courts to control litigation). Professor Sloan raised the desirability of enacting rules that formalize and clarify the standards governing informal en banc review. Sloan, *supra* note 12, at 764–71. Similarly, other commentators have advocated adopting a local rule in the Second Circuit that would set forth the mini en banc procedure, and provide notice to the litigants when mini en banc review is initiated, thereby avoiding sua sponte action by the court. Witzel & Groner, *supra* note 12, at 8.

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

139. *See, e.g.*, Kannikal v. Att'y Gen., 776 F.3d 146, 149 (3d Cir. 2015) (justifying raising an issue sua sponte by noting that the court "ordered two rounds of supplemental briefing" and discussed the matter not raised below "extensively at oral argument"); Planned Parenthood of Kan. and Mid-Mo. v. Moser, 747 F.3d 814, 837 (10th Cir. 2014) (noting that "it would have been better if we had requested supplemental briefing" in a prior case); United States v. Godbolt, 345 F. App'x 881, 882 (4th Cir. 2009) (holding that district court did not abuse its discretion when it added a sentencing enhancement sua sponte because it allowed the parties to provide supplemental briefing); Thomas v. Crosby, 371 F.3d 782, 802 (11th Cir. 2004) (indicating that the "preferred method" includes "requesting supplemental briefing from the parties and permitting oral argument" (citing Milani & Smith and Miller)); *Blumberg Assocs.*, 311 Conn. at 867–69; *Turner*, 594 S.E.2d at 362 n.2 ("At the very least, the parties should be given an opportunity to brief an issue which this Court decides sua sponte.").

supplemental briefing gives litigants an opportunity to be heard on an issue, and is thus fair to all parties.[140] Supplemental briefing also reduces the possibility of error because the court has the benefit of the parties' views.[141] By any analysis, supplemental briefing would not "substantially impair a court's interest in efficiency."[142]

An alternative including similar due process protections would be remanding an issue raised sua sponte for resolution by the lower court,[143] which is arguably the only approach "fully consistent with the usual rule that issues not raised below will not be considered on appeal."[144] Furthermore, the district court "may have useful light to shed on the issue."[145]

A third option is for federal courts of appeals to certify questions of state law which have been raised sua sponte. Most states allow at least some federal courts to certify a question to the state's highest court "to avoid the often difficult and time-consuming process of researching and predicting the outcome of unresolved state law questions."[146] Parties may request

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140. *Cf.* Miller, *supra* note 12, at 1297 (arguing that "the principles of fairness" upon which due process is based indicate that "[a]n appellate court should always ask for the parties' submissions before ruling") (footnote omitted).

141. *See id.* at 1290 (pointing out that sua sponte decisions "increase the possibility for error by a court because the court does not have the benefit of the parties' views").

142. *Id.*

143. *Id.* at 1300; *see, e.g.*, City of Pontiac Retired Emps. Ass'n v. Schimmel, 726 F.3d 767, 772–73 (6th Cir. 2013) (noting that the parties failed to raise two obvious issues, refusing to decide them because "the parties failed to develop these issues sufficiently for our review," and choosing remand as "the best course of action"), *appeal after remand*, 751 F.3d 427 (6th Cir. 2014) (per curiam).

144. Miller, *supra* note 12, at 1300; *see also Singleton*, 428 U.S. at 120 (noting that Singleton had "never been heard in any way on the merits of the case").

145. Miller, *supra* note 12, at 1300.

146. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 158–59 (2003) (collecting relevant state laws); *accord* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1689–90 (2003) (discussing "pure diversity cases in which unsettled questions of state law are presented, no substantial state interests are implicated, and no issue of federal law lurks, for which certification may be justified" (footnote omitted)). Some state certification procedures allow only certain federal courts to certify questions. Nash, *supra* this note, at 1690 n.74 (analyzing various situations). Only North Carolina does not accept certified questions from at least some federal courts. *See* Cochran, *supra* this note, at 159 n.13 (noting that in 2003, only "Arkansas, New Jersey, and North Carolina [had] no state law certification procedures"); *see also, e.g.*, ARK. R. S. CT. & ARK. CT. APP. 6-8 (allowing certified questions from "a federal court of the United States"); N.J. CT. R. 2:12A-1

certification, but federal courts have the power to invoke certification without being asked to do so, having "final discretion over whether or not to employ certification."[147] But state high courts have the discretion to accept or reject certified questions.[148] "[M]odern federal courts generally agree that they are bound to follow state court responses to certified questions."[149] Some federal courts of appeals, notably the Second Circuit, routinely certify questions to state high courts.[150]

(allowing certified questions from Third Circuit). *Compare R & J Holding*, 670 F.3d at 428 (noting that court's decision "relies solely on [its] interpretation of Pennsylvania claim preclusion law," and indicating court's assessment that "failure to object constitutes implied consent under Pennsylvania law" and its conclusion that claim splitting was permitted under Pennsylvania law) *with* Centurion Props. III, LLC v. Chi. Title Ins. Co., 793 F.3d 1087, 1092 (9th Cir. 2015) (certifying question to Washington Supreme Court) *and* Mendoza v. WIS Int'l, Inc., 2015 Ark. 321 (Ark. 2015) (accepting certified question from federal court in Arkansas).

