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APPELLATE COURTS AS FIRST RESPONDERS:  
THE CONSTITUTIONALITY AND PROPRIETY  
OF APPELLATE COURTS' RESOLVING  
ISSUES IN THE FIRST INSTANCE

*Joan Steinman\**

In designing court systems in this country, all of the states and the federal government have created trial courts and one or more levels of appellate courts. Legal professionals, litigants, and the people of this country in general typically conceive of appellate courts as courts of review, courts that review decisions made by trial court judges, by decision makers in administrative agencies, or occasionally by arbitrators. We view it to be the role of trial judges and juries, administrative agencies, and arbitrators—not appellate courts—to make the initial findings of fact, reach the initial conclusions of law, apply the law to the facts in the first instance, and exercise discretion as to issues, raised in the foundational proceeding, whose resolution is not dictated by rules of law. We then see it as the function of courts of appeals acting as such to re-examine fact-findings, conclusions of law, applications of law to fact, and exercises of discretion under appropri-

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ate standards of review.<sup>1</sup> We generally expect courts of appeals to affirm, reverse, or vacate the judgment of lower courts or other tribunals, but not to act as a court of first instance in finding facts, stating the law, or exercising other judicial functions.<sup>2</sup>

Appeals courts sometimes review for clear error, and sometimes review for abuse of discretion. When reviewing agency action they may review for arbitrary and capricious action or for substantial evidence.<sup>3</sup> Even when review is *de novo*, so that the appeals court is

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1 A court that is empowered to decide appeals also may be empowered to exercise "original jurisdiction" over certain kinds of cases. The Supreme Court of the United States and the supreme courts of many states are examples. *See, e.g.*, U.S. CONST. art. III, § 2; KAN. CONST. art. III, § 3; VA. CONST. art. VI, § 1; WASH. CONST. art. IV, § 4; *State ex rel. Att'y. Gen. v. Vail*, 53 Mo. 97 (1873) (holding that the Supreme Court of Missouri has original jurisdiction of an information in the nature of *quo warranto*, whether filed on the relation of a private person or by the attorney general, but also holding that whether it will exercise that jurisdiction in a case involving an information filed by a private party is within the discretion of the court); *State v. Nelson Cnty.*, 45 N.W. 33, 33 (N.D. 1890) ("[I]n the exercise of its original jurisdiction, under section 87 of the state constitution, the supreme court, exercising its jurisdiction, will issue the writs of habeas corpus, mandamus, *quo warranto*, certiorari, and injunction only when applied for as prerogative writs; and where the question presented is *publici juris*, and one affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people."). When a court is hearing a case within its original jurisdiction, it is not functioning as a court of appeals.

2 *Cf.* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 837 n.6 (2000) (explaining that the authors excluded from their study cases within the Court's original jurisdiction "because they are of a fundamentally different nature from the Court's appellate-jurisdiction cases. In original jurisdiction cases, the Court does not 'affirm,' 'reverse,' or 'vacate' another court's judgment but acts instead as a court of first instance and indeed as a factfinder").

3 Commonly, at least in the federal courts, courts of appeals review judges' findings of fact for clear error, judges' conclusions of law *de novo*, judges' applications of law to fact either for clear error or *de novo* depending upon a variety of factors, and judges' exercises of discretion for abuse of discretion, with district court judges being given varying degrees of latitude depending on a variety of factors. Federal appeals courts review juries' findings of fact and applications of law to fact by reference to whether reasonable jurors acting reasonably could have so concluded, administrative decisions in accordance with the standards of review dictated by the Administrative Procedures Act, 5 U.S.C. § 706 (2006), typically looking for substantial evidence to support formal agency fact-finding and guarding against arbitrary and capricious action in informal administrative fact-finding, and reviewing arbitrators' decisions under varying standards of review, depending upon the issue to be reviewed. *See generally* J. ERIC SMITHBURN, *APPELLATE REVIEW OF TRIAL COURT DECISIONS* (2009) (describing appellate standards of review). Much judicial and scholarly writing has been devoted to what these various standards of review mean and should mean, what standard of review ought to be applied to various conclusions, and whether the standard of review even matters. The literature is vast. For preeminent and recent schol-

giving no deference to the lower tribunal's conclusion, that earlier conclusion is being reviewed. The appeals court does not merely announce what a correct understanding of the law is. A lower court has taken the first stab at the issue, and the appeals court concludes that the trial court judge (or other decision maker)<sup>4</sup> either erred or reached the correct, or an acceptable, answer.<sup>5</sup> The appeals court has the benefit of the lower court's thinking and is passing judgment upon the lower court's determination.

We traditionally defend the division of function between trial and appellate courts on functional and institutional grounds. Despite some evidence that our beliefs about the relative superiority of particular decision makers are not always accurate,<sup>6</sup> as a society we generally believe and historically we generally have believed that trial courts—judges and juries—have advantages in making fact findings, so we

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arship, see, for example, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003) (arguing that there is no meaningful difference between questions of law and questions of fact, but that the legal fiction is useful and should be maintained); Debra Lyn Bassett, "I Lost at Trial—in the Court of Appeals!": *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129 (2001); Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975 (2004) (arguing that the Supreme Court should give greater deference than it does to intermediate courts of appeals' interpretations of state law); Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2004) (arguing for greater appellate factfinding in criminal cases where there is a need for greater accuracy); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002) (examining the unpredictable consequences of appellate courts' application of different agency review standards).

4 To avoid awkward and repetitive locutions, I often will say "the trial court judge" when I intend the trial court judge or other prior decision maker.

5 Cf. *McComish v. Bennett*, 611 F.3d 510, 519 (9th Cir. 2010) ("[Review de novo] means that we will look at the case 'anew, the same as if it had not been heard before, and as if no decision previously had been rendered,' and 'giving no deference to the district judge's determinations.'" (quoting *Freeman v. DirectTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006))).

6 See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) ("According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."); *id.* at 1096 ("An appellate court may always be 'in as good a position to decide as the trial court,' in the sense that the traditionally disparaged 'cold record' may be as good a basis for decision, including judgments of credibility, as the trial court's traditionally exalted opportunity to see the witnesses."). Professor Wellborn argues, however, that "[d]e novo review of facts is nevertheless a bad idea, and appellate court rejection of trial court findings should continue to be limited to instances of clear error" in order to maintain confidence in trial courts and avoid appeals. See *id.*

allow appellate courts to review fact-findings but only to avoid severe aberrations, violations of duty, and clear errors that would result in injustice to the parties. We make the review deferential to give effect to our belief that judges and jurors who were firsthand witnesses to the testimonial evidence and arguments usually have a superior ability to accurately find the facts.<sup>7</sup> For reasons of consistency and in deference to trial court experience and expertise in fact-finding, we take the same tack, making review deferential—although perhaps not to exactly the same degree—even when all of the evidence is documentary or is otherwise available to appellate court judges in the same form in which it was presented to the trier of fact. Technological advances that can put appellate judges in shoes that very much resemble those of jurors and trial judges raise questions about whether appellate courts should defer to judges and juries as they traditionally have done, but thus far, and for the most part, appellate courts have remained deferential.<sup>8</sup>

Appellate courts utilize varying degrees of deference when reviewing matters that are within the district courts' discretion, depending on the reasons that discretion is afforded and sometimes based upon other policy considerations.

Finally, appellate judges typically are authorized and expected to review questions of law *de novo* because, as a society, we believe that appellate judges have advantages over trial judges in deciding what the law is or should be. As Professor Chad Oldfather, among others, has recognized, *de novo* review has been thought to be appropriate for questions of law based on beliefs that appellate court judges are

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7 See *Pierce v. Underwood*, 487 U.S. 552, 560 (1988) (stating that a lower court may have insights the record may not convey so that even appellate review of the entire record may not afford an appellate court knowledge equal to that of the trial judge).

8 *Scott v. Harris*, 550 U.S. 372 (2007), is a counter-example. A young motorist brought an action against a county deputy and others, alleging use of excessive force in violation of his Fourth Amendment rights, based upon the deputy having rammed plaintiff's car to end a high-speed chase, thereby causing a crash that made plaintiff a quadriplegic. *Id.* at 375–76. The district court denied the deputy's motion for summary judgment based on qualified immunity. *Id.* at 376. The Eleventh Circuit affirmed, concluding that the deputy's actions could have constituted an unwarranted use of deadly force. *Id.* The Supreme Court viewed a videotape of the chase that had been filed with the trial court. *Id.* at 378–80. The Court found that the facts depicted so blatantly contradicted plaintiff's version of the facts that no reasonable jury could believe plaintiff's version. *Id.* at 380. It announced that, in those circumstances, a court should not adopt plaintiff's version for purposes of ruling on a motion for summary judgment, and, based on the videotape, held that the deputy did not violate plaintiff's Fourth Amendment rights. *Id.* at 380–81.

more competent (than trial judges) to answer questions of law and to formulate new law when necessary.<sup>9</sup> We have reason to believe that three interacting heads are better than one and that appellate court judges will bring more expertise than trial judges to the task of law-making, based both on their greater experience and on advantages that appellate judges enjoy, such as more and better law clerks and greater time to devote to research, contemplation, writing, and editing. Moreover, appellate courts are better positioned in the judicial hierarchy (than are trial courts) to enforce uniformity and improve predictability in the law. But again the norm is that appellate courts address questions of law only *after* a tribunal that is inferior (hierarchically and perhaps qualitatively) has addressed those questions and has given the appellate court an analysis that can inform its own.<sup>10</sup>

Is there any place in our system for appellate courts to rule on issues upon which no inferior court has ruled? In fact, appellate courts, including the United States Supreme Court, sometimes do this. There are, indeed, a surprising number of occasions on which courts of appeals, including the United States Supreme Court, address and decide questions that a trial court judge did not decide. On those occasions, the appellate courts are not reviewing the decision of another tribunal. The Supreme Court has declared that intermediate

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9 Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 327–38 (2009) (discussing the appropriateness of appellate courts' use of the de novo standard of review, marshalling the arguments that others have made in support of universal de novo review of legal questions, including competence-based justifications (namely, three heads are better than one, appellate judges have expertise in deciding issues of law, and appellate courts are structurally advantaged over trial courts), and justifications grounded in appellate courts' supposed superior ability to make law and to assure equality and predictability through the precedent-setting quality of their decisions); *see also* *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) ("Courts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues."); Mark A. Bross, Comment, *The Impact of Ornelas v. United States on the Appellate Standard of Review for Seizure Under the Fourth Amendment*, 9 U. PA. J. CONST. L. 871, 872–73 (2007) (arguing that de novo review is preferable to review for clear error where the constitutionality of a seizure is at issue because of the precedential effects of the decision). Professor Oldfather, however, challenges the conventional wisdom that appellate courts always should review questions of law de novo. *See* Oldfather, *supra*, at 327–56.

10 To the extent that one doubts appellate courts' pervasive superiority in deciding questions of law, one should be that much more skeptical of appellate courts' taking the first stab at legal questions and deciding them with no preference for or deference to trial court determinations of those issues. *See* Oldfather, *supra* note 9, at 330–49.

federal courts of appeals (“IFACs”) have discretion to decide when they will address such issues. For ease of reference, I will describe questions that no inferior court has ruled upon as “new issues” or “new questions.”

This reality raises a great many questions. Preliminarily, there are what one might call definitional lines that need to be drawn. Parties are free to raise, in the appellate court, legal authorities that they did not cite below, without violating any general rule against appellate courts entertaining new issues. The line between new “arguments” or “theories” that may be raised for the first time on appeal without need of an exception to the general rule and new “issues” that may *not* be raised for the first time on appeal without need of an exception to the general rule is less clear.<sup>11</sup> There is no bright line for determining whether a matter was raised below, and there is likely a spectrum from

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11 Aside from the distinctions made in the text, there are other situations in which it might be debated whether a particular question posed on appeal was among the questions decided in the district court or in an intermediate court of appeals before reaching the Supreme Court. I describe just one case for illustrative purposes. In *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), petitioner did not object to a jury instruction but, in motions for summary judgment and for a directed verdict, raised a legal issue concerning the standard for determining municipal liability that also was posed by the jury instruction. *Id.* at 118–21. Given the absence of objection to the jury instruction, the district court did not rule on the propriety of the instruction, but it did rule on the aforementioned motions, and the focus of the petition for certiorari was those rulings. *Id.* The Court commented:

It should not be surprising if petitioner’s arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for cert. Accordingly, we find no obstacle to reviewing the question presented in the petition . . . , a question that was very clearly considered, and decided, by the Court of Appeals. . . . We therefore do not believe that our review . . . will undermine the policy of judicial efficiency that underlies [Federal] Rule [of Civil Procedure] 51.

*Id.* at 120–21 (citation omitted). In dissent, Justice Stevens argued that the Court was permitting a litigant who had lost in a jury trial to advance legal arguments that it did not make in the district court, and that, in its motions in the district court, petitioner had made no argument for any legal standard for municipal liability. *Id.* at 165–66 (Stevens, J., dissenting). Given the procedural history, he thought it unfair to the respondent and poor judicial practice to use this case to reshape a legal landscape. *Id.* at 166; *see also* *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1143 (10th Cir. 2009) (noting that a litigant “may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory, even if the new theory falls under the same general category as an argument presented at trial” (quoting *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721–22 (10th Cir. 1993)) (internal quotation marks omitted)); *United States v. Brown*, 561 F.3d 420, 435 n.12 (5th Cir. 2009) (responding to the government’s argument that the defendants failed to object below

old issues to new issues, rather than the two being polar opposites. Important though these line-drawing problems are, I will not dwell on them in this Article. I will focus on situations in which it is posited that a new issue is proffered.

Beyond this threshold matter, questions one might ask include: Do Article III or Congressional statutes speak to federal appellate authority to address new issues—and, if so, what do they say? What guidance has the Supreme Court given with respect to appellate courts' proper role with regard to new issues? What is the proper role of appellate courts with regard to new issues? When, if ever, is appellate courts' taking the "first stab" appropriate, and why? Do intermediate appellate courts and supreme courts vary in their responses to new questions, depending upon the different ways in which the new issues arise or based upon other parameters? What are those other parameters, and *should* appellate courts' responses vary with them? What do appellate courts' acceptance and decision of new questions say about the roles and capacities of appellate versus trial courts, and about how we design appellate systems? In this Article, I attempt to explore many of these questions and propose some answers.

Introductory Notes address the scope of this Article and of prior literature on aspects of its subject, and distinguish between raising issues and resolving issues. Part I explains the importance of the issues raised here and discusses sequencing theory because of the light it sheds on that importance. Part II explores Article III, Congressional legislation, and pronouncements and decisions by the Supreme Court concerning the power of the Supreme Court and of intermediate federal appellate courts to take the first stab at issues. It also makes the point that the scope of appellate jurisdiction before and after final judgment constrains what new issues appellate courts may hear. Part III shifts the focus from power to judicial discretion and examines the realities in the Supreme Court and in the federal intermediate appellate courts. It categorizes and discusses both cases in which the Supreme Court or IFACs did consider new issues and cases in which the Supreme Court or IFACs declined to consider new issues. In so doing, it categorizes the kinds of issues and the circumstances in which the Supreme Court and IFACS have been inclined to address new issues on appeal and the reasons they have given for declining to do so. Part IV evaluates these realities, exploring the circumstances in which appellate courts should and should not exercise their power to decide issues that were not ruled upon in the district courts. I am

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to provisions of the district court's remedial order in part with the observation that there is no bright-line rule for determining whether a matter was raised below).



interested in seeing how explicitly and how satisfactorily case law addresses the circumstances under which appellate courts will decide issues not decided below. Just as in other areas of the law, case law developed over time ideally should tend toward greater clarity and certainty, as it develops theoretically and practically defensible answers to the questions when appellate courts should decide new issues and when appellate courts should utilize mechanisms to have trial judges or adjuncts to the appellate branch make initial determinations that appellate courts can review. The Article offers a proposal to govern the circumstances under which a new issue should be heard on appeal. It considers whether and when the Supreme Court should have more leeway than IFACs. The Article then concludes.

#### INTRODUCTORY NOTES

*Limits on the scope and aspirations of this Article.* For the most part, I focus upon civil cases, not criminal cases, and I do not address issues raised in connection with petitions for writs of habeas corpus, since they will be affected by the values that affect criminal cases differently than they affect civil cases. Second, I concentrate on the practices of federal appellate courts. Although observations made here may have relevance to state court systems, those systems often are subject to statutory, or even constitutional, dictates that would alter the analysis. Furthermore, although I examine the considerations that affect the decision-making processes in the circuits with respect to new issues, I have not attempted systematically to draw out the differences that exist among the federal circuits in how they approach questions that arise for the first time on appeal. I am painting with a broader brush.

*Prior literature.* There is a considerable scholarly literature concerning some matters and doctrines that come up in this Article. Given the fundamental nature of the questions posed by appellate courts' acting as "first responders," however, there is less scholarly commentary than one might expect on how federal appellate courts should handle questions that either the appellate courts themselves or litigants raise on appeal but that were not decided, and may not have been raised, below. Nonetheless, I am by no means the first commentator to have considered the role of appellate courts with regard to new issues. I will bring in the insights of other commentators as they fit into my analysis, but I want to mention some of the most important prior writings now to suggest the multifaceted nature of "new issues" on appeal.

An early, perhaps the earliest, published exposition addressed to some aspects of the problem was a three-part article published in

1931–33 in the Wisconsin Law Review. In *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved*,<sup>12</sup> Richard V. Campbell delved into how far courts “can relieve a client from the consequences of his attorney’s fault, and consider questions not properly raised and preserved.”<sup>13</sup> And, indeed, such situations—of issues that might have been raised in the trial court but were not, due to a failing of counsel, and that counsel has raised for the first time on appeal—form an important segment of the domain that this Article addresses.

In addition to Professor Campbell’s writing, the two most comprehensive writings concerning new issues on appeal are Professor Robert Martineau’s treatment in *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*<sup>14</sup> and Rhett Dennerline’s student Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*,<sup>15</sup> which critiqued some of Professor Martineau’s positions and offered its own proposals. Later in this Article I will consider the positions of Professor Martineau and Mr. Dennerline. I note here that Professor Martineau limited the scope of his piece to

issues in a civil case that (1) the appellant knew or should have known about; (2) could have been raised in the trial court but were not raised, only because of the act or omission of the complaining party; (3) [the lower court decision of which might] constitute reversible error; [and that] (4) [were] sought to be raised by appellant over the objection of the appellee.<sup>16</sup>

Thus, waiver by the appellant was the focus of Professor Martineau’s work. Beyond the scope of Professor Martineau’s article were the “inability to raise the issue earlier for reasons not attributable to the appellant, new theory to support the judgment, specificity, harmless error, and acquiescence of appellee.”<sup>17</sup> My Article will be broader in its scope.

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12 Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part I*, 7 WIS. L. REV. 91 (1932) [hereinafter Campbell, Part I]; Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part II*, 7 WIS. L. REV. 160 (1932) [hereinafter Campbell, Part II]; Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part III*, 8 WIS. L. REV. 147 (1933) [hereinafter Campbell, Part III].

13 Campbell, Part I, *supra* note 12, at 92.

14 Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987).

15 Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985 (1989).

16 Martineau, *supra* note 14, at 1025 (footnote omitted).

17 *Id.*

A distinguishable aspect of the problem arises when counsel's failure to raise an issue below may not be clearly blameworthy because the issue that counsel seeks to raise for the first time on appeal is one that crystallized only after the trial was over and took shape by virtue of decisions subsequently made in other cases. How much (or how little) fault a court finds with the failure to raise an issue in the trial court may depend on such factors as how unexpected the newly decided proposition of law is and how well-settled to the contrary the law previously was. The mere mention of these factors raises the question whether the degree of counsel's fault in not raising an issue below should matter to an appellate court's willingness to entertain the newly-raised issue. The Article will explore what policies undergird the general rule that reviewing courts will refuse to consider questions presented for the first time on appeal in order to appraise the relevance of that consideration. Writings that address new issues that were made prominent by post-trial legal developments are cited in the margin.<sup>18</sup>

Whatever degree of attorney culpability may lie behind a failure to raise, or the inartful raising of, issues in the trial court, an additional set of issues is posed when appellate courts raise *sua sponte* and resolve issues that lower courts did not address. As pointed out in *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*,<sup>19</sup>

[w]hen appellate judges believe that a potentially dispositive issue was missed by the parties . . . [:] (1) they can ignore the issue; (2) they can spot the issue in their opinion, but treat it as not properly raised or [as] waived; (3) they can spot the issue and remand it for resolution in the first instance in the trial court; (4) they can ask the parties for supplemental briefs before deciding the issue; (5) they

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18 See, e.g., Campbell, *Part I, supra* note 13, at 96–97 (arguing that “questions which do not arise until after a case has reached the court of review do not come within . . . the rule that new questions will not be considered on review” and may be considered when raised at the first opportunity); Christopher R. Prior, Note, *Not Too Little, But A Little Too Late: The Eleventh Circuit’s Refusal to Consider New Issues Raised by Supplemental Authority*, 15 J.L. & POL’Y 249 (2007); Mitchell J. Waldman, Annotation, *When Will Federal Court of Appeals Review Issue Raised By Party for First Time on Appeal Where Legal Developments After Trial Affect Issue*, 76 A.L.R. FED. 522 (1986); see also J.H. Huebert, *How to Raise New Issues on Appeal*, 51 FOR THE DEFENSE, Nov. 2009, at 37, 71 (providing an overview of the exceptions to the general rule disallowing new issues on appeal).

19 Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253 (2002).

can decide the issue without briefs; (6) they can spot the issue in the opinion, and write dicta.<sup>20</sup>

The Article will visit when appellate courts should raise and decide issues *sua sponte*, and parties' entitlement to notice and an opportunity to be heard before the appellate court decides an issue that the court raised *sua sponte*.

*Distinguishing Issue Creation from Issue Resolution:* It also is fundamental to this Article to distinguish between the raising of issues and the resolution of issues, and between issue creation (the *sua sponte* raising of issues) by an appellate court and appellate resolution of issues raised *sua sponte*. Appellate court resolution of issues newly raised in the court of appeals, whether by the parties or by the court itself, rather than issue raising or creation, is my concern.

In *The Limits of Advocacy*, Professor Amanda Frost argues that judicial "issue creation," that is, judges' raising of legal claims and arguments that parties have overlooked, ignored, or deliberately chosen not to advance, is a "necessary corollary [of] the federal judiciary's constitutional obligation[s] to articulate the meaning of contested questions of law . . . [and] to avoid issuing inaccurate or incomplete statements of law."<sup>21</sup> While arguing that judges should not routinely raise legal claims and arguments that parties have not made—"because it can lead to delay, disrupt settled expectations, and undermine litigant autonomy,"<sup>22</sup>—she posits that judges should raise new claims and arguments in a number of situations. Professor Frost finds

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20 *Id.* at 1256; *see also* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 511 (2009) (noting that in raising new issues, courts "must be careful to preserve the benefits of the adversarial structure. . . . [T]he 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"). *See generally* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002) (arguing that it is an abuse of discretion for appellate courts to decide issues that they have raised *sua sponte* without input from the parties, as doing so is inconsistent with due process and with the adversary system).

21 *Id.* at 447; *see also* Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251 (2005) (focusing at the level of theories and arguments, advocating that judges should improve the law by applying the most correct reasoning, even when the parties have not proposed it).

22 Frost, *supra* note 20, at 453. As Professor Frost points out, the principle that parties, and not judges, should frame cases is grounded in the same values that inform standing doctrine, has roots in our notions of due process—in particular, the idea that the decision maker should not be an advocate but should be impartial—and promotes finality and judicial economy. *See id.* at 450–51. Thus, "the norm against issue creation is an important limit on judicial power that should be honored in the typical case." *Id.* at 470.

judicial issue creation to be legitimate when necessary to fulfill the federal courts' duties to accurately say what the law is and to avoid expanding the judicial role beyond its proper limits; to preserve judicial independence; to enforce constitutional restrictions on other branches of the government; and also to effectuate constitutional exercises of legislative power.<sup>23</sup> The situations in which she finds it appropriate for federal judges to raise new claims and arguments—and in which she therefore argues that federal judges should be recognized to have discretion to do so—thus include those in which failing to do so would lead to inaccurate statements of precedent-setting law,<sup>24</sup> cause the court to fail to respect constraints on judicial decision making (such as the constitutional avoidance doctrine or the presumption against preemption of state law),<sup>25</sup> or cause the court to ignore or undermine legislative enactments.<sup>26</sup> By contrast, she argues that

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 . . . its opinion will not mislead others or create flawed precedent . . . . Moreover, questions that are truly independent from those that the parties have . . . briefed and argued would likely require the development of facts not already in the record, which is unfair . . . .<sup>27</sup>

Although Professor Frost does not always systematically differentiate between federal trial court judges and federal appellate court judges, she sometimes does so, and some of her arguments apply to one of these groups rather than, or to a much greater degree than, the other. Thus, it is more important that federal courts of appeals accurately state the law than that trial courts do so. It is essential that federal appeals courts not cede to the parties complete control over the courts' legal analyses because the decisions of IFACs are preceden-

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23 *Id.* at 470–71, 485. Professor Frost elaborates on these ideas. *See id.* at 470–91.

24 *See id.* at 452–53, 509–10, 516.

25 *See id.* at 510.

26 *See id.* at 510–11. Professor Frost did not purport to provide a definitive set of criteria. *Id.* at 509.

27 *Id.* at 509–10; *c.f.* Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 *FORDHAM L. REV.* 477, 508–11 (1959) (focusing on issue creation, and assuming that appellate courts would resolve the issues they chose to raise *sua sponte*; finding and sometimes advocating for exceptions to the general reluctance to interfere with the course of litigation as determined by the parties for questions of jurisdiction, sometimes in the interest of justice or in furtherance of a fundamental public policy, where public rights are involved, when there is “a pressing need for a statement of a point of law” or to avoid making new law but, outside the realm of jurisdictional issues, always in exceptional circumstances).

tial, affect future litigants as well as the parties before the court in a particular case, and often are persuasive outside the jurisdiction.<sup>28</sup> Moreover, in light of the rarity of en banc or Supreme Court review, most decisions by appellate panels represent the last word in the circuit on a legal issue.<sup>29</sup> In addition, unlike the United States Supreme Court, an IFAC cannot decline to hear a case in which the parties have not done a good job in framing or arguing the issues.<sup>30</sup> In Frost's view, all of this renders IFACs most justified (as compared with both federal trial courts and the United States Supreme Court) in injecting new issues.<sup>31</sup> On the other hand, district courts are in a better position to raise new issues because they "need not be as concerned about finality, or the possibility of prejudice, as an appellate court . . . . [T]he 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[n appellate] court . . . ." <sup>32</sup> Thus, she cautions against IFACs introducing new legal issues and arguments when the new issue would turn on facts not in the record or not fully developed below, particularly as judicial issue creation in that circumstance would likely be unnecessary to avoid erroneous statements of law. She also cautions generally that "raising new questions on appeal may delay resolution and put litigants to additional expense" and may cause litigants to feel ambushed by the newly injected questions.<sup>33</sup>

In Professor Frost's view, the Supreme Court has less reason (than IFACs) to engage in issue creation insofar as it can avoid taking cases in which the parties have failed to raise relevant legal questions. Moreover, the same concerns about delay, disruption, ambush, unfairness, and the possibility of an inadequately developed record that constrain IFACs apply equally or even more strongly when a case is in the Supreme Court.<sup>34</sup> Nonetheless, Professor Frost argues that there may

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28 See Frost, *supra* note 20, at 511–15. Professor Frost reconciles her view of the federal judiciary's role in issue creation with the adversary system by arguing that: (1) judicial issue creation can improve the adversary system by helping to level the playing field between adversaries who are not evenly matched in resources, legal talent, and the like; and (2) judicial introduction of new issues need not turn judges into adversaries, undermine judges' impartiality, or undermine litigant autonomy, as amici can be used when parties choose not to argue a position suggested by the court. See *id.* at 494–508. Professor Frost envisions the parties being given the opportunity to address, in an adversarial manner, any new issues that a court introduces. See *id.* at 508, 511.

29 See *id.* at 512.

30 See *id.*

31 See *id.*

32 *Id.*

33 *Id.* at 513.

34 See *id.* at 513–14.

be occasions when it is appropriate for even the Supreme Court to inject new issues—as it is most important that the Supreme Court issue “accurate” statements of the law, set appropriate limits on the judicial role, preserve judicial independence, and enforce constitutional restrictions on other branches of the government while effectuating the other branches’ constitutional exercises of authority. As previously noted and as will be shown below, there is no question that the Supreme Court in fact has injected new issues into cases it has heard.<sup>35</sup>

Professor Frost’s analysis makes a good case for the legitimacy of judicial “issue creation” in narrow circumstances, but she considers in only a very limited way how the role of an appellate court, as such, should constrain appellate courts in taking the first stab at resolving issues that the appellate court introduces into a case. Thus, Professor Frost notes:

[T]here 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.<sup>36</sup>

I would note, moreover, that even if an appellate court has power to raise new issues and would not abuse its discretion in doing so in a particular case,<sup>37</sup> the appeals court that *raises* a new issue could remand the case to the district court to *address* the newly identified issue in the first instance, rather than taking the first stab at it. Such a remand would result in some disappointment to litigants who hoped for a quicker end to the litigation, and it would entail some delay and disruption, but these might be prices worth paying in order for the

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<sup>35</sup> See *id.* at 467–69, 514–16.

<sup>36</sup> *Id.* at 513. Professor Frost also comments on the risk that raising new questions on appeal will increase costs and delay, will require that the parties be given an opportunity to be heard, and may generate feelings of ambush. *Id.* None of these has anything to do with the role of an appellate court, however, and none is peculiar to appellate courts’ raising new issues, though the degree of added cost and delay, and the degree of feeling ambushed, may be greater when an issue is first raised on appeal than when it is raised even very late “in the game” in the trial court.

<sup>37</sup> That could be the situation because doing so is necessary to avoid the court’s making inaccurate statements of precedent-setting law, or a failure to do so would cause the court to fail to respect constraints on judicial decision making (such as the constitutional avoidance doctrine or the presumption against preemption of state law) or would cause the court to ignore or undermine legislative enactments.

trial court to play its customary role of decider in the first instance and for the appellate court to adhere to its customary role of reviewing court. After all, some disappointment and delay would ensue even if it were the appellate court that required the parties (or intervenors or amici) to address the newly identified issue. As the discussion below will demonstrate, federal intermediate appellate courts do not limit themselves to deciding new issues in the circumstances in which Professor Frost finds that it would be appropriate for them to raise new issues. But, as noted earlier, the two are not the same; an appellate court can raise a new issue but not decide it in the first instance, and an appellate court can decide a new issue that it did not raise, but a party did, for the first time, in the court of appeals.

### I. THE IMPORTANCE OF THE ISSUES RAISED HERE

The subject of this Article is important. It affects *who* decides issues; *what* issues are decided; at what point in the course of a case (*when*) they are decided, *where* (by what courts) they are decided; and potentially *how* those issues are decided. Issues may be decided differently when they are decided in the first instance by appellate courts, rather than by trial courts, in part because such appellate resolution of issues affects the standards of decision that an appellate court uses. Whenever a court of appeals decides an issue that was not decided by an inferior court, it is acting *de novo*, not correcting only clear error in fact-findings or abuses of discretion, and not deciding issues of law with the benefit of the thinking of the lower court. This activity goes to the heart of the role and function of appellate courts, and of how our judicial system is designed. Constitutional, statutory, prudential, and functional considerations all are involved.

#### *Sequencing Theory*

Sequencing theory reinforces the importance of the subject explored in this Article by shedding light on additional consequences of the order in which courts resolve issues in litigation. Professor Peter Rutledge opines that “the order in which courts decide issues has a significant and underappreciated impact on the law;”<sup>38</sup> this order influences the parties’ behavior in litigation, the incentives they have to settle, and the development of the law—that is, which areas of law get more attention and which get less—and in turn influences the investment of judicial resources.<sup>39</sup> Horizontal sequencing rules,

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38 Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 7 (2010).

39 *Id.* at 7.



which “determine the sequence in which a single decision-maker . . . determines issues,” apply to an appellate court, as they apply to trial courts, and they thus influence how (*i.e.*, on what grounds) a case will be resolved.<sup>40</sup> As a result, horizontal sequencing rules also affect the outcomes of future cases. In addition, vertical sequencing rules, which determine when reviewing courts can review particular decisions of inferior tribunals, obviously influence the relationship between trial courts and appeals courts, and also can influence the parties’ behavior in litigation and the incentives they have to settle, the development of the law, and the amount and allocation of investment of judicial resources.<sup>41</sup> Thus, for example, the immediate appealability of denials of motions to dismiss based upon qualified immunity allows defendants to require an investment of resources by the appellate courts, evokes precedential decisions from the appellate courts, and enhances the settlement position of defendants.<sup>42</sup> Moreover, both horizontal and vertical sequencing rules can be rigid or flexible and thus affect the degree of discretion that a court has in sequencing the decisions of the issues it faces.<sup>43</sup>

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40 *Id.* at 10. An example of a horizontal sequencing rule that operates at the appellate level is the rule that the appellate court should decide its appellate jurisdiction over a case and the district court’s subject-matter jurisdiction over a case, and confirm both, before proceeding to merits questions. For an exploration of mandatory horizontal sequencing rules in the federal appellate courts, see Joan Steinman, *After Steel Co.: “Hypothetical Jurisdiction” in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855 (2001). Other articles on sequencing include Gregory Scott Crespi, *The Underappreciated Importance of Issue Sequencing in Contract Litigation: The “Signed Offer” Statute of Frauds Cases*, 46 NEW ENG. L. REV. 37 (2011); Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725 (2009); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2002); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235 (1999); J. Stanton Hill, Note, *Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts*, 41 VAND. J. TRANSNAT’L L. 1177 (2008).

41 See Rutledge, *supra* note 38, at 29–32.

42 See *id.* at 22–23.

43 See *id.* Compare, for example, the relative rigidity of the requirement that a court consider its subject-matter jurisdiction (or appellate jurisdiction) before addressing any merits questions and the discretion that district courts have to determine the sequence in which they will consider issues of subject-matter jurisdiction, personal jurisdiction, or even forum non conveniens. Compare *Sinochem Int’l Co. v. Malaysia Int’l Shipping Co.*, 549 U.S. 422 (2007) (recognizing district court discretion to dismiss on grounds of forum non conveniens without first determining that district court has subject-matter jurisdiction over the case or personal jurisdiction over the parties), and *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (holding that in cases removed to federal courts, as well as in cases initiated in federal court, district

What relevance does Rutledge's decisional sequencing theory have to the issues raised in this Article? When an appellate court takes the first stab at an issue it is not *reversing* the normal and expected vertical sequence of decision, because the district court is not going to follow the appellate court, in time, and review the appellate court's work. However, for the appellate court to take the first stab typically changes the sequence in which decisions are made at the same time that such "first stabs" constitute a *re-allocation* of authority from the district court to the appellate court, which in turn changes the question that the court of appeals will address. No longer will the question be whether the district court erred in deciding the issue through its misunderstanding of the law or its clear error in determining the relevant facts or its abuse of discretion. The questions will be *de novo*: What is the law on this issue? What do the facts in the record establish as to this issue? How will the *appellate* court exercise discretion as to a particular matter? This Article will consider the circumstances under which such a reallocation of decision-making authority may be acceptable and when it would not be,<sup>44</sup> but Rutledge helps us to appreciate several additional consequences of this reallocation of authority. For instance,

(a) The reallocation might be regarded as problematic in that the usual consequences of a district court decision, had it been made in a timely manner, will be changed by the alteration of the time frame in which the decision is made, as well as by the status of the decision maker. For example, if no party raises *forum non conveniens* ("fnc") in the district court, with the result that that court does not address the issue but proceeds to decide the case on the merits, the investment that the district court makes in the case increases, and a defendant that loses on the merits in the district court has less settlement leverage than it would have had if the court had dismissed on fnc grounds. If the fnc issue is raised for the first time on appeal and the appeals court decides the issue and orders the case dismissed without prejudice, the judicial investments, the settlement dynamics, and the law that has been announced all differ from what they would have been had the district court dismissed on fnc grounds.

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court may dismiss on the ground that the court lacks personal jurisdiction over the defendants without first ruling on a motion to remand or dismiss for lack of subject-matter jurisdiction), *with Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (rejecting the doctrine of hypothetical jurisdiction, under which, in some circumstances, a court may decide merits questions without first addressing objections to the court's jurisdiction, concluding that the doctrine violates separation of powers).

<sup>44</sup> See *infra* Parts III and IV.

The extent of delay before resolution of an issue that is first presented to a court of appeals and the change in the sequence of the rulings made by the trial and appellate courts may be influenced by whether the appellate court takes on an issue raised for the first time on appeal or sends the new issue back to the trial court. If proceedings in the trial court have not been stayed pending appeal, the trial court may continue to issue rulings while the appellate court is considering the issue newly raised there, whereas the trial court might address the “new issue” raised on appeal before it ruled on other matters, if the appeals court remanded the new issue for the trial court’s consideration. The order in which the district court addresses the issues presented to it after remand, including whether it regards the appellate court as having commanded it to address initially the issue that was raised for the first time on appeal and was remanded, again may affect the extent of judicial investment, the settlement dynamics, and the law that is announced.

If an appellate court chooses to address an issue that is raised for the first time on appeal rather than remand the case back to the district court, that choice also may change the nature of the decision to be made because, on remand, the parties might re-frame the issue or offer the district court alternative grounds on which it could decide the case. It seems more likely that this would occur in the district court on remand than that it would occur in the court of appeals.

Recognizing these facts in the abstract does not say anything about whether the court of appeals should proceed to decide the new issue itself or remand the case so that the district court will take the first stab at it. In a particular fact setting, however, a court of appeals might consider the different effects when choosing its course of action.

(b) More obviously relevant is the fact, discussed below,<sup>45</sup> that the appellate court as an institution may be more or less competent than the trial court to address the new issue. To the degree that a new issue requires fact finding based on oral testimony or an exercise of discretion as to a matter that trial courts often deal with and appellate courts seldom deal with, an appellate court presumably will be less competent than the trial court would have been.

(c) It also should be noted when the parties fail to raise an issue or a district court misses or ignores an issue, the sequence of decisions that ensues could violate a mandatory rule of horizontal sequencing, or it might not do so. If a district court would have had discretion to decide an unraised or missed issue *last* (or if the district court would

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45 See *infra* Part IV.

not have needed to reach the “missed” issue at all, given how it decided other issues), its failure to address the unraised or neglected issue might or might not have any effects on judicial resource expenditure, settlement leverage, or law pronouncement, depending upon the sequence in which the court would have addressed the various issues had they all been raised and noticed, and its sequencing decisions will not be tainted by error, given the discretionary nature of the sequencing that we are positing.<sup>46</sup> Thus, if the trial court would have addressed a motion to dismiss under the *forum non conveniens* doctrine only after it denied motions to dismiss for lack of subject-matter or personal jurisdiction (had it addressed *fnc* at all), its postponement of the *fnc* issue would not be erroneous and would not have changed judicial resource expenditure, settlement leverage, or law pronouncement. However, a district court’s violation of a *mandatory* sequencing rule may lead to judicial resources being wasted on issues that need not have been addressed, may affect settlement leverage, and certainly will alter what law was and was not made by the district court. The district court’s critical rulings on discovery as to the merits, before ruling on subject-matter jurisdiction, could have all of those consequences. The effects would, at best, be remediable only in part.<sup>47</sup> An appellate court could vacate rulings that ought not to have been made and reverse rulings that are erroneous, but the law announced by the district court may have had influence in the interim. If the appellate court takes the first stab at the issue that the district court ought to have addressed under mandatory horizontal sequencing rules, that will affect how the appellate court’s resources are expended, the manner in which the appellate court addresses the question—because it will address the issue *de novo*, regardless of what standard of review it normally would have employed—and settlement leverage. Some or all of these are matters that a court of appeals should consider in deciding whether to take a first stab.

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46 See Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 306–07 (2011) (opining that trial judges have a great deal of discretion to sequence their decisions of issues and that the primary constraints on them are the requirement that federal courts confirm their subject-matter jurisdiction before deciding merits issues and the common law rule “that when a common factual issue will come before both judge and jury . . . [because it is] common to the merits of both law and equity claims for relief joined in the same case . . . the jury must decide it first”).

47 One cannot recover the judicial resources that were expended—although perhaps some of that expended time and effort will help to facilitate resolution of other cases or can otherwise be put to good use. One cannot undo the effects on settlement leverage, although perhaps other developments in the case will tend to undo any distortions.

(d) Moreover, just as a relatively strict final judgment rule increases the burden on district courts, a rigid rule that required appellate courts to remand to district courts to take the first stab at issues that arose for the first time on appeal would increase the required investment by trial judges while conserving, or at least postponing the expenditure of, appellate resources. A flexible rule that permitted appellate courts to take the first stab at issues that arose for the first time on appeal could increase, or at least hasten, the investment by appellate judges and could increase the quantity of appellate precedent, when the appellate courts chose to accept the new question.<sup>48</sup> An appellate court that permits a new question to be raised on an interlocutory appeal enables the appellant to get an appellate disposition of the issue less expensively and more quickly than if the party had to wait until after final judgment.<sup>49</sup> An appellate court that permits a new question to be raised after final judgment also may save the litigants time and money, as compared to the time and money they would expend if the new issue were remanded to the trial court. Also, if the unavailability to defendants of immediate appeal of decisions adverse to them strengthens plaintiffs' settlement leverage,<sup>50</sup> it would seem to follow that the ability of defendants to raise a new issue on an interlocutory appeal reduces a plaintiffs' settlement leverage, both because the defendant may prevail on the appeal and because the raising of the new issue increases the plaintiff's costs.<sup>51</sup> Appellate courts seem well aware of the reallocation of work that results from their addressing issues that are raised for the first time on appeal.<sup>52</sup> But the effect on settlement dynamics is not something that they have explicitly recognized, and might be something that appellate courts would want to consider when they contemplate whether to entertain a question that is raised for the first time on appeal.<sup>53</sup>

(e) Finally, focusing on horizontal sequencing rules as they apply in appellate courts, one could ask what, if any, principles govern (or should govern) where, among the issues presented to the appellate

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48 See Rutledge, *supra* note 38, at 23.

49 See *id.* at 29–30.

50 See *id.* at 12.

51 See *id.* at 21–22, 31–32.

52 It is not equally clear that they adequately take into account the change in the standard of review that is entailed in their taking the first stab at issues, but the appellate courts' tendency to favor issues of law, as to which the standard of review is *de novo*, see *infra* text accompanying notes 179–84, does indicate some sensitivity to this matter.

53 As to the effects of vertical sequencing rules generally, see Rutledge, *supra* note 38, at 27–30.

court, that court should consider issues that were not raised below. For example, should an appellate court consider new issues only if none of the presented issues that *were* raised in the district court lead to an acceptable result? Should the appellant's argument on the new issue be the analogue of an affirmative defense in which the appellant argues, "Even if I would lose on every other basis, I should prevail on this basis?" Even in that situation, it does not follow that the new issue always should be the last issue that an appeals court considers, for a mandatory sequencing rule such as that which requires a court to confirm its subject-matter jurisdiction before reaching merits questions could dictate otherwise. For example, upon the appeal of denial of summary judgment to a government official whose "claim" to qualified immunity was rejected by the district court judge, the defendant might also raise the defense of lack of subject-matter jurisdiction if the plaintiff's claim was based upon violation of state-created rights. Affirmance would lead to the case moving forward in the trial court but the appeals court should consider the district court's subject-matter jurisdiction first, because, if the district court lacks jurisdiction over the case, it will be unnecessary to determine, and it will not matter, whether the defendant was qualifiedly immune from suit.

It should be clear then that the opportunity for appellate courts to take the first stab at issues has important implications for *who* decides issues; *what* issues are decided; at what point in the course of a case (*when*) they are decided, *where* (by what courts) they are decided; and potentially *how* those issues are decided. It also has consequences for party behavior, litigation costs, settlement incentives, the relationship between trial and appellate courts, and the allocation of judicial resources.

## II. APPELLATE JURISDICTION

A fundamental initial question to ask is: How it is that appellate courts *ever* are permitted to reach questions that no inferior tribunal has addressed? In the federal system, do Article III or Congressional statutes confer authority on appellate courts to address new issues?