147. Nash, *supra* note 146, at 1692. Federal courts "will consider numerous factors" when deciding whether to certify a question, in particular "the degree to which state law on the issue in question is unclear and difficult to predict," and the "posture of the parties." *Id.* at 1692 n.77. To use *R & J Holding* as an example, given Pennsylvania's stated policy against claim splitting unless the parties and the court "agree on that method of adjudicating the action," Keystone Bridge Corp. v. Lincoln Sav. & Loan Ass'n, 360 A.2d 191, 196 n.10 (Pa. 1976); *see also* Turner v. Crawford Square Apartments III, 449 F.3d 542, 551 (3d Cir. 2006) (noting Pennsylvania courts' "long-standing disapproval of claim splitting"), the question of what constitutes permissible claim splitting and acquiescence in a split—and the coordinate question of what constitutes objection and court approval—would have been appropriate for certification to the Supreme Court of Pennsylvania.

148. Nash, *supra* note 146, at 1693; *see also* Cochran, *supra* note 146, at 169–70 (noting that, of fifty-five cases "certified to and addressed by" the Ohio Supreme Court between July 1, 1988, and Dec. 31, 2001, it "resolved nine by dismissal, declined to answer ten, and issued an order or opinion in answer to thirty-six").

149. Nash, *supra* note 146, at 1695 (citation omitted). The Supreme Court specifically endorsed the certification procedure in Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960), complimenting the Florida Legislature for its "rare foresight" in enacting a certification statute. *Id.*

150. Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 392, 397, 397 n.143 (2000) (noting passage of certification law in 1986, indicating that the Second Circuit certified forty-four questions to the New York Court of Appeals between 1986 and 2000, and pointing out that, while the average number of questions certified by the federal courts of appeals between 1990 and 1994 was 14.8, the Second Circuit certified thirteen questions over that period to the New York Court of Appeals alone); *cf.* Gregory L. Acquaviva, *Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN ST. L. REV. 377, 400 (2010) (noting that the Third Circuit had certified eleven cases to the Supreme Court of Pennsylvania between 2000 and 2010).

Certification of a question raised sua sponte provides significantly more due process protection to litigants than does making a decision sua sponte, and is thus preferable to it. When a state court accepts a question, the parties have the opportunity to brief and argue the issue before that court.[151] There is no possibility for the court to reach an erroneous result—indeed, it is paradoxical that the highest court of a state, often said to be "the definitive authority of the law of that state,"[152] could ever erroneously interpret its own state's laws.[153] Although it would arguably take longer to reach a resolution through use of the certification process,[154] certification appears to provide far more due process protection than does issuing a decision sua sponte. The federal courts of appeals should in consequence consider certifying questions of state law that they raise sua sponte.[155]

VI. CONCLUSION

In this era when Justices of the Supreme Court invite cases posing issues that they would like to hear,[156] when appellate courts' raising issues not presented by the parties is common practice,[157] and when appellate courts feel the obligation to "get

151. Nash, *supra* note 146, at 1744 ("Attorneys for the parties submit briefs to and present arguments before the state court.") (footnote omitted).

152. *Id.* at 1680.

153. But it is of course possible for a state high court to make a mistake by, for example, inadvertently overlooking relevant state law. *See, e.g.*, text accompanying notes 100–08, *supra* (discussing *Poyner*).

154. The authors could find no studies comparing the temporal and financial costs of using the certification process with those incurred when the court to raise the issue decides it sua sponte. Although "certification costs, both temporal and monetary, are not insignificant," only "a minority of commentators suggests that the procedure's costs outweigh its benefits" in a more general context. Nash, *supra* note 146, at 1697; *see also* Jeffrey G. Weil & Lezlie Madden, *3rd Circuit Case Illustrates Certification Procedure's Efficiency*, 242 LEGAL INTELLIGENCER 5 (July 9, 2010) ("[C]ertification provides parties the opportunity to save . . . substantial legal fees. [It is also] an efficient use of state resources both financially and with regard to judicial economy.").

155. The authors take no position on the merits of certification in this context versus those of ordering supplemental briefing or remanding to the trial court level. They acknowledge, however, that certification would not be available in nearly as many instances as would ordering supplemental briefing. *See supra* notes 138–42 and accompanying text.

156. *See* Liptak, *supra* note 57.

157. *See, e.g.*, Kontorovich, *supra* note 52, and accompanying text (analyzing *Kiobel*).

it right" irrespective of the parties' arguments, suggestions of judicial activism have become commonplace.[158] This perception is exacerbated by the Supreme Court's jurisprudence on sua sponte appellate court actions, and the continued application of the Gorilla Rule.[159]

"Blindsided" is not a word ordinarily heard in the context of appellate review. But it is precisely the assertion sometimes made by the aggrieved party (or, in the case of Judge Scheindlin, a federal judge) when an appellate court raises and decides matters sua sponte. This startling situation suggests that the bench and bar should work to mitigate the negative effects of sua sponte actions, to afford procedural due process to all parties, and to provide notice to those who later rely on cases decided by appellate courts acting sua sponte.

Respect for the appellate process requires no less.

158. *See, e.g.*, DAMON ROOT, OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT 8 (2014) (arguing that there is today a "long war between judicial restraint and judicial action" that "cuts across the political spectrum in surprising ways"); *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RESEARCH CTR. (July 29, 2015), http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction (discussing in depth popular perception of Supreme Court, including belief that few Justices set aside their political views when deciding cases); *see generally* LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION (2015) (discussing in detail recent Roberts Court rulings of political importance).

159. *See supra* notes 26 & 30, and accompanying text.