### A. Article III and Congressional Legislation

Article III of the U.S. Constitution provides in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United

States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects . . . . *In [specified] cases . . . the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*<sup>54</sup>

Congress then “conferred” jurisdiction on the Supreme Court,<sup>55</sup> by stating the circumstances under which parties “may appeal to the Supreme Court” from orders entered in proceedings required by Congress to be determined by district courts composed of three judges,<sup>56</sup> providing the methods by which cases in the intermediate federal courts of appeals “may be reviewed by the Supreme Court”<sup>57</sup>—implicitly recognizing Supreme Court appellate jurisdiction over all such cases—and stating which judgments and decrees issued by State courts “may be reviewed by the Supreme Court by writ of certiorari.”<sup>58</sup>

Additional statutes confer subject-matter jurisdiction on the intermediate federal courts of appeals. Those of broadest application are 28 U.S.C. §§ 1291 and 1292, both of which confer “jurisdiction of appeals from” specified kinds of decisions, orders, and decrees.<sup>59</sup>

54 U.S. CONST. art. III, §§ 1, 2 (emphasis added).

55 Article III of the Constitution, after vesting the judicial power of the United States in the Supreme Court and in such inferior courts as Congress may establish, states that in all cases not within the Supreme Court’s original jurisdiction, “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” *Id.* § 2. Nonetheless, the Court and commentators often regard Congress as having “conferred” jurisdiction on the Supreme Court. *See, e.g.*, 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3525, at 521 (2008) (“The orthodox view of McCardle remains that Congress has plenary power—at least under Article III—to confer or withhold appellate jurisdiction [from the Supreme Court and subject to limitations derived from other parts of the Constitution].”)

56 28 U.S.C. § 1253 (2006).

57 *Id.* § 1254.

58 *Id.* § 1257.

59 *Id.* §§ 1291, 1292. In addition to 28 U.S.C. §§ 1291 and 1292(a), see 28 U.S.C. § 1292(b), authorizing federal courts of appeals to permit appeal from interlocutory orders that district courts have certified under that section; § 1292(c), stating that the Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal

Thus, for present purposes, “appellate jurisdiction,” “review,” and “appeal” are the key words in these statutes.

Others have noted that Article III does not define the judicial power<sup>60</sup> and “says nothing about the procedures by which courts vested with the judicial power must or may consider and decide cases.”<sup>61</sup> Article III similarly invokes but does not say what it means for the Supreme Court to “have appellate Jurisdiction.” Article III, Section 2 does make clear that the Supreme Court’s appellate jurisdiction extends to both law and fact, and that Congress may make exceptions to and may regulate the Supreme Court’s appellate jurisdiction. How far Congress may go in doing so has been the subject of much scholarly debate<sup>62</sup> and of some case law,<sup>63</sup> but the issues that have

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from specified interlocutory orders and judgments; and § 1295, stating that the Court of Appeals for the Federal Circuit shall have exclusive jurisdiction on an appeal from further specified final decisions of district courts, the U.S. Court of Federal Claims, the U.S. Court of International Trade, the Merit Systems Protection Board, and certain final decisions of an agency board of contract appeals.

60 Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1877 (2001) (noting that Article III does not define the judicial power); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (observing that Article III is unhelpful in clarifying who may obtain constitutional declarations from the Supreme Court and under what circumstances).

61 Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1335 (1999).

62 See, e.g., John Eidsmoe, *The Article III Exceptions Clause: Any Exceptions to the Power of Congress to Make Exceptions?*, 19 REGENT U. L. REV. 95, 145 (2007) (considering the historical evolution of the Exceptions Clause and the possible negative consequences of a broad interpretation of the Clause that allows jurisdiction-stripping); Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 516–31 (1983) (advocating maintenance of a narrow interpretation of the Exceptions Clause, for a broad interpretation could strip the Supreme Court of essential functions); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 513, 515 (1983) (noting that, at the Constitutional Convention, the debate did not focus on Congressional control over the Court’s appellate jurisdiction but on whether that jurisdiction should reach findings of fact as well as conclusions of law, and concluding that, “[t]he remarks of the Framers leave no doubt that the exceptions clause was intended to permit only those exceptions to the Court’s jurisdiction over factual issues as would be necessary to preserve the integrity of state juries. . . . At no time did the Framers consider the possibility that the exceptions clause could be used to limit Supreme Court jurisdiction over questions of law”); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 201 (2007) (arguing that certain forms of jurisdiction stripping violate the constitutional requirements of supremacy and inferiority); Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 792 (2005) (discussing the possibility that Congress could transfer a category or sub-category of cases from the Court’s appellate to its



been raised with respect to the Court's appellate jurisdiction relate primarily to the constitutionality of "jurisdiction stripping," and so are peripheral to the concerns of this Article.

Similarly, neither § 1291 nor § 1292, nor other jurisdictional statutes, speak to what it means for a federal court to have jurisdiction of

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original jurisdiction); Mark Strasser, *Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction*, 2001 UTAH L. REV. 125, 126, 145–48, 186–87 (arguing that Congress's power to limit appellate jurisdiction is more limited than traditionalist scholars believe, especially if the limitation does not involve an area requiring specialized legal expertise); see also THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (recognizing the "clamors" against Supreme Court appellate jurisdiction over matters of fact, and its response to those concerns).

63 See, e.g., *Felker v. Turpin*, 518 U.S. 651, 658–64 (1996) (upholding the constitutionality of a Congressional statute that imposed restrictions on successive habeas corpus petitions, but did not preclude the Supreme Court from entertaining a habeas corpus petition filed as an original matter in the Supreme Court and that appeared to leave open other avenues to Supreme Court review); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 103–07 (1868) (suggesting limiting constructions of *McCardle*, as explained for example in Strasser, *supra* note 62, at 151–52); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1868) (indicating that Congress has "plenary power" over the Court's appellate jurisdiction, but in circumstances that permit limiting interpretations of the case); cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (striking down, as violative of separation of powers principles, a statute that would have allowed plaintiffs to obtain judicial relief after the courts had held them entitled to none); *United States v. Klein*, 80 U.S. 128, 146–47 (1872) (holding unconstitutional a statute that the Court construed to require courts to rule in favor of the government in cases pending before them, under an existing law; indicating that the exceptions clause does not grant legislative authority to mandate the result of particular cases); Mickenberg, *supra* note 62, at 516–23 (arguing that early judicial interpretations of the exceptions and regulations clause that some litigants and commentators have argued established Congressional authority to strip the Court of appellate jurisdiction did not create exceptions but rather reflected acceptance of mere procedural regulations). The cases that Professor Mickenberg distinguished in this way include *United States v. Goodwin*, 11 U.S. (7 Cranch) 108 (1812), *United States v. More*, 7 U.S. (3 Cranch) 159 (1805), and *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796). He also argued that many of the Court's statements recognizing broad Congressional power over Supreme Court appellate jurisdiction have been mere dicta. Mickenberg, *supra* note 62, at 522–23. Finding both constitutional history and judicial precedent indeterminate with respect to which exceptions to jurisdiction are within or beyond congressional power, he argues on public policy grounds that the exceptions clause should not be used to undermine constitutional separation of powers, stare decisis, and uniformity of constitutional interpretation. *Id.* at 531–38, 541–42. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2 (5th ed. 2007) (canvassing the most pertinent U.S. Supreme Court cases and scholarly commentary, and concluding that there is no consensus on the constitutionality of restrictions on the Supreme Court's jurisdiction to hear cases on particular topics); 13 WRIGHT ET AL., *supra* note 55, § 3525 (addressing congressional control of U.S. Supreme Court jurisdiction).

an appeal, or authority to “review” lower court decisions. Because the very existence and jurisdiction of the intermediate federal appellate courts depend upon Congress’s will, however, Congress has greater authority to shape and confine the appellate jurisdiction of those courts than Congress has vis-à-vis the Supreme Court, whose existence uniquely is dictated by and whose powers uniquely find their source in Article III. Courts and scholars have theorized about limits upon Congress’s authority vis-à-vis the intermediate federal courts of appeals.<sup>64</sup> However, legal scholarship seldom has focused directly upon what it means, within the meaning of Article III or jurisdictional statutes, for a court to have jurisdiction of an appeal, as we currently understand the term—either in general or in particular with respect to the kinds of questions posed in this Article, having to do with appellate courts’ proper role in deciding questions in the first instance, without prior district court consideration.<sup>65</sup>

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64 See, e.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 207–09 (1997) (critiquing the theory proposed in Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Court Jurisdiction*, 65 B.U. L. REV. 205 (1985)); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000) (arguing that “the constitutional requirement of ‘supremacy’ may leave Congress free to fashion exceptions and regulations to the Court’s as-of-right appellate jurisdiction, but limit its ability to couple such regulations with restrictions on the Court’s supervisory role that would threaten the constitutional requirement of lower federal court ‘inferiority’ to the one ‘supreme’ court specified in Article III”); Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress’s Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 139 (1995) (arguing that the case law record is much less clear than previously thought as to Congress’s power to restrict the lower federal courts’ jurisdiction). See generally CHEMERINSKY, *supra* note 63, § 3.3 and articles cited therein (noting a lack of consensus as to the constitutionality of congressional restrictions on lower federal court jurisdiction); 13 WRIGHT ET AL., *supra* note 55, § 3526 (exploring approaches to congressional restrictions on lower federal court jurisdiction).

65 One could, however, consider the scholarship that relates to Congress’s power, or lack of power, to interfere with appellate decisions in pending cases as speaking to certain aspects of what it means for a court to have jurisdiction of an appeal, but this too is peripheral to the concerns of this Article. Scholarship addressing cases such as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) and *United States v. Klein*, 80 U.S. 128 (1872) would fall into this category. See, e.g., David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75 (identifying and examining intrinsic limits on Congress’s power to legislate regarding the federal judiciary, deriving from the necessary and proper clause); Amanda Frost, *supra* note 20, at 472 (“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. The political branches can, of course, override a judicial decision . . . through the constitutional mechanisms for enacting new law. Unless and until they do so, however, judicial pronouncements *are* the law.” (footnotes omitted));

### B. *A Very Short History of the Appeal*

We do have history that distinguishes early “appeals” from other mechanisms for obtaining appellate review:

In current legal terminology, the word “appeal” is often used in a generic sense, to designate any attempt to have a higher court review the factual or legal findings of a lower tribunal. In the eighteenth and nineteenth centuries . . . the word appeal was a term of art, defining a specific kind of review and requiring that appellants follow specific procedures in order to obtain review. “An appeal [was] a process of civil law origin, and remove[d] a cause entirely; subjecting the fact, as well as the law, to a review and retrial.” A writ of error, in contrast, was “a process of common-law origin, and it remove[d] nothing for re-examination, but the law.” The Judiciary Act of 1789 drew a sharp distinction between “appeals” and “writs of error,” and established specific regulations governing the use of appeals and writs of error to gain circuit court review of district court decrees and judgments.<sup>66</sup>

We also have enlightening explorations of how our notion of an appeal broadened to encompass not only that which the common law writ of error permitted to be heard by a superior court but also some of what equity permitted to be revisited. As Professor Mary Sarah Bilder has explained:

We refer to a higher court review of a lower court or administrative agency decision as an “appeal.” We call these higher reviewing courts “Courts of Appeal.” And we describe our vertical, multi-tiered legal system in which a Supreme Court is the final arbiter of judgment as an “appellate” system. . . .

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John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 504–05 (2000) (pointing out “that Congress at least may adopt any norm of stare decisis that a court reasonably could recognize” and therefore, Congress “may adopt or modify rules of precedent in pursuit of accuracy, economy, stability, and predictability in the law”); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998) (exploring questions relating to the integrity of the federal courts and the constitutionality of the Prison Litigation Reform Act, the Antiterrorism and Effective Death Penalty Act of 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

<sup>66</sup> Mickenberg, *supra* note 62, at 517 (footnotes omitted) (citing *Wiscart v. D’Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796)); *see also* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 173–74 & n.77, 191–93 & n.178 (1960) (discussing appeals as contrasted with writs of error in exploring Congress’s power to make exceptions to and to regulate the jurisdiction of the United States Supreme Court and the scope of statutory restrictions on United States Supreme Court jurisdiction).

But how did the word and concept of “appeal” ever get into American legal culture and discourse? Almost every legal system develops procedures to address grievances about initial judicial determinations. However, . . . [t]hree hundred years ago, the term “appeal” referred to a legal procedure which was available only in the separate system of English courts governed by canon and civil law—and not in the common law system with which the Puritan settlers were so enamored. The legal procedure known as “the appeal” did not refer to what we now think of as an “appeal”—the correction by a higher court of errors of law made by a lower court. Instead, the “appeal” referred to a procedure under which a higher tribunal could completely and broadly rehear and redetermine not only the law, but also the entire facts of a case. Moreover, the legal procedure called “the appeal” represented a substantive theory of justice, emphasizing the importance of equity and a particular attitude towards the hierarchy of authority. It was this more liberal system of redress that eight of the colonies initially adopted, including Massachusetts and Rhode Island.

. . . .

Over time, many of these American colonies would replace or combine the appeal with the more traditional review procedures of the common law: the writ of error and the writ of certiorari. And by the eighteenth and nineteenth centuries, these more common-law-like procedures had significantly narrowed the possibilities of review—for example, courts only permitted redress for errors of law shown in the written record of the case, similar to procedures in England. Yet the word “appeal” and arguably some of its broader jurisprudential connotations never completely vanished from the American legal system.

The appeal and the writ of error thus were two separate paths, and although our modern appellate system seems to owe more today to the narrow theory of redress represented by the writ of error, the fact that we stubbornly continue to use the word “appeal” suggests that some part of the original substantive theory of the appeal remains with us. . . . [P]erhaps the word still survives because we still remember, perhaps still continue to believe in, this early, broader and more flexible and equitable notion of appeal.

. . . .

The meaning of the appeals script arose from the long heritage of canon and civil law in which a commitment to equity required that a higher tribunal must be able to rehear and redetermine both the facts and law of an individual’s case. The decisions to adopt the appeals script betrayed the colonial leaders’ . . . agreement with the

broader, more flexible, and more equitable theory of review and redress that the appeal reflected.<sup>67</sup>

The general rule in our system today is that courts of appeals will *not* consider new issues on appeal, but will entertain only errors that were complained of below. As the short history presented above indicates, this approach came out of English common law. In the competing tradition from equity, an appellate tribunal did not limit itself to issues that had been presented to the lower court, review was *de novo*, and the appellate court could render any judgment it thought justice required. Many of the exceptions that our courts have made to the general rule<sup>68</sup> reflect the philosophy that the English courts of equity had embraced.

C. *Guidance from The Federalist Papers and the Supreme Court's Actions and Words*

From *The Federalist Papers* and from Supreme Court opinions as well we have indications of the meaning of “appellate jurisdiction” and of federal appellate courts’ authority to review lower courts’ decisions. The Court regards the terms “review” and “appeal”—or at least the terms “original jurisdiction” and “appellate jurisdiction both as to law and fact”—as “borrowed from the common law, meaningless without that background, and . . . meant to carry their common-law implications.”<sup>69</sup> The current Court may be content to look to dictionaries. Thus, in *Wall v. Kholi*,<sup>70</sup> in which the Court in 2011 construed the term “collateral review” in 28 U.S.C. § 2244(d)(2),<sup>71</sup> the Court looked to WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993),<sup>72</sup> to BLACK’S LAW DICTIONARY (9th ed. 2009),<sup>73</sup> and to the OED for the meaning of “review.” It adopted the definition of “a looking over or

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67 Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 913–15, 922 (1997) (footnotes omitted).

68 See *infra* text accompanying notes 171–78.

69 D’Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471 n.9 (1942).

70 131 S. Ct. 1278 (2011).

71 The Antiterrorism and Effective Death Penalty Act of 1996 generally requires a federal habeas petition to be filed within one year of the date on which a judgment became final, but provides that a properly filed application for State post-conviction or other collateral review tolls that period. 28 U.S.C. § 2244(d)(2) (2006). The Court was called upon to interpret the term “collateral review” in that context. *Wall*, 131 S. Ct. at 1283–89.

72 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 444 (1993).

73 BLACK’S LAW DICTIONARY 298 (9th ed. 2009).

examination with a view to amendment or improvement,” quoting WEBSTER’S.<sup>74</sup>

Neither the word “review” nor the phrase “jurisdiction of appeals” obviously suggests that appellate jurisdiction encompasses authority to determine issues that no inferior court has reached. *The Federalist Papers* say that the word “‘appellate’ . . . denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both.”<sup>75</sup> Commentators likewise speak of appeal and review as processes that have reference to the decisions of inferior tribunals. Thus, highly respected authorities tell us that,

appellate courts serve as the instrument of accountability for those who make the basic decisions in trials courts and administrative agencies. The traditional appeal calls for an examination of the rulings below to assure that they are . . . at least within the range of error the law . . . allows the primary decision-maker. . . . [At the same time,] appellate courts are needed to announce, clarify, and harmonize the rules of decision . . . .<sup>76</sup>

Yet the Supreme Court reaches new questions itself and has long permitted intermediate federal appellate courts to reach them. At the same time, the Court and its members sometimes have expressed discomfort or displeasure with this practice.

What guidance has the Supreme Court given with respect to appellate courts’ proper role with regard to “new” issues?

There have been occasions on which the Court has sought to confine its own appellate jurisdiction and that of the IFACs, and to distinguish appellate from original jurisdiction. In no less a case than *Marbury v. Madison*,<sup>77</sup> in the course of deciding whether the Court could issue a writ of mandamus—as it was statutorily authorized to do—the Court observed:

If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. . . . [Thus, t]o enable this court . . . to issue a mandamus, it must be shewn to be an exer-

<sup>74</sup> *Wall*, 131 S. Ct. at 1285.

<sup>75</sup> THE FEDERALIST NO. 81, at 498 (Alexander Hamilton) (Bantam ed., 1982).

<sup>76</sup> PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2–3 (1976); see also FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 766 (5th ed. 2001) (“Appellate review is not a retrial of the case, but rather a review of the trial court’s determination to discern whether prejudicial error occurred.”).

<sup>77</sup> 5 U.S. (1 Cranch) 137 (1803).

cise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.<sup>78</sup>

Having concluded that issuance of a writ to an officer, commanding the delivery of a paper, did not belong to the appellate jurisdiction and was not necessary to enable the court to exercise its appellate jurisdiction, the Court concluded that the statutory grant of authority to issue a writ of mandamus was repugnant to the Constitution and therefore could not be implemented.<sup>79</sup> By contrast, the Supreme Court regards jurisdiction to issue mandamus to an inferior court judge to fall within appellate jurisdiction. As explained in a 1910 decision, “[w]here a case is within the appellate jurisdiction of the higher court[,] a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.”<sup>80</sup>

In an 1892 decision, about ninety years after *Marbury*, the Court denied a writ of prohibition to a district court to prevent further proceedings in a suit to obtain the return of a yacht and damages for its seizure for non-payment of duties.<sup>81</sup> The writ was sought on the ground that the district court had no jurisdiction over the suit.<sup>82</sup> The Court responded, saying that for *it* to decide in the first instance whether the yacht was an article imported from a foreign country and subject to duty would be to render a decision as a matter of original, and not of appellate, jurisdiction, and to decide a question that was duly pending before the district court.<sup>83</sup>

In *Baltimore & Ohio Railroad Co. v. ICC*,<sup>84</sup> the Court interpreted an act of Congress—one that authorized the federal appeals courts to certify questions of law to the Supreme Court (a predecessor of 28 U.S.C. § 1254)—not to permit certification of an entire case before any judgment had been rendered.<sup>85</sup> The Court reasoned that to permit certification of an entire case before judgment would run afoul of

78 *Id.* at 174–75.

79 The Court in *Marbury* had defined appellate jurisdiction as jurisdiction invoked to revise or correct a prior court judgment. *Id.* at 175. In *Marbury* there was no prior judicial proceeding that the Court was being asked to revise. See Reinstein & Rahdert, *supra* note 62, at 790.

80 *McClellan v. Carland*, 217 U.S. 268, 269 (1910); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101–07 (1807) (finding appellate jurisdiction over petitions for habeas corpus that were filed directly in the Supreme Court because the Court was being asked to revise a decision of an inferior court).

81 See *In re Fassett*, 142 U.S. 479, 488 (1892).

82 See *id.* at 484.

83 See *id.*

84 215 U.S. 216 (1909).

85 See *id.* at 221–25.

the limits on the Supreme Court's original jurisdiction.<sup>86</sup> It quoted Chief Justice Taney for the proposition that such a practice would convert the Court "into one of original jurisdiction *in questions of law*, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals."<sup>87</sup> Because the certification at bar attempted to send a whole case to be determined by the Court, the Court disallowed the certification, and remanded the case to the circuit court.<sup>88</sup>

In *Baltimore & Ohio RR* the Court did not explain why the limitation to appellate jurisdiction was not violated by the Court's decision of *some* issues, rather than *all* those presented by a case. But *Wheeler Lumber Bridge & Supply Co. v. United States*<sup>89</sup> may furnish the answer. It indicated that certification from a court of first instance, restricted to definite and distinct questions of law, invokes appellate action, and that this was settled by early and long-continued usage that amounted to a practical construction of Article III.<sup>90</sup> The same long-continued usage might well *not* support the forays into decision-making in the first instance that now can be found in federal appellate decisions, although appeals courts often restrict themselves to definite and distinct questions of law. The difference is that they are not doing so pursuant to a certification from a district court.<sup>91</sup>

In modern times, one of the hints that the Court continues to believe in limits on appellate jurisdiction can be found in the Supreme Court's decision in *Singleton v. Wulff*.<sup>92</sup> The Court there stated 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. We announce no general rule."<sup>93</sup> But the opinion warrants a closer look for what more it can teach. In that case, physicians had sued to challenge the constitutionality of a Missouri statute that excluded certain abortions from the services for which needy persons

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86 *See id.*

87 *Id.* at 221 (emphasis added) (quoting *Webster v. Cooper*, 51 U.S. 54 (1850)).

88 *See id.* at 224.

89 281 U.S. 572 (1930).

90 *Id.* at 576–77.

91 As to the history and structure of Article III generally, see Eidsmoe, *supra* note 62; David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041 (2006); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1589–92 (2001).

92 428 U.S. 106 (1976).

93 *Id.* at 121.



could obtain Medicaid benefits.<sup>94</sup> On motion, the district court dismissed the complaint against a state-official on the basis that plaintiffs lacked standing to sue him.<sup>95</sup> The defendant had filed no pleading addressed to the merits, stipulated to no facts, and given no intimation of what other defenses he might have; he had answered some interrogatories.<sup>96</sup> On plaintiffs' appeal to the Eighth Circuit, defendant addressed only the question of standing.<sup>97</sup> The Eighth Circuit, however, after reversing—holding that plaintiffs did have standing to sue—went on to decide the merits of the case, rather than remanding to the district court for it to decide the merits.<sup>98</sup> The appeals court justified its decision to reach the merits on the grounds that “the question of the statute’s validity could not profit from further refinement, and indeed was one whose answer was in no doubt. The statute was ‘obviously unconstitutional.’”<sup>99</sup>

After affirming the holding that plaintiffs had standing to bring the suit, the Supreme Court disapproved the Eighth Circuit’s exercise of appellate jurisdiction over the merits.<sup>100</sup> The Court explicitly assumed, without deciding, that the court of appeals had jurisdiction to proceed to the merits in this case.<sup>101</sup> In so assuming, the Court communicated that there *is* a question whether federal courts of appeals have jurisdiction to reach merits questions that were not decided by an inferior court; it is not a foregone conclusion that they have such jurisdiction.<sup>102</sup> Perhaps this recognition also lies behind the Court’s pronouncement that the matter of which merits questions not decided by the trial court an appellate court may reach “is one left *primarily* to the discretion of the courts of appeals.”<sup>103</sup> Until the Court announces limits that derive from the statutes that confer jurisdiction to review lower court decisions and decide appeals, if not from Article III itself, however, we are left to come to our own conclusions as to what those limits may be.

At times, dissenters have complained that the Supreme Court was permitting and even requiring IFACs to exceed the proper bounds of appellate jurisdiction and exercise what amounted to original jurisdic-

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94 *See id.* at 109–10.

95 *See id.* at 110–11.

96 *See id.*

97 *See id.* at 111–12.

98 *See id.*

99 *Id.* (citation omitted).

100 *See id.* at 119.

101 *See id.* at 119–21.

102 *See id.*

103 *Id.* at 121 (emphasis added).

tion. The first Justice Roberts so opined in a case in which a party came directly to the court of appeals, arguing that its adversary had committed a fraud on the Patent Office and on the court of appeals itself in a closed infringement suit.<sup>104</sup> After the court of appeals denied relief, the Supreme Court declared that the appellate court had the power and the duty to vacate the earlier judgment and to direct the district court to set aside its judgment, deny relief to the plaintiff in the infringement suit, and take appropriate additional action.<sup>105</sup> The first Justice Roberts, in dissent, argued that the appellate court had no power to do as the majority ordered and was without authority to try the issues:

Neither this court nor a circuit court of appeals may hear new evidence in a cause appealable from a lower court. No suggestion seems ever before to have been made that they may constitute themselves trial courts, embark on the trial of what is essentially an independent cause and enter a judgment of first instance on the facts and the law. But this is what the opinion sanctions.<sup>106</sup>

Similarly, in *Moses H. Cone Hospital v. Mercury Construction Corp.*,<sup>107</sup> the Court held that a stay order was immediately appealable and that the court of appeals had acted within its authority in deciding that the parties' contract dispute was arbitrable.<sup>108</sup> Justice Rehnquist, dissenting, criticized at length what he viewed as the Court's approval of "an extraordinary departure from the usual and accepted course of judicial proceedings by affirming the Court of Appeals decision on an issue that was not decided in the District court."<sup>109</sup> That is, the Court of Appeals had commanded the district court to enter an order compelling arbitration even though the district court had not considered that issue, and even though the Arbitration Act gave the hospital a right to jury trial on disputed issues of fact.<sup>110</sup> The appeals court had decided that there were no such disputed issues, although there was no motion for summary judgment before it.<sup>111</sup> Justice Rehnquist condemned the appellate court's order as a non-appellate act that the appeals court had no discretion to take, asserting that 29 U.S.C. § 2106 "does not grant the courts of appeals authority to constitute

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104 See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 257 (1944) (Roberts, J., dissenting).

105 *Id.* at 251 (majority opinion).

106 *Id.* at 258 (Roberts, J., dissenting) (footnotes omitted).

107 460 U.S. 1 (1983).

108 *Id.* at 13, 29.

109 *Id.* at 35 (Rehnquist, J., dissenting).

110 See *id.*

111 See *id.* at 29 (majority opinion).

themselves as trial courts.”<sup>112</sup> It was not enough that the appeals court had in its possession the memoranda filed in the District Court:

There was no reason to believe that the District Court would not have acted promptly to resolve the dispute on the merits after being reversed on the stay. [The fact t]hat judges of a court of appeals believe they know how a case should be decided is no reason for them to substitute their own judgment for that of a district judge without regard to the normal course of appellate procedure.<sup>113</sup>

On the other hand, the Supreme Court allows questions of federal subject-matter jurisdiction and appellate jurisdiction to be decided on appeal either to the IFACs or to the Supreme Court itself, although those questions were not raised below.<sup>114</sup> Indeed, the Court has made clear that it is a *duty* of federal appellate courts to raise and decide such issues *sua sponte*, if the parties have failed to raise them.<sup>115</sup> Notice that a trial court (ordinarily) would have no occasion to address appellate jurisdiction and it would seem very peculiar for a federal appellate court to remand a case to a district court to have *it* consider the appellate court’s jurisdiction over an appeal. But it would not seem comparably strange for an appellate court to remand to have a district court address, in the first instance, whether the district court had subject-matter jurisdiction over a case. And yet the norm is for federal appellate courts to address issues of district court subject-matter jurisdiction if the district court has failed to do so, as well as when a party argues that the district court erred in its determination of its subject-matter jurisdiction.<sup>116</sup> The fact that jurisdictional

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112 *Id.* at 36 (Rehnquist, J., dissenting).

113 *Id.*; see also *Johnson v. Bd. of Educ.*, 457 U.S. 52, 54 (1982) (Rehnquist, J., dissenting) (commenting, in an opinion joined by Justice Marshall, that nothing in the case record suggested any reason the Court should assume a function more properly exercised by the Court of Appeals or by the District Court, and order consolidation of this case with another action pending in the District Court).

114 See *infra* note 116 and accompanying text.

115 See *id.*

116 See, e.g., *Smith v. Jefferson Cnty. Sch. Bd. of Comm’rs*, 549 F.3d 641, 649 (6th Cir. 2008) (in a case in which terminated teachers alleged that defendants violated the teachers’ Establishment Clause and due process rights and in which the district court granted summary judgment to defendants and denied partial summary judgment to plaintiffs, the court reached the question whether plaintiffs had municipal-taxpayer standing, an issue that defendants had raised below but that the district court had not reached although it held that the teachers did not meet individual standing requirements for an Establishment Clause claim), *vacated*, 2009 WL 1045462 (2009); see also Martineau, *supra* note 14, at 1047 (“[a]llowing the issue of subject matter jurisdiction to be raised at any time is not an exception to the general rule but a precondition” to the applicability of the general rule).

issues can be raised for the first time on appeal also results in issues sometimes arising for the first time on appeal as to whether a particular issue is “jurisdictional” for purposes of this principle.<sup>117</sup>

The Supreme Court also allows arguments of “plain error” to be raised in federal appellate courts, both in criminal cases and in civil cases.<sup>118</sup> In *United States v. Marcus*,<sup>119</sup> the Court stated that an intermediate appellate court, in its discretion, may correct an error not raised at trial when the appellant demonstrates that: (1) there was an error; (2) that is clear or obvious; (3) that affected the appellant’s substantial rights, that is, the outcome of the proceedings, or is a structural error (a category that the Court has not defined clearly),<sup>120</sup> whose effect is difficult to assess; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings.<sup>121</sup>

Back in the year 1850, the Court opined:

There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments [to libels]. . . . But it has been the practice of this court, where amendments are necessary, to remand the cause to the Circuit Court for that purpose.<sup>122</sup>

A few years later, in *Udall v. S.S. Ohio*,<sup>123</sup> the Court expressed concern that if amendments that created jurisdiction were allowed in the Supreme Court, “parties would be taken by surprise, and litigation would be encouraged. The plaintiff . . . would never fail to sustain the jurisdiction of this court, on his appeal.”<sup>124</sup> Not liking that result, the *Udall* Court dismissed the appeal for lack of federal jurisdiction over the case.<sup>125</sup> Yet, years later, in *Newman-Green, Inc. v. Alfonzo-Larrain*,<sup>126</sup> the Court took advantage of the notion that “there is [nothing] in the nature of an appellate jurisdiction, [proceeding according to the common law] . . . which forbids the granting of amendments,” to hold that a court of appeals has authority to grant a motion to dismiss a dispen-

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117 See, e.g., *Mixon v. Ohio*, 193 F.3d 389, 397 (6th Cir. 1999) (raising sua sponte the question of Eleventh Amendment immunity, concluding that it was a jurisdictional issue).

118 See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256–57 (1981) (indicating the Court’s view that plain error doctrine can be used in civil cases).

119 130 S. Ct. 2159 (2010).

120 *Id.* at 2168 (Stevens, J., dissenting).

121 *Id.* at 2164 (majority opinion).

122 *Kennedy v. Bank of Ga.*, 49 U.S. (8 How.) 586, 610–11 (1850).

123 58 U.S. (17 How.) 17 (1855).

124 *Id.* at 19.

125 *Id.*

126 490 U.S. 826 (1989).

sable party, and need not remand the case to the district court for dismissal in that court's discretion.<sup>127</sup> It cautioned that appellate courts should exercise sparingly the authority to allow such amendments and should remand to the district court "when appropriate," but it declined to erect a per se barrier to appellate courts' making the determination.<sup>128</sup> The Court cited the deep historical roots of the understanding of appellate power to include such power, widespread modern authority in the federal IFACs and in the Supreme Court itself upholding appellate authority to dismiss dispensable non-diverse parties consistently with the policies underlying Federal Rule of Civil Procedure 21, a lack of evidence that the authority had been abused, and the efficiencies that such self-help created.<sup>129</sup> While acknowledging that although "[a]ppellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach to the spoiler problem, . . . 'some consideration must be given to practicalities.'" <sup>130</sup> The Court did concede that if factual disputes arose, for example as to prejudice that might result to the remaining parties as a result of a dismissal of a dispensable party, it might be appropriate to remand to the district court to make the determination.<sup>131</sup> Justice Kennedy, in dissent, did not believe that the appellate court had power to dismiss the dispensable party, did not believe that the cases relied on by the majority sufficiently supported the asserted power, and was not persuaded that practical considerations warranted upholding the power when a limited remand to the district court would be expeditious and would put the issue into the court best able to determine whether to dismiss anyone.<sup>132</sup>

These are examples, by no means exhaustive, of the circumstances in which the Supreme Court itself has resolved issues that were not raised or were not ruled upon in a lower court and in which the Court has approved intermediate appellate courts' decisions of new issues. Indeed, Professor Amanda Frost has observed that "some of the Supreme Court's landmark cases were decided on grounds that were never raised by the parties."<sup>133</sup> She cites as examples *Erie Railroad*

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127 *Id.* at 834.

128 *Id.* at 827.

129 *Id.* at 833-37.

130 *Id.* at 836-37 (quoting *Newman-Green v. Alfonzo-Lorrain*, 854 F.2d 916, 925 (7th Cir. 1988)).

131 *Id.* at 838.

132 *See id.* at 839-43 (Kennedy, J., dissenting).

133 Frost, *supra* note 20, at 450.

*Co. v. Tompkins*,<sup>134</sup> *Washington v. Davis*,<sup>135</sup> and *Dickerson v. United States*.<sup>136</sup> Additional cases in which the Supreme Court decided issues that had not been raised or decided below are discussed in subsequent sections of this Article.

Although this history does not give us any litmus test, the history is important. Past scholars have not given it the attention that it deserves. At a minimum, it tells us that constitutionally grounded limits on appellate jurisdiction do exist, and that intermediate appellate courts as well as the Supreme Court itself should keep that in mind when they contemplate deciding issues that were not decided by lower tribunals. Perhaps at some point the Supreme Court will better delineate the boundaries of appellate jurisdiction. In the meantime, even an exhaustive examination of the Supreme Court's jurisprudence would not definitively determine whether particular contemporary instances of appellate courts' taking the first stab at issues were or would be constitutional. It would be naive to think that "fine and ambiguous points of constitutional history will determine the outcome of the present . . . debate."<sup>137</sup>

We will continue our investigation by considering potential sources of appellate judicial power to take such first stabs, although, of course, any statutory sources of such appellate judicial power would themselves have to be permissible under Article III and the Necessary and Proper Clause of the Constitution.<sup>138</sup>

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134 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) and holding that federal courts must apply state common law where state law governs, without any challenge to *Swift* by the parties). For discussion, see Frost, *supra* note 20, at 467–68.

135 426 U.S. 229 (1976) (holding that the Constitution forbids only intentional discrimination despite the parties' agreement that conduct having a racially disparate impact was barred by the Equal Protection Clause). For discussion, see Frost, *supra* note 20, at 468.

136 530 U.S. 428 (2000) (invalidating a federal statute that addressed the admission of confessions, overruling the Court of Appeals for the Fourth Circuit which had held the statute to govern, where neither party had relied on the statute). For discussion, see Frost, *supra* note 20, at 468–69.

137 Mickenberg, *supra* note 62, at 531 (speaking of the debate over the meaning of the exceptions and regulations clause of Article III).

138 U.S. CONST. art. I, § 8 (granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

D. 28 U.S.C. § 2106

Appellate powers of the Supreme Court and of the federal IACs sometimes are rested in 28 U.S.C. § 2106. That section provides, in pertinent part, that:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.<sup>139</sup>

What that section has been held to authorize and what it has been held *not* to authorize in general could form the subject of another article or book. With reference to the subject matter of *this* Article, it too provides no definitive answers. While the statute does confer and confirm judicial powers, it does not authorize appellate courts and the Supreme Court to do whatever they like, and it certainly does not address explicitly the circumstances under which it is proper for the Supreme Court or any other court of appellate jurisdiction to decide issues that were not resolved in the courts of first instance. The Court has referred to § 2106 as the statute that provides power to give plenary consideration to an issue that was not properly raised in the trial court.<sup>140</sup> However, it also has made clear that the power is not limitless. The Court refused to find in § 2106 authority for a court of appeals to hear arguments in support of increasing a criminally convicted person's sentence when the Government failed to appeal or cross-appeal for such relief.<sup>141</sup> Similarly, in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*,<sup>142</sup> the Court observed that § 2106 "must be exercised consistent with the requirements of the *Federal Rules of Civil Procedure* as interpreted by this Court."<sup>143</sup> And in 1996, in discussing the Supreme Court's power to "GVR," that is, to grant certiorari, vacate the lower court judgment, and remand for further consideration under the auspices of § 2106, Justice Scalia wrote that, "[t]his facially unlimited statutory text is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States."<sup>144</sup> Although the majority disagreed that the statute imposed

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139 28 U.S.C. § 2106 (2006).

140 *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.16 (1981).

141 *See Greenlaw v. United States*, 554 U.S. 237, 249 (2008).

142 546 U.S. 394 (2006).

143 *Id.* at 402-03, n.4.

144 *Lawrence v. Chater*, 516 U.S. 163, 178 (1996) (Scalia, J., dissenting).

implicit limitations on the Court's power, at least with respect to GVRs,<sup>145</sup> Justice Scalia argued that

[some] applications of no-fault V&R . . . are appropriate to preserve the operational premise of a multi tiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of state and lower federal tribunals.<sup>146</sup>

But he objected to the expansive view, that he attributed to the majority, that the Court had power to vacate lower court orders, unfettered by Constitutional or even prudential limits:

When the Constitution divides our jurisdiction into "original Jurisdiction" and "appellate Jurisdiction," I think it conveys, with respect to the latter, the traditional accoutrements of appellate power. There doubtless is room for some innovation . . . but the innovation cannot be limitless without altering the nature of the power conferred.<sup>147</sup>

Section 2016 also is relevant to the concerns of this Article insofar as it has been cited in support of the proposition that appellate courts should not only correct error, but also should do substantial justice, including considering changes of law or fact that have occurred since the decision below.<sup>148</sup> Such changes provide the reason that some questions that were not passed upon by a lower court are presented to courts of appeals, although the Court has not always been convinced that the circumstances warranted appellate intervention. For example, in *Standard Industries, Inc. v. Tigrett Industries, Inc.*,<sup>149</sup> in which judgments were affirmed, without opinion, by an equally divided Court, Justices Black and Douglas dissented because the Court rebuffed a defendant-petitioner patent-licensee that sought to attack the

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145 See *id.* at 166 (majority opinion).

146 *Id.* at 181 (Scalia, J., dissenting).

147 *Id.* at 189–90.

148 See *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978) (observing that, under § 2106, an appellate court would have discretion to remand for further proceedings when an agency invoked an FOIA exemption for the first time on appeal because of an interim development in applicable legal doctrine); *Kenneally v. First Nat'l Bank of Anoka*, 400 F.2d 838, 843 (8th Cir. 1968) (remanding with directions to determine the validity of prior assignments of accounts receivable in light of additional evidence to be offered, so that substantial justice could be done (citing 28 U.S.C. § 2106)).

149 397 U.S. 586 (1970).



validity of a patent for the first time on appeal, where it was only after the Sixth Circuit's decision in the case that the Supreme Court decided that a patent licensee could attack the validity of a patent and was not estopped to do so.<sup>150</sup> The dissenters found the situation to satisfy criteria that the Court had used in deciding whether new arguments could be considered.<sup>151</sup> There was a material change in the law, earlier assertion of the issue would have been futile, and an important public interest (the elimination of specious patents) would have been served by consideration of the issue.<sup>152</sup> But no majority of the Court agreed.

Section 2106 sometimes is cited in support of appellate affirmation of decisions on grounds different from those relied upon by the district court,<sup>153</sup> and it has been cited in support of the proposition that if a district court does not rule on an issue raised by the parties, a federal appeals court may rule on the issue without remanding to the district court, so long as the parties have been given a full and fair opportunity to address the issue.<sup>154</sup> The appeals court alternatively may remand for further proceedings consistent with its rulings.

As was true of the Supreme Court's actions and pronouncements, while this history of the interpretation of § 2106 is interesting and instructive, interpretations of § 2106 do not suffice to determine whether particular contemporary instances of appellate courts' taking the first stab at issues is constitutional or otherwise proper.

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150 *Id.* at 586.

151 *Id.* at 588.

152 *Id.*

153 *See, e.g.,* *Smith v. United States*, 18 F. App'x. 80, 81 (4th Cir. 2001) (affirming denial of relief on ground that district court lacked jurisdiction over plaintiff's petition); *Jordan*, 591 F.2d at 791 (MacKinnan, J., dissenting on other grounds) (invoking § 2106 in support of affirming even where a district court relied on a wrong ground or gave wrong reasons).

154 *See* *Smith v. Jefferson Cnty. Sch. Bd. of Comm'rs*, 549 F.3d 641, 649 (6th Cir. 2008), *vacated*, 2009 WL 1045462 (6th Cir. 2009). *Smith* was a case in which terminated teachers alleged that defendants violated the teachers' Establishment Clause and due process rights and in which the district court granted summary judgment to defendants and denied partial summary judgment to plaintiffs, making the statement that appears in the text and applying that principle in reaching the question whether plaintiffs had municipal-taxpayer standing, an issue that plaintiffs had raised below but that the district court had not reached, although it held that the teachers did not meet individual standing requirements for an Establishment Clause claim. In *Smith*, municipal-taxpayer standing was a jurisdictional issue, which made it all the more clearly appropriate for the appellate court to reach. The court concluded that some of the plaintiffs did have municipal-taxpayer standing and remanded for further proceedings. *See* *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 209–16 (6th Cir. 2011) (en banc).

Before moving on to consider the role of discretion (as opposed to power) in appellate attention to issues that were not decided below, we stop to make a point about how appellate power changes over the life span of a case.

*E. The Scope of Appellate Jurisdiction Before and After Final Judgment*

Before proceeding with exploration of appellate courts' discretion to decide new issues, one more area that derives from the federal appellate courts' statutory jurisdiction should be noted. It has long been held that when a federal court has jurisdiction over a claim, the court has jurisdiction to resolve all issues that are encompassed by that claim. As a result, federal courts can hear state law issues between non-diverse parties in cases that arise under federal law.<sup>155</sup> Federal courts also can hear state law claims that form part of an Article III case or controversy.<sup>156</sup> When it comes to pendent appellate jurisdiction, the Supreme Court has indicated that federal appellate courts may decide issues for which there is *no* independent basis of federal appellate jurisdiction when those issues are inextricably intertwined with issues for which there *is* an independent basis of federal appellate jurisdiction or when it is necessary to resolve the former issues in order to meaningfully review the latter.<sup>157</sup>

By implication, it follows that, when a federal appellate court is entertaining an interlocutory appeal, it is a necessary, but not a sufficient, condition to the appellate court's consideration of an issue that was not decided below that the new issue be inextricably intertwined with issues for which there *is* an independent basis of interlocutory federal appellate jurisdiction or be necessary-to-resolve in order to

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155 See *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 257 (1992) (holding that "sue and be sued" provision in Red Cross's federal corporate charter conferred original federal jurisdiction over all suits in which the Red Cross was a party, and as a result the court of appeals erred in deciding that the removed tort suit against the Red Cross should be remanded to state court); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (upholding jurisdiction over a stockholder's state-law created action to enjoin a corporation from purchasing bonds that allegedly had been issued under an unconstitutional statute); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 756 (1824) (upholding the constitutionality of a statute that gave federal courts jurisdiction over actions in which the Bank, a federally chartered corporation, was a party, regardless of the source of the rights and obligations involved in the merits of the case).

156 See 28 U.S.C. § 1367 (2006).

157 See, e.g., *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995). See generally Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 *HASTINGS L.J.* 1337 (1998) (discussing *Swint* and pendent appellate jurisdiction).

afford meaningful review of the latter. By contrast, after final judgment, that restriction would be too limiting, as appellate jurisdiction encompasses all of the lower court decisions that led up to and are “merged” in the judgment.<sup>158</sup> We might want to say, however, that the new issue must be necessary-or-appropriate to resolve in order to affirm the judgment *or* in order to avoid manifest injustice in cases in which resolution of the issue would lead to reversal or vacatur of the existing judgment. If the litigant who raises the new issue had good cause not to raise it below, that circumstance would tend to support the conclusion that the appellate court should hear the new issue to avoid manifest injustice. As indicated in the sections of the Article that follow, however, these would be necessary but perhaps not sufficient reasons for an appellate court to take the first stab at new issues, for we need to design the system so that it maintains or increases litigants’ incentives to litigate their cases vigorously and thoroughly in the trial court.

### III. FROM POWER TO DISCRETION

Because the Supreme Court itself decides questions that were not decided in the lower courts and because it approves federal intermediate courts of appeals’ and presumably state appellate courts’ doing so on occasion, the most pressing questions are less about power than about discretion. The focus thus must turn from whether federal courts of appeals *can* decide issues that were not ruled upon below to the circumstances in which they *should* exercise their power to do so. This part explores the principles that govern those exercises of discretion.

Recently, the Supreme Court has settled for pronouncements that it is within the discretion of IACs to determine on what occasions they will resolve issues that were not resolved below. The Court never has attempted to comprehensively state the considerations that govern its own exercises of discretion to decide issues that were not decided in either or both the district court or the intermediate court of appeals. For many reasons—including the constitutional and statutory restrictions on appellate jurisdiction discussed above—the Court can and should do better than it has done in governing itself and in guiding federal IACs in their exercises of discretion to hear or not to hear new issues. Of course, the federal IACs themselves can confine the manner in which they exercise their discretion, to keep their conduct within constitutional bounds and otherwise appropriate given

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158 See generally 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3905.1 (1992) (discussing review, after final judgment, of pre-finality orders).

their competence, their role, and the limits of both. We will see what principles the IACs have articulated to guide their own conduct in this regard.

A. *From Power to Discretion in the Supreme Court and in the Federal IACs—What the Courts Say and What the Courts Do*

Typical, recent statements of general principles by the federal courts of appeals are these:

“[C]ourts of appeals have discretion to address issues raised for the first time on appeal,” but exercise such discretion “only in exceptional circumstances, as, for example, in cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.”<sup>159</sup>

“We will review an issue that has been raised for the first time on appeal under certain narrow circumstances . . . [:](1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.” “The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party.”<sup>160</sup>

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159 *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (quoting *Flynn v. Comm’r*, 269 F.3d 1064, 1069 (D.C. Cir. 2001)) (holding that district court’s determination that order imposing contempt sanctions, in civil proceeding for contumacious conduct, was not impermissible criminal sanction, did not constitute plain error or an exceptional circumstance warranting reversal where contemnor was sanctioned pursuant to a schedule of per diem fines set in an earlier order enforcing a settlement agreement, and the contemnor had had the opportunity to limit or avoid the fines altogether by complying with the settlement agreement after the issuance of that order).

160 *Comty. House, Inc. v. City of Boise*, 468 F.3d 1118, 1128 (9th Cir. 2006) (quoting *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996)); *see also McIntosh v. Partridge*, 540 F.3d 315, 326 (5th Cir. 2008) (affirming summary judgment for the defendant, a former state supervisor, on the basis of official immunity in a § 1983 defamation suit based upon termination of employment, where the court concluded that affirmance on a different ground than the district court relied on was proper because the record appeared to be adequately developed, defendant had raised the defense of qualified immunity although the district court did not specifically address it, plaintiff had presented no evidence that no reasonable supervisor in defendant’s position would have reported to the state dental board as defendant did, and plaintiff had not suggested that he had other evidence that he would have tendered if official immunity had been raised as a ground for summary judgment or had the qualified immunity privilege been properly raised; the court thus ruled as a matter of law that defendant was entitled to official immunity with respect to his statements to the state dental board, that those statements were made without malice, and that there was no evidence to support a contrary finding); *Forest Guardians v. Forsgreen*, 478 F.3d 1149,

In deciding whether to reach issues we have considered: whether the litigant's failure to raise the issue has deprived the court of appeals of useful factfinding, or whether the issue was of a purely legal nature; whether the argument was highly persuasive and failure to reach it would threaten a miscarriage of justice; whether considering the issue would cause prejudice or inequity to the adverse party; whether the failure to raise the issue was inadvertent and provided no advantage; whether the issue was of constitutional magnitude; and whether the issue implicates a matter of great public concern.<sup>161</sup>

As the quotations above suggest, although there is not total uniformity among the circuits with respect to the circumstances under which they will entertain issues raised for the first time on appeal, key factors often are:

- (1) whether the issue presents a pure question of law;
- (2) whether the trial court made a "plain error"<sup>162</sup> and/or whether immediate appellate intervention is necessary to avoid a miscarriage of justice; and
- (3) whether the issue is of particular public interest or importance that justifies immediate appellate intervention.

These factors reflect concerns about appellate competence and that there be adequate justification for departing from a contrary norm. A situation that often is not captured by the usual formulations, but that may tempt an appellate court to address issues for the first time on appeal, is the situation in which facts have changed during the course of the appellate process, particularly if the facts will continue to change so that it is unlikely that the factual situation that

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1152 (10th Cir. 2007) (relying on the principle that an IAC may affirm on any ground supported by the record, provided the parties had an opportunity to address that ground, and affirming dismissal of complaint, concluding that plaintiff had not adequately alleged the agency action necessary to trigger the Forest Service's statutory duty to consult with the Fish & Wildlife Service). In *Forsgreen*, the IAC did not reach the ground on which the district court had relied in dismissing the complaint. *Forsgreen*, 478 F.3d at 1152.

161 *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 125 (1st Cir. 2010) (deciding whether counter-defendant was a state actor, subject to suit under 42 U.S.C. § 1983, and whether the actions for which it was sued were protected by the First Amendment (both of which were raised for the first time on appeal) on the grounds that, as to the first issue, the court was not deprived of useful fact finding, the counter-plaintiff was not prejudiced, and the counter-defendant gained no advantage, and, as to the second issue, that the issue was constitutional, was significant to the administration of justice in the federal courts, and was a pure issue of law, as to which the law was quite clear).

162 *See Salazar*, 602 F.3d at 434.

would face the district court upon a remand would remain static and be the factual situation that would face the court of appeals upon a return of the case to that court. Although appellate courts have various options, including remand to the trial court, it has been argued that, especially when the facts are not going to “hold still,” the most attractive option is for the appellate court to make updated fact findings, and rule based upon as current a factual base as it can.<sup>163</sup>

Some courts express reluctance to entertain arguments that were forfeited by a failure to raise them in the trial court, noting that “to preserve the integrity of the appellate structure, we should not be considered a second-shot forum, . . . where . . . back-up theories may be mounted for the first time.”<sup>164</sup> Other courts seem to think that it is sufficient that the new question presents a pure question of law.<sup>165</sup>

The principal modern rationales for the general rule that appellate courts will not address issues newly raised by appellants on appeal include the theories that:

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163 See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 272, 309–15, 333–73 (1999).

164 *Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709, 714 (10th Cir. 2010) (quoting *Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005)).

165 See, e.g., *Borntrager v. Cent. States Se. & Sw. Areas Pension Fund*, 577 F.3d 913, 924 (8th Cir. 2009) (observing that whether a trust agreement provision was preempted by ERISA was a purely legal question that did not require additional evidence or argument, that the court therefore could review de novo “for the first time on appeal”); *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009) (affirming dismissal of a challenge to a contractual prohibition on contributions to candidates for the office of State Attorney General from employees of private law firms that performed legal work for the state, holding that the district court erred in dismissing on the ground that plaintiff lacked standing to bring the suit but that the defendant was qualifiedly immune from suit for money damages because any right plaintiff had to receive campaign contributions was not clearly established at the time of the challenged conduct; although the argument of qualified immunity was argued for the first time on appeal, the court entertained it, in its discretion, because whether plaintiff’s claimed right was clearly established at the pertinent time was a question of law, and there was no need for additional fact-finding). The opinion in *Blumenthal* suggests that the court raised the question of qualified immunity sua sponte at oral argument. See *id.*; *Bertin v. United States*, 478 F.3d 489, 491–94 (2d Cir. 2007) (affirming dismissal of pro se action seeking return of property seized by customs officials, relying on principle that appeals court may affirm on any basis for which there is a record sufficient to permit conclusions of law, whether or not district court relied on those grounds, concluding that insofar as plaintiff’s claim constituted a claim under the FTCA, it was barred by sovereign immunity, and insofar as plaintiff’s claim was a claim for return of property under FEDERAL RULE OF CRIMINAL PROCEDURE 41(g), it was time-barred).

(1) by encouraging objections to be raised in the trial court, the general rule enables trial courts to avoid and correct many errors;<sup>166</sup>

(2) the general rule prevents appellees from being prejudiced by the failure of appellants to object at trial, where the appellee would have had the opportunity to respond not only with arguments but also, when appropriate, with evidence;<sup>167</sup> and

(3) the general rule promotes development of a complete record, both from an evidentiary point of view and with respect to articulation of the trial court's views, thus facilitating appellate review, at the appropriate standard of review.<sup>168</sup>

At least one commentator has questioned these rationales. Rhett Dennerline observed that the general rule typically is unnecessary to encourage attorneys to raise issues the resolution of which could favor their clients, when the attorneys recognize the existence of the issues, and that the rule cannot encourage attorneys to raise issues of which they are unaware.<sup>169</sup> Thus, the rule could affect attorney behavior only when a trial attorney is contemplating intentionally withholding an issue until appeal.<sup>170</sup> Put slightly differently, the rule might influence an attorney who was trying to decide, as a strategic matter, whether to raise an issue at trial (absent the rule, he or she might be more tempted to wait to raise it on appeal), but it would not influence others.<sup>171</sup> Similarly, because the general rule truly affects trial conduct only when attorneys would not have raised issues in the trial court absent the rule, it will not very often lead to the creation of a more complete trial record than otherwise would exist.<sup>172</sup> Dennerline further noted that the rule "is not narrowly drawn to prevent unfairness,"<sup>173</sup> and similarly that the avoidance-of-prejudice rationale does not always apply. He thus argued that the rule should be limited to situations in which a departure from it would be unfair and prejudicial.<sup>174</sup>

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166 See *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982) (explaining why an appellant must identify errors to the trial court, in order to provide an opportunity for avoidance or correction of error), *vacated on other grounds and remanded*, 462 U.S. 523 (1983).

167 See *id.*

168 See *id.* See generally Martineau, *supra* note 14, at 1031, 1035–38 (same); Dennerline, *supra* note 15, at 987–88 (discussing the rationale for the general rule).

169 See Dennerline, *supra* note 15, at 989.

170 See *id.* at 989–90.

171 See *id.*

172 See *id.* at 990.

173 See *id.*

174 See *id.* at 991.

But if the rationales for the general rule listed above are not so strong as might first appear, perhaps others that are grounded in appellate courts' strengths and weaknesses, their role, and judicial economy at the appellate level, are stronger. For example, because the general rule discourages appeals courts from addressing new issues, and because it does so regardless of whether the record is adequate,<sup>175</sup> it serves judicial economy at the appellate level.

Why then do appellate courts ever choose to entertain new issues? The answer harkens back to the history of review in equity. Appellate judges—particularly appellate judges in intermediate appellate courts, to whom appeal is of right—often view it as a proper part of their mission to “do justice,” and appellate judges want to do justice between the parties, as best they can.<sup>176</sup> As Professor Bruhl wrote in a different context, “[w]e want courts to have some discretion because [it allows them to make use of] . . . case-specific information that [firm rules cannot accommodate].”<sup>177</sup> At the same time, appellate courts are constrained by their roles, their procedures, and the limits on their competence.<sup>178</sup>

Have the courts acted consistently with these insights? When have the courts exercised discretion to decide new issues? As you read the pages that follow, you will see that the occasions on which appellate courts have been inclined to resolve issues that the district court did not decide correspond to the conventional view of appellate courts' competency and role, the efficiencies apparently to be gained, and the justifications for departing from the norm against deciding new issues. Thus, the “lawiness” (as contrasted with “factiness”) of an issue, and the adequacy of the existing record, go to the appellate court's competence. The “plain”ness of the error, the clarity of proper resolution, the absence of objection, and the circumstance that resolution of the new issue will support affirmance of the judgment, go to the efficiency of having the appellate court resolve the

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175 *Id.*

176 *See supra* text accompanying note 27; *see also* 28 U.S.C. § 2106 (2006) (empowering appellate courts to modify judgments in the interest of justice); *Hormel v. Comm'r*, 312 U.S. 552, 557 (1941) (“A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy [to promote the ends of justice].”); *Dennerline*, *supra* note 15, at 993 (noting that “appellate courts hear new issues because they want disputes resolved correctly”).

177 Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 249 (2011).

178 *See supra* text accompanying note 7; *infra* text accompanying notes 179–97, 204–10, 287, 331–54.



issue rather than remand to the district court. The jurisdictional nature of the issue, the fact that an issue goes to governmental structure or officials' rights or obligations, and the notion that injustice might well result if the new issue were not addressed all relate to the justification for departing from the norm against deciding new issues.

### 1. Unmixed Questions of Law

Appellate courts often say that they can decide new issues that are questions of law, as opposed to questions of fact and "mixed questions" of law and fact.<sup>179</sup> This position is grounded on the premise that the appellate courts' competence to decide "pure" questions of law is not compromised by the risk that the factual record will be incomplete or inadequate to allow for proper resolution of the new issue.<sup>180</sup>

One might ask whether the line between questions of law, on the one hand, and questions of fact and "mixed questions" of law and fact, on the other, is a tenable one. The slipperiness of the slope between questions of law and mixed questions of law is notorious,<sup>181</sup> and even the reality of the distinction between law and fact has been questioned.<sup>182</sup> Moreover, some commentators have challenged the notion that appellate courts ever can be confident that the record from the trial court is complete and that the party against whom the issue is raised would not have done something differently if the new issue had been raised in the trial court.<sup>183</sup> I do not believe that these difficulties justify abandonment of the distinctions between law, fact, and mixed questions, which remain grounded in appellate courts' core competencies.<sup>184</sup> These insights do, however, properly caution appellate

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179 See Dennerline, *supra* note 15, at 996.

180 See *id.*

181 Compare *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defining mixed questions as those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard") with WILLIAM W. SCHWARZER ET AL., *FED. JUD. CTR., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS* 14-21 (1991) (arguing that when the material facts are undisputed, application of law to fact is a matter of law for the court, but when application of law depends on resolution of disputed historical facts, the question is a "mixed question," attempting to distinguish "ultimate facts" from mixed questions, and noting that who should decide various questions, as between judge and jury, involves policy considerations as well as analysis that seeks to characterize the nature of issues).

182 See, e.g., Allen & Pardo, *supra* note 3, at 1769; Benjamin, *supra* note 163, at 359-60.

183 See Martineau, *supra* note 14, at 1038-40; Dennerline, *supra* note 15, at 997.

184 See *infra* note 336 and accompanying text.

courts to investigate the sufficiency of the record and to entertain arguments from the parties before deciding that a particular question is a question of law that the appellate court can hear without prejudice to any party.<sup>185</sup> By so doing, appellate courts can do their best to limit themselves to new issues that are well-positioned to be decided by appellate courts on the record that exists before those courts.

Assuming that the line of distinction between questions of law and other questions is workable, one might still ask whether the line is appropriate. In 1982, Judge John C. Godbold published an article in which he defended appellate fact finding when done in a principled fashion.<sup>186</sup> He argued that appellate courts are not jurisdictionally precluded from making fact findings in non-jury cases where district courts have not made fact findings as to the point at issue,<sup>187</sup> and sought to debunk the notion that practical limitations make it difficult for appellate courts to find facts,<sup>188</sup> noting the resources that appel-

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185 See *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1352 (11th Cir. 2011) (remanding to district court so that it could determine mootness argument, raised for the first time on appeal, where the issue required additional factual development); cf. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011) (entertaining the argument, raised for the first time on appeal, that the Alien Tort Statute does not recognize corporate liability, reasoning that the question was a question of law, important and recurring, did not depend on any additional facts not considered by the district court, that appellants did not suggest that they were prejudiced but rather had fully addressed the issue on appeal, and that efficiency would be served, as the complaint had been filed more than a decade earlier). See generally Dennerline, *supra* note 15, at 997–98 (describing the “practical implications of applying the [pure law] exception”).

186 John C. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 365–70 (1982); see also Chad M. Oldfather, *supra* note 3, at 445–66 (rejecting the conventional account of the relative institutional competencies of appellate courts and trial courts when it comes to the assessment of historical facts).

187 See Godbold, *supra* note 186, at 370–72 (contrasting the effect of FEDERAL RULE OF CIVIL PROCEDURE 52 in limiting appellate courts to setting aside a trial judge’s findings of fact when those findings are clearly erroneous, giving due regard to the trial court’s opportunity to judge witnesses’s credibility).

188 Judge Godbold took a parallel position with respect to receiving new evidence. *Id.* at 373. That is, he wrote that federal appellate courts have jurisdiction to receive new evidence, but that “[c]onsiderations of fairness to the trial court and of judicial economy . . . severely restrict the instances in which new evidence may be taken.” *Id.* at 384. He opined that litigants should not be afforded an opportunity to present evidence that should have been presented at trial but was not, due to their own fault. *Id.* at 387. And he acknowledged that “[i]t is sometimes impractical for appellate courts to receive new evidence,” but he asserted and illustrated that this is not always true. *Id.* at 384–89.

late courts have, the contexts (including original proceedings and motion practice) in which they do frequently engage in fact finding, and the issues (such as jurisdiction) as to which they commonly find facts.<sup>189</sup> Even Judge Godbold argued for limits that appellate courts should observe in fact finding, however. While he opined that appellate courts are free to find facts when the district court inadvertently overlooked a necessary fact finding or purposely did not address a factual issue because the court did not need to do so in light of the different ground upon which it ruled, Judge Godbold drew the line at appellate fact findings that would not have been relevant to the issues raised in the trial court.<sup>190</sup> He found that appellate fact finding as to issues not raised in the trial court “would be contrary to effective judicial administration,”<sup>191</sup> as he thought it best to encourage parties to bring their fact issues, as well as their legal issues, to the trial court.<sup>192</sup> Judge Godbold backed away from this limitation insofar as parties are not barred from raising new issues on appeal; that is, it appears to be his view that appellate courts properly can make fact findings as to issues not raised at trial if it is proper for the parties to raise those issues on appeal.<sup>193</sup>

Among the problems I see with Judge Godbold’s analysis are these: First, the proposition that appellate courts should *not* make fact findings as to a new issue that was not properly raised on appeal does not imply that appellate courts *should* make fact findings on new issues that are properly raised on appeal. Thus, there is a logical flaw in the argument. In addition, there is a circularity problem if the propriety of raising a new issue in the appellate court depends on whether resolution of the new issue would require the appellate court to make fact findings (as many courts say), while the propriety of the appellate court making fact findings depends on whether the new issue is properly before it. What remains is Judge Godbold’s view that appellate courts should not make fact findings that would not have been relevant to the issues raised in the trial court. That view is in accord with the pronouncements of most federal appellate courts, and revives the relative propriety of appeals courts focusing on new questions of law, rather than on new questions of fact, that are raised on appeal.

Professor Oldfather has argued that:

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189 See *id.* at 372–75; see also Benjamin, *supra* note 163, at 333–69 (making a case for appellate capability and experience in fact finding).

190 See Godbold, *supra* note 186, at 379–81.

191 *Id.* at 380.

192 See *id.* at 381.

193 See *id.*

Thought processes based on information from a textual source are more compatible with systematic, rational (and therefore “legal”) thought than are those based on information received orally. . . . Moreover, research demonstrates that people consistently perform poorly at using demeanor evidence to assess credibility and veracity . . . . In addition, appellate courts are at least as well equipped as trial-level fact finders to assess documentary and circumstantial evidence, and also enjoy advantages arising from experience and perspective. In sum, there are fundamental respects in which appellate courts can function as superior fact finders.<sup>194</sup>

Even accepting all of these premises (which one might not do), Professor Oldfather recognizes that whether appellate courts ought to exercise their fact-finding prowess depends on the larger aims of the system.<sup>195</sup> Thus, he makes the prescriptive points that “appellate review of facts should be reordered so as to require express consideration of institutional competence as applied to the specific matters before the court in a given case” and should account for systemic aims in determining the extent to which appellate courts should utilize their fact-finding competence.<sup>196</sup> Professor Oldfather’s refined thinking is helpful for purposes of this Article and for the question when, if ever, appellate courts should take first stabs at questions of fact or mixed questions of law and fact that encompass questions of fact. It does make sense for appellate courts to consider their institutional competence as applied to the specific matters before them in a given case. But, as Professor Oldfather agrees, even when the nature of the evidence and the state of the record is such that an appellate court would be competent to take the first stab at a factual issue, appellate courts should be restrained in their exercise of their powers in consideration of their role and of what best serves judicial economy.<sup>197</sup> This is not to say that matters of judicial economy and the role of appellate courts invariably will cut against appellate courts taking the first stab at issues, but it is to say that these factors need to be highly influential when the relative competence of appellate and trial courts is not determinative. These matters, which bear upon the idea that appellate courts are not designed to and are not best suited to address fact questions *de novo*, are further explored below.

The frequently cited requirement of an unmixed question of law speaks to appellate courts’ competence to resolve issues. It does not

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194 Oldfather, *supra* note 3, at 440 (footnotes omitted).

195 *Id.*

196 *Id.* at 444.

197 *See id.* at 440.

however reflect any need for further justification for departing from the norm of leaving issues to district courts, in the first instance.

## 2. Questions Proper Resolution of Which is Beyond Doubt

As noted earlier, in the Supreme Court's decision in *Singleton v. Wulff*, the Court stated 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."<sup>198</sup> Nonetheless, providing some guidance, *Singleton*, in dicta, made clear that the Court believes that the circumstances in which a federal appellate court is justified in resolving an issue not passed on below include situations in which the proper resolution is beyond any doubt, or where injustice otherwise might result.<sup>199</sup> The first of these instances (where proper resolution is beyond doubt) suggests that efficiency and the utility or lack of utility, to the appellate court, of a district court opinion are acceptable criteria for appellate courts to use when deciding whether to resolve an issue not passed upon below. Efficiency seems to be one of the values that is promoted by immediate appellate resolution of an issue the proper resolution of which is beyond any doubt, and hence as to which a district court opinion would have little utility to the appeals court.<sup>200</sup> Does this reasoning hold up?

In the short run, immediate resolution by the appellate court may be more efficient than remand to the district court would be. However, judicial economy also can be furthered by the enforcement of rules that require issues to be timely raised in the trial court, on pain of waiver or forfeiture. The latter presumptively would save resources of the appellate courts, while expending resources of the district courts, rather than expending resources of the appellate courts while saving resources of the district courts. Features of our appellate sys-

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198 *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

199 *See id.* (citing *Turner v. City of Memphis*, 369 U.S. 350 (1962)) (treating the appellant's jurisdictional statement as a petition for writ of certiorari prior to the judgment of the court of appeals, granting the petition, vacating the district court's order, and remanding the case to the district court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained of, as the regulation that plaintiff challenged was clearly unconstitutional under the Court's precedents). In *Hormel v. Commissioner*, 312 U.S. 552, 557 (1941), also cited by the *Singleton* Court, the Court stated that "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy [to promote the ends of justice]."

200 *See Singleton*, 428 U.S. at 121.

tem, particularly the final judgment rule, suggest that we favor conserving the resources of our appellate courts. Hence, a good reason should be needed to justify appellate courts taking the first stab at a new issue.

Of course, an appellate court lacks reason and motivation to address a new issue whose resolution is beyond doubt if doing so would not correct an injustice. Hence, the “beyond doubt” criterion normally is coupled with a requirement that the losing parties below have been wronged by the lower court’s decision.<sup>201</sup>

### 3. Injustice Otherwise Might Result

The second of the instances cited by the Court in *Singleton* (where injustice otherwise might result) indicates that the doing of justice and the avoidance of injustice are acceptable criteria for appellate courts to use when deciding whether to resolve an issue not passed upon below. This of course harkens back to the equity side of our history, but the criterion presents even more subtle and complex consideration than does efficiency. When might injustice result if the appellate court does not immediately address an issue not previously decided by an inferior court? It would not seem that the possibility that the lower court, on remand, would “get it wrong” in-and-of-itself should render appropriate an appellate decision without benefit of lower court consideration. Our system ordinarily contemplates that the trial court should make the initial decision, notwithstanding that it may provide a “wrong” answer. Delay before the appellate court would get another opportunity to set things right might lead to injustice in some circumstances, but such delay should not “automatically” be regarded as imposing injustice that would justify early appellate intervention. Perhaps something approaching “irreparable harm” should be required.<sup>202</sup>

The Court has not really focused on whether and when injustice might result if the appellate court did not address an issue not previously decided by an inferior court. It appears that the Court has

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201 See Dennerline, *supra* note 15, at 999, 1001 (arguing that when appellate courts decide new issues on the ground that they pose pure questions of law or their proper resolution is beyond doubt, they do so despite a failure of the “exception” to address all of the concerns that underlie the general rule). Dennerline concludes that these therefore are not true exceptions to the general rule. *Id.* at 1001. The logic behind that inference eludes me.

202 We might gain some insight from cases in which the Court itself has resolved issues that were not resolved in the inferior courts, although it also could be that the Court believes that different standards should apply when *it* is deciding whether to resolve a new issue than should apply when an IAC is deciding whether to do so.

focused instead on the need for *some* court to address the new issue so as to avoid injustice. One seldom sees the Court (or intermediate federal courts of appeals) discuss why the appellate court, rather than a lower court on remand, should address the new issue that commands judicial attention so that injustice may be avoided. Instead, the Court has seemed to *assume* that—barring some obstacle such as the need for additional evidence—the appellate court should address an issue raised when the case is pending before it, when justice hangs in the balance. But if the avoidance of injustice really is the Court's concern, then efficiency may be all that drives the doctrine or practice that permits the appellate court to immediately address the new issue. And, as the preceding discussion indicates, having the appellate court address the new issue will not necessarily be most efficient.<sup>203</sup> While it is the appellate court's job to decide whether courts should hear an issue that is raised for the first time on appeal, it does not follow that it is the *appellate* court that should hear the issue in the first instance.

#### 4. The Appeals Court Will Not Benefit from Further Proceedings in the Lower Court

We have seen that, in reaching the merits in *Singleton*, one of the rationales that the Eighth Circuit relied upon—that the answer on the merits was beyond doubt—was a rationale that the Supreme Court approved.<sup>204</sup> The circuit's second rationale—that the appeals court would not benefit from further proceedings in the district court because the question of the challenged abortion statute's validity could not profit from further refinement—also makes good sense in theory, and goes to an appellate court's competence to decide the new issue well, under the circumstances. However, the Court disagreed with the circuit's *application* of this criterion, and thereby made clear that appellate courts' discretion to decide what questions may be taken up and resolved for the first time on appeal is not unfettered;<sup>205</sup> indeed, it can be abused even when the IAC has invoked acceptable criteria. This is the next noteworthy aspect of the decision. Why was the discretion abused here? The Court indicated that the answer to the merits question was *not* beyond doubt because the issue never had been passed upon by the Supreme Court.<sup>206</sup> Moreover, in this case the defendant never had had an opportunity to offer evidence in defense of the challenged abortion statute and had not had occasion

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203 See *supra* notes 198–202 and accompanying text.

204 See *Singleton*, 428 U.S. at 118.

205 *Id.* at 119–20.

206 *Id.* at 121.

to present its legal arguments on the constitutionality of the statute; the case had not proceeded to that point in the district court, and defendant was justified in not presenting those merits arguments to the court of appeals as the appellee on an appeal from a dismissal for lack of standing.<sup>207</sup> In these circumstances, the Court found that “injustice was more likely to be caused than avoided by” the Eighth Circuit’s decision of the issue.<sup>208</sup>

So, the “takeaway” from *Singleton* is that: (1) there are unresolved questions as to whether and when federal court of appeals have jurisdiction or power to reach merits questions that were not decided in an inferior court;<sup>209</sup> (2) the appellate courts have some discretion to choose the theretofore undecided questions that they will resolve; (3) proper resolution being beyond any doubt and the possibility that injustice otherwise might result are among the relevant considerations (but those considerations themselves need additional clarification); (4) the discretion to decide new issues can be abused even when the IAC has invoked acceptable criteria; and 5) appellate courts need to be sure that interested litigants have had a fair opportunity to be heard before they resolve issues that the lower courts have not resolved.<sup>210</sup>

The Supreme Court has said that a litigant seeking review in that Court generally has the ability to choose how to frame the questions to be decided.<sup>211</sup> Although, on occasion, the Court has 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, ordinarily the Court does not consider questions outside those presented in the petition for certiorari. This rule is prudential in nature, but the Court disregards it “‘only in the most exceptional cases,’ where reasons of urgency or of economy suggest the need to address the unrepresented question in the case under consideration.”<sup>212</sup> The Court also seeks to avoid situations in which the respondent

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207 *Id.* at 120.

208 *Id.* at 121.

209 *See supra* note 176 and accompanying text.

210 The Supreme Court’s recent plain error decision, *United States v. Marcus*, 130 S. Ct. 2159 (2010), *might* provide reason to believe that the Court has tightened-up after *Singleton*, but the Court does not seem to regard plain error doctrine as covering the waterfront of new issues that appellate courts may decide.

211 *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

212 *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976)); *see also* *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971) (referring to the Court’s authority to notice plain error and indicating the relevance of whether the parties had briefed and argued an issue beyond that on which certiorari had been granted).



would lack any opportunity to argue that the un-presented questions are not worthy of review. In light of the Supreme Court's discretionary docket, it often can avoid taking cases in which the parties have failed to raise all of the relevant legal questions. However, as Professor Frost has observed, in view of the Court's role in our system, the especial importance of the precedents that the Supreme Court sets and of the pronouncements of law that it makes, its responsibilities to address questions of pressing national importance and to maintain appropriate balance among the branches of the federal government and between the state and federal governments and the people, on occasion the Court will have strong incentives to raise, and sometimes to decide, issues that the parties failed to raise below, or that the lower courts did not address.<sup>213</sup>

What more can we learn from Supreme Court decisions?

##### 5. "Jurisdictional" Issues, Whether or Not the Court Raises Them Sua Sponte

Federal court original jurisdiction and appellate jurisdiction are prerequisites to federal courts' addressing questions on the merits, and so questions of federal court jurisdiction and of appellate jurisdiction are logically prior to any questions on the merits that are posed by an appeal. Thus, appellate courts should be able, and indeed should be obligated, to raise those questions.<sup>214</sup> Nonetheless, if the jurisdictional questions are based on factual matters as to which there is a dispute, and *a fortiori* if the relevant factual matters were not explored in the trial court and made part of the record, reasons will exist to remand to the trial court for resolution of issues that go to the

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213 See Frost, *supra* note 20, at 514–15.

214 See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Which issues are "jurisdictional" and which are something else is not always clear, however. Scott Dodson, *The Failure of Bowles v. Russell*, 43 TULSA L. REV. 631 (2008) (analyzing holding of *Bowles v. Russell*); Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 Nw. U. L. REV. COLLOQUY 42 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/21> (criticizing *Bowles v. Russell* decision for not producing a framework by which rules could be characterized as jurisdictional or not); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008) [hereinafter Dodson, *Mandatory Rules*] (analyzing the role of nonjurisdictional rules); Philip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of Kontrick, Eberhart & Bowles*, 59 RUTGERS L. REV. 847 (2007) (analyzing Supreme Court decisions affecting the conception, as jurisdictional or not, of various timing prescriptions that confront federal appellate litigants); Steinman, *supra* note 40, at 865–68, 878–91, 923–27 (exploring what issues would be jurisdictional for purposes of the Supreme Court's insistence that a federal court determine jurisdictional issues before reaching merits issues).

federal district court's jurisdiction. District courts and parties already have incentives to reach subject-matter jurisdiction issues before spending time, money, and effort on merits questions, but knowing that they may have to face the issue on a limited remand if the appellate court thinks there is an issue presumably would add still further to the incentives to get subject-matter jurisdiction resolved early on, and certainly prior to any appeals. However, appellate courts are empowered to utilize special masters to resolve in the first instance any disputed factual matters that are material to determinations that are ancillary to proceedings in the court—which could include matters of *appellate* jurisdiction, such as standing to appeal—and it might be possible for appellate courts to utilize special masters to help them resolve in the first instance disputed factual matters that are material to determinations of *original* federal court jurisdiction.<sup>215</sup> Appellate courts could decide, in their discretion, when use of such adjuncts would be preferable to remand to the district court and to the appellate court's unaided resolution of the factual questions that are posed.

The Supreme Court has raised *sua sponte* and decided issues of prudential ripeness that had not been raised in or addressed by the lower federal courts.<sup>216</sup> It has entertained the arguments in support

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215 Although FEDERAL RULE OF CIVIL PROCEDURE 53 applies only to district courts, "its principles have been applied by analogy in references ordered by courts of appeals," 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2602 (2008), which may appoint masters under authority that derives from "inherent traditional equity powers . . . to seek assistance in discharging their duties." *Id.* Moreover, FEDERAL RULE OF APPELLATE PROCEDURE 48 authorizes a court of appeals to

hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following: (1) regulating all aspects of a hearing; (2) taking all appropriate action for the efficient performance of the master's duties under the order; (3) requiring the production of evidence on all matters embraced in the reference; and (4) administering oaths and examining witnesses and parties.

FED. R. APP. P. 48. The Advisory Committee Notes make clear that the Advisory Committee did not intend to alter the ordinary practice of federal appeals courts to remand a case to the district court or agency when a factual issue needs to be resolved, but it recognized that, "when factual issues arise in the first instance in the court of appeals . . . it would be useful to have authority to refer such determinations to a master for a recommendation." FED. R. APP. P. 48 advisory committee's note. *See generally* 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3993 (2008) (discussing local rules and practices).

216 *See Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 (1993) (citing Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974)) (indicating that the Court can raise issues of ripeness *sua sponte*, even when they are prudential).

of the judgment below, and made for the first time in the Supreme Court, that no justiciable controversy existed,<sup>217</sup> and that a case has become moot.<sup>218</sup> The Court has even reached the issue, raised for the first time on appeal, whether a case fell within the equity jurisdiction that had been exercised below.<sup>219</sup>

The Court also sometimes has held that a statutory requirement that might be thought to be jurisdictional was not, and hence could not be raised for the first time on appeal. In *Grubbs v. General Electric Credit Corp.*,<sup>220</sup> the Court was confronted with a civil action that had been removed to federal court on the petition of the United States, which had been brought into the suit ostensibly because it claimed a lien on property that was involved in the action.<sup>221</sup> Before judgment, no party objected to the removal, but the court of appeals held sua sponte that the removal had been improper because the purported interpleader of the United States was spurious.<sup>222</sup> It therefore vacated the judgment and directed remand to state court.<sup>223</sup> The Supreme Court reversed, holding that erroneous removal did not require vacatur of the district court's judgment so long as the requirements of federal subject-matter jurisdiction were met when judgment was entered.<sup>224</sup> For our purposes, the important point is the Court's declaration that, where jurisdiction existed at judgment time, "the validity of the removal procedure followed may not be raised for the first time on appeal,"<sup>225</sup> as matters of mere removal procedure are not jurisdictional.<sup>226</sup>

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217 See *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 134 (1947) (refusing to consider the argument that the State lacked capacity to bring the suit, reasoning that failure to so object in the trial court constituted a waiver of that defect).

218 See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 7–9 (1978) (raising and resolving sua sponte the question of mootness).

219 See *New Orleans v. Morris*, 105 U.S. 600, 601–02 (1882) (finding equitable jurisdiction and hence rejecting the challenge).

220 405 U.S. 699 (1972).

221 See 28 U.S.C. §§ 1444, 2410 (2006).

222 *Grubbs*, 405 U.S. at 702.

223 *Id.*

224 At judgment, the court had subject-matter jurisdiction because, in the suit's posture at judgment, the suit was one that could have been brought in federal court under diversity jurisdiction. *Id.* at 700.

225 *Id.*

226 Although federal courts sometimes disagree as to whether particular defects are jurisdictional or merely procedural, the removal statutes clearly distinguish between those categories. For example, 28 U.S.C. § 1447(c) provides:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final

The exception for jurisdictional issues does not derive from appellate courts' presumptive competence to decide these issues; sometimes the issues will require factual discovery and fact findings. Rather, it derives from a justification for departing from the norm that appellate courts will not decide new issues. Here, the justification has been thought to lie in separation of powers and in the federal structure of government, to keep federal courts from over-stepping their bounds vis-à-vis the states and to keep appellate courts from over-stepping their congressionally established bounds vis-à-vis the district courts.

It should be noted that the categories that were discussed above (unmixed questions of law, proper resolution beyond doubt, injustice otherwise might result, the appeals court will not benefit from further proceedings in the lower court) are not categories that in-and-of-themselves imply anything about when particular issues should be reached in relation to other issues. The same is true of many of the categories discussed below. By contrast, because the Supreme Court has established sequencing rules with respect to jurisdictional issues and insists that courts determine that they have subject-matter jurisdiction before they decide merits issues, when a court of appeals decides in the first instance that the district court lacked subject-matter jurisdiction over a case after the district court has addressed issues

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judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). It is far from clear, however, that a removal under § 1444 that the United States may not properly effect is tainted by a merely procedural—rather than a jurisdictional—defect, 28 U.S.C. § 1444; foreclosure action against the United States, provides: “Any action brought under [28 U.S.C. § 2410] against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending.” *Id.*; *see also* *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 178 (8th Cir. 1978) (affirming denial of leave to amend a complaint against the Secretary of HUD because the federal district court would have lacked jurisdiction over the claims, where the suit purportedly had been removed pursuant to 28 U.S.C. § 1444, but the court concluded that it lacked jurisdiction because the removed claim was ultimately a tort claim, rather than one for foreclosure of a mechanic’s lien, and there was no present valid lien that plaintiff could enforce); *Mongelli v. Mongelli*, 849 F. Supp. 215, 218–19 (S.D.N.Y. 1994) (remanding to state court suit removed by intervenor United States, holding in part that under New York law the United States had no lien, and because there was no lien as required by 28 U.S.C. § 2410, the court lacked subject-matter jurisdiction over the action, and the case had to be remanded under 28 U.S.C. § 1447(c)); *Page v. Greenwood*, 1990 U.S. Dist. LEXIS 14926, at \*2–8 (D. Or. 1990) (remanding to state court ejectment action removed by third-party defendant United States pursuant to § 1444, because by the time the action was brought the United States no longer had a lien on the property involved, having sold it to the plaintiffs in the ejectment action).

on the merits and likely procedural issues as well, the intended sequencing of issues is thrown off. The various consequences that Rutledge explores (such as consequences for party behavior, litigation costs, settlement incentives, the relationship between trial and appellate courts, and the allocation of judicial resources) are very evidently involved.<sup>227</sup> However, that would be true even if the appellate court remanded for the district court to address its subject-matter jurisdiction, subject to review by the court of appeals.

Finally, it is important to note—as some of the discussion above may have implied—that the line between which issues are “jurisdictional” and which are not is not a clear and obvious line. Indeed, Professor Scott Dodson has made us realize that even “nonjurisdictional rules exhibit some attributes of jurisdictionality”<sup>228</sup> and may have jurisdictional effects. The dichotomy is false. From the perspective of this Article, the implications relate to both mandatory sequencing (which, if any, rules that are nonjurisdictional for some purposes need to be addressed before merits questions?) and to the duty of appellate courts to raise issues *sua sponte* (which, if any, issues that are nonjurisdictional for some purposes are issues that a court of appeals must raise *sua sponte*, if the parties have failed to raise those issues?). Professor Dodson’s insights also have direct relevance to what the Supreme Court sometimes as referred to as “quasi-jurisdictional issues,” which are discussed immediately below.

## 6. But Not Necessarily Quasi-Jurisdictional Issues

*Hypothesis: If an appellate court can reach the same ultimate disposition on other grounds, it is preferable that the court not exercise its discretion to consider and decide a quasi-jurisdictional issue, of constitutional dimensions, that the parties did not litigate below.*

The Supreme Court sometimes has refrained from addressing *sua sponte* quasi-jurisdictional matters that neither the parties nor the intermediate appellate courts raised. Thus, in *Wisconsin Department of Corrections v. Schacht*,<sup>229</sup> for example, the Court refrained from raising *sua sponte* and taking the first stab at the question whether, by giving its express consent to removal of a case against a state department, Wisconsin waived its Eleventh Amendment<sup>230</sup> immunity from suit in

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227 See generally Rutledge, *supra* note 38 and text accompanying notes 39–53 (advancing a multi-disciplinary approach to “decisional sequencing”).

228 Dodson, *Mandatory Rules*, *supra* note 214, at 6.

229 524 U.S. 381 (1998).

230 U.S. CONST. amend. XI states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prose-

federal court.<sup>231</sup> In deference to the bar's "hybrid nature," rooted in the jurisdictional language of the Eleventh Amendment, the Court had held that a State may raise the Eleventh Amendment bar for the first time on appeal, despite the strategic advantages that that ability gives to a State.<sup>232</sup> However, where neither the parties nor the intermediate appellate courts had raised the issue, the Court decided that "the proper course [was] for [it] to defer addressing the question until it [was] presented . . . [and] supported by full briefing and argument, in some later case."<sup>233</sup> The Court may have acted with restraint in this instance because it had other grounds upon which to hold that the district court had *not* erred in hearing the claims that the plaintiff had asserted against Department of Corrections employees sued in their personal capacity, and in granting summary judgment to those employees, prompting Schacht's appeal.<sup>234</sup> Thus, the Court had no need to reach out to decide whether removal waived the State's Elev-

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cuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign state." U.S. CONST. amend. XI.

231 See *Schacht*, 524 U.S. at 381.

232 See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984) (noting that Eleventh Amendment defense can be raised at any time in the proceedings); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279–81 (1977) (addressing whether the school board had an Eleventh Amendment immunity, where the district court had skipped that question and decided instead that an Ohio statute and decisional law had waived any such immunity); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (approving Seventh Circuit's dealing on the merits with a defense that the Eleventh Amendment barred suit against Illinois officials, which had not been raised in the trial court; reasoning that the Eleventh Amendment "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court;" relying on *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945), in which the Court considered an Eleventh Amendment issue that was urged for the first time in the Supreme Court, stating that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court").

233 *Schacht*, 524 U.S. at 398 (Kennedy, J., concurring). Justice Kennedy, in dicta, articulated arguments in support of finding waiver by removal. See *id.* at 394–97. The Court later did, in a unanimous opinion, hold that a State does waive its Eleventh Amendment immunity by removing a case from state to federal court. See *Lapides v. Bd. of Regents*, 535 U.S. 613, 617–24 (2002). Its holding, however, was limited to the situation presented, that is, to state-law claims where the State had waived immunity from state-court proceedings. See *id.*

234 The Court held that the presence in an otherwise removable case of a claim or claims barred by the Eleventh Amendment does not destroy jurisdiction that otherwise would exist. *Schacht*, 524 U.S. at 386–93. Upon removal, a federal court can proceed to hear the remaining claims, and the district court did not err in doing so in this case. *Id.* at 383.

enth Amendment immunity. A lesson may be implied here: If an appellate court can reach the same result on other grounds because a quasi-jurisdictional issue is not critical to the federal courts' jurisdiction over the case as a whole, it is preferable that the court *not* exercise its discretion to consider and decide a quasi-jurisdictional issue that the parties did not litigate below—particularly where the issue involves constitutional interpretation.<sup>235</sup> Alternatively, one might conclude that sovereign immunity is a doctrine that is mandatory when raised by the parties (it is, for example, not subject to exceptions based on equity), but is not jurisdictional in the sense that the court has a duty to raise it *sua sponte*.<sup>236</sup>

### 7. Questions Going to Governmental Structure and Government Officials' Rights and Duties

The Supreme Court also has taken-up issues, raised for the first time on appeal, when those issues went to fundamental principles of the structure of the federal government or government officials' rights and duties. Thus, in *Glidden Co. v. Zdanok*,<sup>237</sup> in one of the suits before the Court a decision had been rendered by a Second Circuit panel on which sat a judge of the Court of Claims, sitting by designation of the Chief Justice of the United States, pursuant to statute.<sup>238</sup> In the other suit before the Court, the trial of a criminal case had been presided over by a retired judge of the Court of Customs and Patent Appeals, sitting by similar designation.

In both cases the Supreme Court granted certiorari limited to the question whether the judgment was vitiated by the participation of the judges mentioned above. The challenge to the participation of these judges was raised for the first time on the appeal to the Supreme Court. The Court concluded that, while there often is reason to reject post-judgment challenges to judges' authority, that "rule does not obtain . . . when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction [or i]n other circumstances . . . when the statute claimed to restrict authority . . . embodies a strong policy concerning the proper administration of judicial business."<sup>239</sup> Then, "this Court has treated the alleged defect as 'jurisdic-

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235 See Martineau, *supra* note 14, at 1050 (taking the position that Eleventh Amendment issues—and perhaps, by implication, other quasi-jurisdictional issues—should not be exceptions to the general rule against considering new issues on appeal).

236 See Dodson, *Mandatory Rules*, *supra* note 214, at 28–34.

237 370 U.S. 530 (1962).

238 *Id.* at 530.

239 *Id.* at 535–36 (citations omitted).

tional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity."<sup>240</sup>

A fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds [as this case was]. . . . At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and this is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.<sup>241</sup>

*Glidden* illustrates that the importance of the issue raised for the first time on appeal also is significant in the Court's exercises of discretion to hear or not to hear such issues. Again, however, while the importance of the issue speaks to whether the courts should address it, it does not necessarily speak to which court should address the issue first—the trial court, the intermediate court of appeals, or the Supreme Court. This seems to be overlooked in the Court's decisions.

It also is worth noting that the Court sometimes decides merits-related issues that were decided in the district court but were not decided in the intermediate court of appeals, when those issues go to

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240 *Id.* at 536.

241 *Id.*; see also *Freytag v. Comm'r*, 501 U.S. 868 (1991) (considering an issue that had been raised for the first time on appeal to the court of appeals, namely, whether the assignment of complex cases to a special trial judge was not statutorily authorized and violated the Appointments Clause of the Constitution). The challenge in *Freytag* went to the validity of the Tax Court proceeding that was the basis for the litigation and, thus, was "a non jurisdictional structural constitutional objection that may be considered, even though petitioners consented to the assignment." *Freytag*, 501 U.S. at 868–69. The IAC had heard the issue on the theory that the attack was on the subject-matter jurisdiction of the special trial judge. *Freytag v. Comm'rs*, 904 F.2d 1011, 1015 (5th Cir. 1990). The Court said:

It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.' We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.

*Freytag*, 501 U.S. at 879 (citation omitted) (quoting *Glidden Co.*, 370 U.S. at 535–36); see also *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 50 (2d Cir. 2010) (entertaining an argument, raised for first time on appeal, that the Terrorism Risk Insurance Act of 2002 was unconstitutional as applied in this case because it mandated reopening of a final judgment in violation of separation of powers, reasoning that a contention that legislative enactment intrudes on the courts' powers is the kind of claim that appropriately now be considered for the first time on appeal); *Frost*, *supra* note 20, at 485–91 (discussing judicial issue creation to enforce constitutional restrictions on government power and to safeguard legislative power).



federal officials rights and duties. In *Mitchell v. Forsyth*,<sup>242</sup> for instance, the Supreme Court held that the district court erred in holding that former Attorney General John Mitchell was not entitled to summary judgment on the ground of qualified immunity from suit, reaching the purely legal question on which his claim of immunity turned, where the IAC had not reached that issue because it had held that the denial of summary judgment on this ground was not immediately appealable under the collateral order doctrine.<sup>243</sup> The Court might have held merely that the denial of summary judgment for lack of qualified immunity *was* immediately appealable, and remanded the case to the court of appeals to address the rejected claim to qualified immunity. Instead, the Court said that the purely legal question on which Mitchell's claim of immunity turned (*i.e.*, whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions) was appropriate for its immediate resolution,<sup>244</sup> just as the Court had considered the question of the President's absolute immunity from suit in *Nixon v. Fitzgerald*,<sup>245</sup> where the intermediate appellate court also had dismissed for lack of appellate jurisdiction.<sup>246</sup> Concerns of judicial economy and the importance of the question presented warranted the Court's immediate decision, in its view. Justice Brennan, dissenting in part, argued that there was an issue of fact as to the nature of the wiretap in question that the trial court never had resolved.<sup>247</sup> He thus reasoned: "To hold on this record that Mitchell was entitled to summary judgment is either to engage in *de novo* factfinding—an exercise that this Court has neither the authority nor the resources to do—or intentionally to disregard the record below to achieve a particular result in this case."<sup>248</sup>

Did *Mitchell* present an appropriate occasion for the Court to address the qualified immunity issue, and should it matter that the issue had been addressed in the district court, although not in the court of appeals? The fact that the district court had addressed the issue would obviate the concern that a party would be unfairly sur-

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242 472 U.S. 511 (1985).

243 *See id.* at 530.

244 *See id.*

245 457 U.S. 731 (1982).

246 *Id.* at 743 n.23.

247 *See Mitchell*, 472 U.S. at 556 (Brennan, J., dissenting in part) (noting, in an opinion joined by Justice Marshall, that "Forsyth alleged that the Davidson wiretap was not a national security wiretap, but was instead a simple attempt to spy on political opponents" and that "[t]his created an issue of fact as to the nature of the wiretap in question, an issue that the trial court never resolved").

248 *Id.*

prised by the raising of the issue and would obviate the concern that the opposing parties would not have had an opportunity to make the evidentiary record necessary to enable an appellate court to reach a fully informed decision. Here, however, at least in Justices Brennan's and Marshall's view, the district court had failed to make a critical fact finding, and if they were correct, then remand to the district court would have been appropriate.<sup>249</sup> The absence of intermediate appellate consideration of the qualified immunity seems to me less important. While the Supreme Court might benefit from the IAC's reasoning, the Court would review *de novo*, so it would not be failing to give deference that normally would be due to the IAC. Concerns of judicial economy as well as the importance of the legal questions presented favored immediate decision, as the question—which went to the vulnerability of high federal officials to the distractions and other burdens of litigation—was sufficiently important that the Court was determined to decide it, whether or not the intermediate appellate court also had devoted resources to it.

#### 8. Merits Questions—When Essential to Justice, Fairness, and Correct Disposition of Important Issues

The importance to the Supreme Court of doing justice and the philosophy of the Court concerning the power and discretion of appellate courts to consider issues not presented at the trial level is nowhere articulated better than in *Hormel v. Commissioner*. There the petitioner in the Supreme Court challenged the power of a federal court of appeals to pass on questions that had not directly and squarely been presented in the proceedings before the Board of Tax Appeals.<sup>250</sup> The appellate court's authority to review decisions of the Board rested on statutes that provided in part that the appeals court had "power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding . . . for a rehearing, as justice may require."<sup>251</sup> The Court noted that "[i]n general, it is the function of the Board to determine the facts of a tax controversy on issues raised before it and to apply the law to those facts; and it is the function of the reviewing court to decide whether the Board has applied the correct rule of law."<sup>252</sup> The Court further noted:

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249 See *supra* notes 247–48 and accompanying text.

250 *Hormel v. Comm'r*, 312 U.S. 552, 555–56 (1941).

251 26 U.S.C. § 1141(c)(1) (Supp. 1939).

252 *Hormel*, 312 U.S. at 556. The Court added:

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. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. . . . But [our] cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals . . . the power to modify, reverse or remand decisions not in accordance with law 'as justice may require.' There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. . . .

[Various described] decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: those in which it has been held that a decision of the Board of Tax Appeals can be supported in the reviewing court on a new theory of law; those which have been remanded because the lower courts failed to give consideration to a phase of the case involving legal theories not presented; and those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result. Whether articulated or not, the philosophy underlying the exceptions to the general prac-

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The Board's rulings on questions of law, while not as conclusive as its findings of fact, are nevertheless persuasive, and it is desirable that a reviewing court have the benefit of such rulings. This is true not only of the Board of Tax Appeals but of other administrative bodies as well.

*Id.* at 556 n.5 (citations omitted).

tice is in accord with the statutory authority given to courts reviewing decisions of the Board of Tax Appeals—decisions not in accordance with law should be modified, reversed or reversed and remanded 'as justice may require.'<sup>253</sup>

In accordance with this principle, the Court opined that the court of appeals properly considered an intervening interpretation of a particular statutory provision, in determining petitioner's tax liability.<sup>254</sup> When the Board of Tax Appeals made its decision in this case, the Supreme Court had not yet handed down an opinion in a case that was indistinguishable from this case. It explained:

Therefore to apply here the general principle of appellate practice for which petitioner contends would result in permitting him wholly to escape payment of a tax which . . . he clearly owes. Thus viewed, this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice, and the court below was right in so holding.<sup>255</sup>

It is noteworthy that there is particularly strong policy that similarly situated tax payers not be treated differently.<sup>256</sup> It also is noteworthy, however, that because the Board of Tax Appeals had neither found the facts nor considered the applicability of the relevant Internal Revenue Code section in the light of the intervening Supreme Court case, and because Congress entrusted the Board with exclusive authority to determine disputed facts, the Court held that petitioner should get an opportunity to offer evidence before the Board, however unlikely it was that he could show that his case should not be governed by the rule of the intervening case.<sup>257</sup> Accordingly, the Court affirmed the judgment of the lower court reversing the decision of the Board of Tax Appeals, but directed the case to the Board of Tax Appeals for further proceedings in accordance with the Court's opinion.<sup>258</sup> In so doing, the Court paid appropriate respect to the Board of Tax Appeals and to the role that Congress had assigned to the Board as fact finder and applier of the law to the facts.<sup>259</sup>

At times, the Court continues to entertain arguments on the merits that were not addressed below. In *Polar Tankers, Inc. v. City of*

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253 *Id.* at 555–59 (footnotes omitted).

254 *See id.* at 559.

255 *See id.* at 560.

256 *See id.*; *Louisville & Nashville R.R. Co. v. Comm'r*, 641 F.2d 435, 440 (6th Cir. 1981) (seeking to effectuate policy of maintaining parity between similarly situated taxpayers).

257 *Hormel*, 312 U.S. at 560.

258 *See id.*

259 *See id.*

*Valdez*,<sup>260</sup> oil transporters challenged the City's *ad valorem* property tax on large vessels docking at the city's ports, on ships engaged in interstate commerce of \$1 million or more.<sup>261</sup> In the Supreme Court, the City pointed to a separate City tax, and argued that its tax on ships was merely another form of value-related tax on oil-related property, which would have put it outside the prohibitions of the Tonnage Clause of the Constitution.<sup>262</sup> The Court noted that the City had not made this argument in the lower courts; nor had the State, which filed a brief in support of the City, supported this contention. Lacking an explanation of how the other tax worked, the Court said it ordinarily might decline to consider the argument, but as the parties had argued the matter in their Supreme Court briefs, and the Court's decision would reduce the likelihood of further litigation, it chose to consider the argument.<sup>263</sup>

The reasons stated by the Court for taking on the new issue in *Polar Tankers* appear to be weak. True, the parties had briefed the argument (as will not yet be the case with respect to an issue that an appeals court raises *sua sponte*), but that factor should not weigh heavily against the many policy reasons that disfavor permitting parties to raise on appeal arguments that were available in the district court. Moreover, having held *Valdez*'s tax unconstitutional because it violated the Tonnage Clause, *res judicata* would bar re-litigation of the constitutionality of the *ad valorem* property tax on large vessels as between the parties to the suit, and the precedent set by the case would render unnecessary litigation by others who might have been subject to and challenged the tax. Thus, it is not evident how the Court's decision of the new contention would reduce the likelihood of further litigation. It appears that the Court must have taken-on the new argument for different reasons. Perhaps the Court wanted to be sure that the decision it would issue on the constitutionality of the tax would be correct, and it believed it necessary to entertain the new argument in order to do that. That would be a better reason in support of the Court's decision to decide the new issue than the reason that the Court gave.<sup>264</sup> Perhaps too the Court regarded the new mat-

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260 557 U.S. 1 (2009).

261 *Id.* at 1–2.

262 U.S. CONST. art. I, § 10, cl. 3.

263 The Court nonetheless concluded that the challenged tax violated the Tonnage Clause of the Constitution. *Polar Tankers*, 557 U.S. at 14.

264 See Martineau, *supra* note 14, at 1050–51 (arguing that when an appeals court considers a newly raised statutory issue—an issue of statutory interpretation—in order to avoid a constitutional question, that should not be considered an exception to the general rule). I differ with Martineau on this point. The *reason* to depart from the

ter as a new argument as to an existing issue (the constitutionality of the state tax under the Tonnage Clause) as contrasted with a new issue. The Court did not say this (it referred to the new matter as a “claim,”<sup>265</sup> rather than as an argument or an issue), but one could view the case in this way.

#### 9. New Issues to which No One Objects

Sometimes the Court (or an intermediate court of appeals) will hear an issue that is raised for the first time on appeal because the appellee fails to object, or fails to object until too late. For example, in *City of Oklahoma City v. Tuttle*,<sup>266</sup> the Supreme Court permitted a defendant’s objection to a jury instruction to be raised for the first time on appeal to the Court because the plaintiff failed to argue the untimeliness of the objection until its brief on the merits in the Supreme Court.<sup>267</sup> The Court prefers such objections to be brought to its attention no later than the respondent’s brief in opposition to the grant of certiorari.<sup>268</sup>

#### 10. Plain Error—A Category-Crossing Doctrine

The failure to raise any kind of issue (jurisdictional, merits, or procedural) in the district court can involve attorney error and can raise the prospect of an appellate court entertaining the issue pursuant to the plain error doctrine. One of the debates in the Supreme Court over use of 28 U.S.C. § 2106 and the plain error doctrine arose just a few years ago in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*,<sup>269</sup>

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general rule differs from the reasons that courts give in other circumstances, but this still seems to be a departure from, and an exception to, the general rule, as I understand it. Despite Martineau’s position, he also asserted that “the general rule should not be enforced . . . [in] cases in which principles of federalism or constitutional adjudication are involved.” *Id.* at 1059; *cf.* Dennerline, *supra* note 15, at 1001–02 (finding that “if an appellate court considers the new issue . . . to be of importance to the public, the new issue will be heard . . . [T]he exception typically involves the first judicial review of a statute or a constitutional provision which the court sees as having an impact on the public or on future litigants”). Dennerline sees this practice as not accounting for any of the concerns that the general rule seeks to protect and as reflecting policy simply outweighing the rule. *Id.* at 1003.

<sup>265</sup> *Polar Tankers*, 557 U.S. at 3.

<sup>266</sup> 471 U.S. 808 (1985).

<sup>267</sup> *Id.* at 815–16. For an example from the intermediate courts of appeals, see *Soo Line R.R. Co. v. St. Louis Sw. Ry. Co.*, 125 F.3d 481, 483 n.2 (7th Cir. 1997) (noting that while defendant arguably waived for purposes of appeal a judicial admission by Soo, Soo never argued the waiver and so waived the waiver argument).

<sup>268</sup> See *Oklahoma City*, 471 U.S. at 816.

<sup>269</sup> 546 U.S. 394 (2006).

where tensions flared between the policy to enforce procedural rules requiring timely objection, timely motions, or other particular actions, and the policy to do justice under the substantive law.<sup>270</sup> In *Unitherm*, the Court held that a defendant's failure to file a Federal Civil Rule 50(b) post-verdict motion deprived a federal appellate court of power to direct the district court to enter judgment contrary to the judgment entered on the verdict, and similarly deprived the appellate court of power to order the district court to conduct a new trial, as even the district court was not authorized by the Federal Rules to order a new trial when the losing litigant had failed to request that relief in its pre-verdict motion.<sup>271</sup> Because the defendant failed to renew its pre-verdict motion in the manner specified by Rule 50(b), the Federal Circuit erred in vacating the judgment rendered on the verdict and in ordering a new trial on the basis of insufficiency of the evidence.<sup>272</sup>

Justice Stevens, joined by Justice Kennedy, dissented. He cited 28 U.S.C. § 2106<sup>273</sup> in support of the power of federal appellate courts to direct entry of judgments and orders "as may be just under the circumstances," and argued that neither Rule 50(b) nor general principles of waiver or forfeiture stripped federal appellate courts of their authority to execute their powers under § 2106. Justice Stevens found no basis to conclude that the federal appeals courts lack power to review the sufficiency of the evidence and direct a verdict in favor of a party who lost below and who failed to make a timely Rule 50(b) motion, however unfair or abusive of discretion such a decision might be in particular circumstances.<sup>274</sup> In his discussion, Justice Stevens invoked Congress's preservation of the federal appeals courts' power to correct plain error, although trial counsels' omissions ordinarily yield binding waivers,<sup>275</sup> and stated that it is "well settled that a litigant's waiver or forfeiture of an argument does not, in the absence of

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270 *Id.* at 396–97.

271 *Id.* at 394–95.

272 *Id.* at 395.

273 Section 2106 states:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (2006); *see supra* notes 154–55 and accompanying text.

274 *Unitherm*, 546 U.S. at 409.

275 *Id.* at 407.

a contrary statutory command, preclude the courts of appeals from considering those arguments.”<sup>276</sup>

Notwithstanding Justice Stevens’ minority viewpoint, *Unitherm* indicates that the Federal Rules of Civil Procedure (and presumably other codified federal rules such as the Federal Rules of Evidence and the Federal Rules of Appellate Procedure) may restrict the federal appellate courts’ freedom to utilize the plain error doctrine and 28 U.S.C. § 2106 to address issues that are newly raised on appeal.

Although in the past there were debates over whether the plain error doctrine ever should apply in civil litigation,<sup>277</sup> and the U.S. Supreme Court has not explicitly approved the use of plain error doctrine in civil cases,<sup>278</sup> its use in the civil context is now well-accepted by the intermediate federal courts of appeals.<sup>279</sup>

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276 *Id.* at 408 (citing *Singleton v. Wulff*, 428 U.S. 106 (1976)). For a critique of *Unitherm*, see Steven Alan Childress, *Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After Unitherm and Amended Rule 50*, 26 REV. LITIG. 239 (2007).

Other cases in which the Supreme Court decided a procedural issue that the district court did not resolve include *Pennoyer v. Neff*, 95 U.S. 714 (1877) (affirming ruling for Neff in ejectment action; where lower court had rested its holding of invalidity of the judgment pursuant to which Pennoyer acquired the land in question upon defectiveness of the affidavit used to prove service by publication upon Neff, the Supreme Court disagreed with that conclusion but affirmed on the ground that the judgment against Neff and pursuant to which Pennoyer acquired the land was void for want of personal jurisdiction over Neff). This argument was made in the lower court, but was not ruled upon there. *Id.* at 721–22.

277 Compare CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1.22, at 157 (4th ed. 2009) (“[FEDERAL RULE OF EVIDENCE] 103 makes the plain error principle fully applicable in civil cases, and pre-Rules case law makes clear that plain error was not new to civil cases.”) with Martineau, *supra* note 14, at 1055–56 (approving the view that the plain error rule should not apply to civil cases on the ground that due process in such cases requires only notice and an opportunity to be heard).

278 But see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255–57 (1981) (refusing, for a variety of policy reasons, to be limited by the plain error doctrine in reviewing whether a municipality may be held liable for punitive damages under 42 U.S.C. § 1983); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941) (reversing judgment due to plain error in district court’s imposition of a contempt citation for plaintiff’s refusal to submit to a physical examination pursuant to FEDERAL RULE OF CIVIL PROCEDURE 35).

279 See *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 442–43 (D.C. Cir. 2010) (discussing the availability of the plain error doctrine in civil cases); see also *Williams v. Lu*, 335 F.3d 807, 809 (8th Cir. 2003) (addressing the question whether persons had been unlawfully seized in the course of service of summons and complaint in a § 1983 action, though the issue had not been raised in the trial court, because its proper resolution was beyond any doubt and it involved a purely legal issue as to which no additional evidence was necessary). See generally HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW 91 (2007) (stating that “[w]hile there is no broadly applicable rule of civil procedure comparable to



The Supreme Court restated the test for plain error review of alleged errors not raised at trial in *United States v. Marcus*.<sup>280</sup> Although *Marcus* was a criminal case, the test for plain error in a civil case would be at least as stringent.<sup>281</sup> *Marcus* stated that an intermediate appellate court, in its discretion, may correct an error not raised at trial when the appellant demonstrates that (1) there was an error, (2) that is clear or obvious, (3) that affected the appellant's substantial rights, that is, the error affected the outcome of the proceedings or is a structural error (a category that the Court has not defined clearly)<sup>282</sup> whose effect is difficult to assess, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings.<sup>283</sup>

By definition, whenever appellate courts utilize plain error doctrine, they are addressing errors that were not raised or ruled upon in the trial court.<sup>284</sup> I therefore regard the doctrine as representing an exception to the general rule. Professor Martineau does not so regard it because he distinguishes between issues newly raised by parties on appeal and issues raised *sua sponte* by the court to protect the integrity of judicial proceedings, a function that "transcends the adversary process."<sup>285</sup> He also appears to believe that plain error doctrine has no proper place in civil cases.<sup>286</sup> Because many federal appellate courts now do employ plain error doctrine in civil cases, and use it with reference to issues raised by the parties on appeal as well as *sua sponte*, it is within the scope of the matters I consider here.

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Criminal Rule 52(b), it is well accepted that plain error review is generally available for unpreserved claims of error affecting substantial rights in civil cases").

280 130 S. Ct. 2159, 2164 (2010).

281 See *Wiser v. Wayne Farms*, 411 F.3d 923, 927 (8th Cir. 2005) (stating that a standard at least as stringent as that applied in criminal prosecutions should apply in the civil context where the plain error doctrine is judicially, rather than statutorily, created; citing Third, Fourth, Fifth, and Sixth Circuit opinions to that same effect).

282 *Marcus*, 130 S. Ct. at 2168 (Stevens, J., dissenting).

283 *Id.* at 2164. See generally Girardeau A. Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L.J. 945 (1983) (concluding that the plain error rule is justifiable if it advances federalism objectives); David William Navarro, Comment, *Jury Interrogatories and the Preservation of Error in Federal Civil Cases: Should the Plain-Error Doctrine Apply?*, 30 ST. MARY'S L.J. 1163 (1999) (arguing that the plain error doctrine should apply to unpreserved error in jury interrogatories).

284 The converse, of course, is not true. Courts may address new issues on appeal under doctrines other than the "plain error" doctrine.

285 Martineau, *supra* note 14, at 1054.

286 *Id.* at 1054–56. At the same time, however, Professor Martineau asserted that "the general rule should not be enforced . . . when the integrity of the judicial process is threatened." *Id.* at 1059.

## 11. New Issues Raised by Appellees in Favor of Affirmance

It is black letter law that appellate courts may affirm on any ground that has support in the record. Appeals courts are not required to agree with the reasoning of a district court, but merely with its ultimate disposition of a case, in order to affirm the judgment below. The requirement that the ground on which the appellate court affirms be supported by the record made in the trial court constrains the appellate court, however, and to some significant degree implies that the ground on which the judgment is affirmed must not be new to the case. That ground must have been addressed in some fashion by one or both of the parties, if not by the district court, for it to be reflected in the record of the case. Thus, while an argument that an appellee makes in support of affirmance may be one that has long been forgotten by the appellant, it usually will not concern an issue that is new to the case.

It is perhaps possible, however, that an appellee may argue on appeal a reason to affirm that it did not present to the trial court, in support of judgment, in precisely the way that it is presenting its position to the court of appeals. It also may be possible for an appeals court to find in the record a reason to affirm that the appellee did not present to the trial court in precisely the way that the appellate court sees it. In those instances, one might say that the appeals court is deciding a new issue.<sup>287</sup>

### *B. Reasons to Decline to Consider New Issues*

When considering what is and should be going on in the federal appellate courts when they consider whether to decide issues that were not decided in the district courts, it is appropriate to survey not only the cases in which those courts chose to decide new issues but also to survey the cases in which those courts chose *not* to decide new issues. The discussion below reflects a sample of recent such cases.

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<sup>287</sup> See, e.g., *Aikens v. Ingram*, 652 F.3d 496, 504 (4th Cir. 2011) (en banc) (affirming denial of a Rule 60(b) motion that was predicated on “extraordinary circumstances,” purportedly reviewing under the abuse-of-discretion standard of review but ruling against the Rule 60(b) movant on the basis of a new interpretation of “extraordinary circumstances” that had not been argued in the district court). See generally Scott Dodson, *Rethinking Extraordinary Circumstances*, 106 NW. U. L. REV. COLLOQUY 111 (2011), <http://colloquy.law.northwestern.edu/main/2011/11/rethinking-extraordinary-circumstances.html> (arguing that *Aikens* applied far too broadly the *Ackermann* ruling that a federal Rule 60(b) movant is not entitled to relief if his own litigation choices caused his predicament).

As you read the pages that follow, you will see that the occasions on which appellate courts have been *disinclined* to resolve issues that the district court did not decide correspond to the appellate courts' role and lack of competency, the lack of efficiencies apparently to be gained, and the absence of strong justifications for departing from the norm against deciding new issues. Thus, the "factiness" (as contrasted with "lawiness") of an issue, and the inadequacy of the existing record, go to the appellate court's lack of competence. Those two also relate to the impropriety of a court of appeals deciding, in the first instance, many issues that are left to the district court's discretion. The lack of plainness of an error, the difficulty of determining the proper resolution, the existence of objections to the appellate court's decision of an issue not first resolved by the district court, and the circumstance that resolution of the new issue would lead to reversal or vacatur of the judgment, go to the inefficiency and impropriety of having the appellate court resolve the issue, rather than remand to the district court. The non-jurisdictional nature of the issue, and the belief that no great injustice would result if the new issue were not addressed, both relate to the lack of justification for departing from the norm against deciding new issues. In *Mt. Healthy City School District Board of Education v. Doyle*,<sup>288</sup> for example, the Court declined to consider whether the Court should imply a cause of action from the Fourteenth Amendment that would not be subject to the limits of 42 U.S.C. § 1983, whether plaintiff stated a claim for relief, or whether a school district is a person for purposes of § 1983.<sup>289</sup> It observed that these questions were not of the jurisdictional sort that the Court raises on its own motion, and chose to leave them for another day.<sup>290</sup>

In *Patsy v. Board of Regents*,<sup>291</sup> the Supreme Court declined to address an Eleventh Amendment issue that the defendant-respondent had not raised in the district court and that neither the intermediate appellate panel nor that court en banc had addressed, although the respondent had raised the issue in the court of appeals. The respondent did not brief the issue or press it at oral argument before the Supreme Court, although the respondent had mentioned a possible Eleventh Amendment defense in its opposition to the petition for certiorari.<sup>292</sup> The Court reasoned that the Eleventh Amendment was not the kind of issue that courts *must* raise on their own motion, that the

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288 429 U.S. 274 (1977).

289 *Id.* at 279-87.

290 *Id.* at 279.

291 457 U.S. 496 (1982).

292 Brief for Respondent, *Patsy*, 457 U.S. 496 (No. 80-1874).

defense was waivable, that the respondent had expressly requested that the Court address a different question and not pass on its potential Eleventh Amendment immunity, that the respondent could raise the issue on remand, and that the district court was in the best position to address the Eleventh Amendment immunity in the first instance because of the questions of fact and state law that would need to be resolved.<sup>293</sup> Thus, a combination of factors, including the immunity-holders' request that the Court not consider the issue, the continuing ability of the immunity-holder to raise the issue in the district court, and the district court's superior ability to decide the issue, were at work in *Patsy*.

Occasionally, the Court has said that it lacked jurisdiction to consider an issue that was not raised below.<sup>294</sup> One sometimes sees the Court refuse to decide a new issue simply on grounds of waiver<sup>295</sup> or of judicial economy.<sup>296</sup> Often intermediate courts of appeals' reasons lie in a mesh of circumstances that involve the lack of the necessary

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293 See *Patsy*, 457 U.S. at 516.

294 See, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (holding that the Court had no jurisdiction to consider whether the Emergency Petroleum Allocation Act preempted the application of a pass-through prohibition as to oil because it did not affirmatively appear that the issue was decided below). The Court noted:

The decision below does not discuss this issue, and when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' No such showing has been made here. . . . Nor does anything in the record before us indicate that this issue was raised in the trial court.

*Id.* (internal citations omitted).

295 See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 134 (1947) (entertaining the argument, made for the first time in the Supreme Court, in support of the judgment below, that no justiciable controversy as to the constitutionality of an Act of Congress was presented, while refusing to consider the argument that the state lacked capacity to bring the suit, reasoning that failure to so object in the trial court constituted a waiver of that defect); *United Rys. & Elec. Co. of Baltimore v. West*, 280 U.S. 234, 248-49 (1930) (refusing to entertain challenges and objections to a valuation that were raised for the first time in the Supreme Court, holding that they came too late); see also *Puget Sound Power & Light Co. v. Cnty. of King*, 264 U.S. 22, 25 (1924) (dismissing the writ filed by the City of Seattle on the ground that it sought to raise in its assignment of errors to the Court an objection based on the Fourteenth Amendment to the Federal Constitution that it had not raised in the state court system from which the case came).

296 See, e.g., *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (refusing to consider, for reasons of judicial economy, the procedural argument that, at trial, petitioner failed to object to a jury instruction with sufficient specificity to satisfy FEDERAL CIVIL RULE 51, where respondent first raised that argument at oral argument in the Supreme Court and in a supplemental post-argument brief).

factual record and the lack of opportunity for the adversary to have responded with evidence, or the issue having been poorly presented even in the court of appeals.<sup>297</sup> Appellate courts may cite the fact that they would benefit from district court consideration of the issue,<sup>298</sup> or focus on the district court not having had the issue put before it in such a way as to invite its consideration, or not having needed to address the issue because of the way that the district court ruled on other matters. For example, in *Mansourian v. Regents of the University of California*,<sup>299</sup> a putative class action brought by women wrestlers against the state university and university officials, alleging that plaintiffs' exclusion from a wrestling team violated Title IX and their equal protection rights, the Ninth Circuit refused to consider the argument that plaintiffs' § 1983 claim against individual defendants was precluded by qualified immunity.<sup>300</sup> The district court had dismissed the § 1983 claim on other grounds, as to which the Ninth Circuit reversed.<sup>301</sup> Although the defendants raised a qualified immunity defense in their answer, they did not raise it in any of their dispositive motions to the district court.<sup>302</sup> Noting that the Ninth Circuit's "dis-

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297 See, e.g., *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488, 494 (1st Cir. 2009) (declining to address a new issue where the argument was not fleshed out and supported by citations).

298 See, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view."); *Bowie v. Maddox*, 642 F.3d 1122, 1131–32 (D.C. Cir. 2011) (vacating the dismissal of conspiracy claims, declining to consider intra-corporate conspiracy defense, raised for the first time on appeal, in part because the doctrine raised several questions of first impression as to which the appeals court wanted the benefit of the district court's thinking); *Palmyra Park Hosp. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1305 n.13 (11th Cir. 2010) (declining to affirm dismissal on alternative ground that plaintiff failed to state a claim, stating that appellate court would benefit from reasoned deliberation by the district court); *Hydril Co. v. Grant Prideco LP*, 474 F.3d 1344, 1351 (Fed. Cir. 2007) (rejecting the district court's reasons for dismissing plaintiff's antitrust claim and declining to exercise its discretion to consider alternative grounds to affirm the dismissal, on which the district court had not relied, finding it more appropriate that the district court address them in the first instance because the alternative grounds "appear[ed] to involve complex and difficult questions of Fifth Circuit antitrust law, which the parties sharply dispute and the answers to which m[ight] be far from clear [and] . . . require careful study of an already substantial record or even augmentation of that record").

299 602 F.3d 957 (9th Cir. 2010).

300 *Id.* at 964.

301 *Id.* at 963.

302 *Id.* at 964.

cretion to affirm on grounds other than those relied on by the district court extends to issues raised in a manner providing the district court an opportunity to rule,”<sup>303</sup> the appellate court refused to affirm on the basis of qualified immunity and remanded the case to the district court, to have it consider the issue.

Closely related to the rationale for eschewing an issue that looks to the absence of a factual record that is adequate for the appellate court to comfortably find the facts is the appellate courts’ rejection of issues that are best left to the discretion of the district court. *Kode v. Carlson*,<sup>304</sup> for example, presented an issue of first impression in the Ninth Circuit, namely, whether the appeals court might rule on the merits of a Rule 59 motion for a new trial based on the weight of the evidence where the district court had not done so because it (erroneously) found the motion to have been waived.<sup>305</sup> Assuming, without deciding, that it had the power to entertain the issue, the Ninth Circuit refrained. It vacated the district court’s order denying a new trial to a plaintiff to whom the jury had awarded zero dollars in damages, and remanded for consideration of the merits of plaintiff’s motion for a new trial based on the weight of the evidence.<sup>306</sup> The appellate court concluded that remand was preferable where the record did not demonstrate that the district court necessarily would have abused its discretion had it refused to grant a new trial based on the clear weight of the evidence, and the trial court was in a better position to rule on the motion, in the first instance, because the trial judge could weigh the evidence and assess the credibility of witnesses, whereas the court of appeals was not permitted to do so.<sup>307</sup> The court cited a Supreme Court case that had observed that “the authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court,”<sup>308</sup> and indicated that the Ninth Circuit is very deferential to district court determinations that a verdict is not against the weight of the evidence.<sup>309</sup> Thus, the deferential standard of review that applied to determinations of the question that plaintiff proposed that the IAC answer—and the reasons for the allocation of the issue to the trial judge—very much influenced the court of appeals’ unwilling-

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303 *Id.* at 974.

304 596 F.3d 608 (9th Cir. 2010).

305 *Id.* at 611–12.

306 *Id.* at 611.

307 *Id.* at 612.

308 *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

309 *Kode*, 596 F.3d at 612.

ness to take the first stab at an issue that the district court erroneously had not answered.<sup>310</sup>

Often appellate courts invoke a number of factors but rely heavily on the absence of any obvious miscarriage of justice that will flow from a refusal to consider a new issue.<sup>311</sup> Of course, if the court is considering hearing a new issue solely on the basis of the “plain error” doctrine, the court will make its determination by reference to the requirements of that doctrine.<sup>312</sup> Appellate courts also sometimes are

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310 *Id.* at 612–13; *see also* *Yavuz v. 61 MM, Ltd.*, 465 F.3d 419, 427 (10th Cir. 2006) (declining to affirm dismissal under *forum non conveniens* where the appellate court found that the district court dismissal rested on a *forum selection* clause, and the *forum non conveniens* issue was raised but not ruled upon by the district court, relying on the principle that proper judicial administration generally favors remand for the district court to examine the issue initially in such a circumstance, notwithstanding that the parties devoted substantial portions of their briefs to the *forum non conveniens* issue).

311 *See, e.g.*, *Export-Import Bank v. Advanced Polymer Scis., Inc.*, 604 F.3d 242, 247–48 (6th Cir. 2010) (affirming judgment against defendants in an action against borrowers and guarantors, holding that defendants waived a statute of limitations defense that they failed to raise in the district court, having noted that whether to hear an issue not raised below is based on several factors, such as whether the issue is a question of law, whether it requires or necessitates determination of facts, and whether failure to take up the issue for first time on appeal will result in miscarriage of justice or denial of substantial justice). Although the statute of limitations issue was a question of law requiring no further factual development, refusal to address the defense would not work a substantial miscarriage of justice on the guarantors, as the statute of limitations was merely an affirmative defense which could be waived by the failure to assert it in a timely fashion. *See Salazar ex rel Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (holding that district court’s determination that an order imposing contempt sanctions for contumacious conduct, in civil proceeding, was not impermissible criminal sanction and did not constitute plain error or an exceptional circumstance warranting reversal, where contemnor was sanctioned pursuant to a schedule of *per diem* fines set in an earlier order enforcing a settlement agreement, and it had an opportunity to limit or avoid the fines altogether by complying with the settlement agreement); *Wiser v. Wayne Farms*, 411 F.3d 923, 926–28 (8th Cir. 2005) (refusing to consider argument that Georgia law should determine the enforceability of an agreement to arbitrate, noting that the court typically will not consider a choice of law argument not made in the district court, and noting that the consequence—that the case would be heard in federal court rather than be arbitrated—hardly constituted a miscarriage of justice).

312 *See, e.g.*, *Wallace v. McGlothan*, 606 F.3d 410, 421 (7th Cir. 2010) (reciting requirements for plain error review in the Seventh Circuit, noting that plain error review of a forfeited evidentiary issue in a civil case is available only when the party seeking review can demonstrate that exceptional circumstances exist, substantial rights are affected, and a miscarriage of justice will occur if review is not afforded—though the court did not find such in the instant case); *White v. McKinley*, 605 F.3d 525, 539 (8th Cir. 2010) (considering but rejecting plain error argument in a civil case, failing to find plain error that affected substantial rights on the facts presented);

explicitly concerned that litigants might strategically try to avoid the normal sequence of decision and try to maneuver to have the appellate court decide in the first instance issues that initially should go to the district court.<sup>313</sup>

On occasion, the reason an appellate court gives for declining to resolve an issue that was not decided below is its perception that resolving the issue might lead to an expansion of the rights of an appellee who failed to cross-appeal. In *American Roll-On Roll-Off Carrier, LLC v. P & O Ports Baltimore, Inc.*,<sup>314</sup> the Fourth Circuit so reasoned, even though it regarded the cross-appeal requirement as a rule of practice, not a requirement for appellate jurisdiction.<sup>315</sup>

Rather than stating affirmative reasons not to entertain a new issue, appellate courts may list the circumstances in which they are inclined to decide new matters and explain that the case at bar does not meet any of those criteria. For example, in *Community House, Inc. v. City of Boise*,<sup>316</sup> a non-profit organization that had managed a city-owned homeless shelter sued the city and others after the city assumed management of the shelter and leased it to a religiously affiliated organization. The district court ordered injunctive relief.<sup>317</sup> On

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*Salazar*, 602 F.3d at 431; *United States v. JG-24, Inc.*, 478 F.3d 28, 32 & n.3 (1st Cir. 2007); *Wiser*, 411 F.3d at 923.

313 See, e.g., *Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027 (9th Cir. 2007) (reversing a dismissal for lack of subject-matter jurisdiction and then declining to decide in the first instance whether to dismiss the complaint for failure to state a claim, where the defendant had not made a FEDERAL CIVIL RULE 12(b)(6) motion in the district court). In *Stone*, while acknowledging that the appeals court could affirm dismissal on any ground supported by the record, the court reasoned that to decide the issue might encourage defendants to circumvent district courts by filing a motion to dismiss exclusively on jurisdictional grounds, appealing denial of the motion, and asking the court of appeals to decide whether plaintiffs had stated a claim for relief. *Id.* at 1039–40. It also observed that addressing the issue at that point would be inconsistent with the general rule that defendants are not entitled to interlocutory appellate review of the denial of a Rule 12(b)(6) motion. *Id.* This reasoning is problematic because a defendant ordinarily would not be able to take an interlocutory appeal of a district court's denial of its motion to dismiss for lack of jurisdiction. In this case, the district court had *granted* the motion to dismiss, leading to a final judgment, and it was plaintiffs that appealed that grant. *Id.*

314 479 F.3d 288 (4th Cir. 2007).

315 *Id.* at 295–96 (reversing district court's holding that an indemnity claim was untimely, and refusing to rule on an issue that the district court did not address, namely whether recovery on an indemnity claim was limited by the terms of a bill of lading and stevedoring agreement, on the grounds that the defendant had not cross-appealed and accepting defendant's arguments would require the court to modify the district court's judgment in a way that would expand the defendants' rights).

316 468 F.3d 1118, 1128–29 (9th Cir. 2006).

317 *Id.* (internal citations omitted).



appeal, the plaintiffs argued, inter alia, that the district court should have granted broader preliminary injunctive relief than it did with regard to their religious establishment claims because the City's lease violated the Idaho Constitution and the Establishment Clause of the First Amendment of the United States Constitution.<sup>318</sup> The City argued that the court should not consider the plaintiffs' constitutional claims because they were being raised for the first time on appeal.<sup>319</sup> The court said:

"We will review an issue that has been raised for the first time on appeal under certain narrow circumstances . . . [:] (1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party."<sup>320</sup>

The court declined to consider the plaintiffs' contentions based on the Idaho Constitution, reasoning that none of the three narrow circumstances which had to exist was present.<sup>321</sup> There was no miscarriage of justice that the court needed to prevent, there had been no change of applicable law, and although the plaintiffs argued that the City's lease violated two provisions of the Idaho Constitution, that question was not a pure question of law.<sup>322</sup> At the same time, however, the appellate court agreed to consider the plaintiffs' Establishment Clause claim where the parties disputed whether the Establishment Clause challenge had been raised before the district court, and in any event this court generally did not deem an issue to have been waived if the district court actually considered it, which it had here.<sup>323</sup>

As suggested by some of the discussion above, parties sometimes fail to bring an issue to the district court's attention, and sometimes they bring an issue to the district court but it does not decide the issue because it disposes of the case on a separate ground or for some other reason. A party that is defending a judgment (an appellee) commonly is permitted to assert grounds other than those pressed or passed upon below, consistent with the doctrine that an appeals court

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318 Brief for Petitioner at 13, *Cnty. House*, 468 F.3d 1118 (No. 05-36195).

319 Brief for Respondent at 9, *Cnty. House*, 468 F.3d 1118 (No. 05-36195).

320 *Cnty. House*, 468 F.3d at 1128 (citations omitted) (quoting *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996)).

321 *Id.* at 1128-29.

322 *Id.* at 1129.

323 *Id.* at 1129-31.

may affirm on any ground that finds support in the record.<sup>324</sup> But sometimes the record on an issue that was raised but not decided never was fully fleshed out. In that circumstance (just as in the circumstance where a party did not raise an issue at all), the appeals court may decline to entertain it. The situation was of this kind in *Guevara v. Republic of Peru*,<sup>325</sup> where the district court had dismissed claims against Peruvian officials on the basis of sovereign immunity, the court of appeals reversed that holding and declined to consider the officials' argument that the court should affirm their dismissal on the basis of lack of personal jurisdiction, an issue that they had timely raised in the district court but that the district court had not decided because it was mooted by the sovereign immunity dismissal.<sup>326</sup> The Eleventh Circuit held that the district court should resolve the personal jurisdiction issue because the minimum contacts inquiry would be fact specific and the IAC wanted the benefit of fact findings by the district court.<sup>327</sup> The court noted that the principle that it must affirm if the district court reached the correct decision for the wrong reason does not apply where determinations of fact will determine whether the lower court's conclusion was correct.<sup>328</sup>

Speaking generally, it could be argued that—other things being equal—an appellate court should allow the district court to take the first cut at an issue that the parties did *not* put before it, whereas an appellate court should be more inclined to address an issue that the parties did present to the district court but that it chose not to address. One might view this as a situation in which the district court waived its right to have its say on the issue. Some readers might respond that it was the parties' right to have the district court resolve the issue, and that the district court had an obligation to decide the issue, but no right that it could waive. However, the notion that the parties had a right to have the district court resolve one particular issue rather than another is untenable, except in the few instances

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324 See, e.g., *United States v. Estate of Romani*, 523 U.S. 517, 526 n.11 (1998) (citing *Heckler v. Campbell*, 461 U.S. 458, 468–69 n.12 (1983)) (concluding that respondent could defend the judgment on a ground not previously raised); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (“[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.”); *Saturn Telecomms. Servs., Inc. v. Covad Commc'ns Co.*, 560 F. Supp. 2d 1278, 1284 n.4 (S.D. Fla. 2008) (noting that a party defending a judgment usually is allowed to assert grounds other than those pressed or passed upon below, but that that is not true of a party attacking a judgment).

325 468 F.3d 1289 (11th Cir. 2006).

326 *Id.* at 1305–06.

327 *Id.* at 1306.

328 *Id.*

where the Supreme Court has laid down a mandatory sequencing rule,<sup>329</sup> so the “parties’ right” argument often would fail. In any event, there is no reason why an appellate court should be bound by a district court’s waiver of its “right” to have the first say on an issue, if any such “right” exists. Thus, while the “waiver” could support an appellate court’s otherwise warranted decision to take the first stab at an issue,<sup>330</sup> the appellate court would be entitled to remand to have the district court address an issue it previously bypassed, if the appellate court believed that having the district court’s decision would be preferable.

Based on my review of many cases, it does not appear that appellate courts in fact systematically afford different treatment to cases in which the parties did not put an issue before the district court and cases in which the parties did present an issue but the district court chose not to address it. Indeed, appellate opinions often fail to make clear whether an issue that the appellate court chooses or refuses to decide was raised in the district court.

#### IV. EVALUATION OF APPELLATE PRACTICES IN TAKING FIRST STABS

Let us begin with the institutional and functional arguments for appellate courts *not* to decide issues for the first time on appeal.

##### A. *The Institutional and Functional Arguments for Appellate Courts Not to Decide Issues for the First Time on Appeal, and Responses to those Arguments*

Several justifications have been argued in support of the general rule that an appellate court should not address issues that the district court did not address or at least have the opportunity to address by virtue of presentation by the parties. One could take the stricter position that appellate courts should review only the decisions made by the district court judge and *not* consider even issues that the parties

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329 See Clermont, *supra* note 46, at 307 (finding only two significant sequencing rules, one of which addresses which jurisdictional defenses a court must decide before reaching the merits, and the other of which dictates that when a common factual issue will come before both judge and jury within the same federal case, because it is “common to the merits of both law and equity claims for relief joined in the same case,” the jury must decide the common fact issue first, to avoid the preclusive effect of a judicial decision subverting the constitutional jury right).

330 See, e.g., *Guevara v. Republic of Peru*, 608 F.3d 1297, 1310 (11th Cir. 2010) (addressing *de novo* whether Peru was subject to federal subject-matter jurisdiction where the district court had failed to address the question after a prior interlocutory appeal and remand, as the appeals court intended it should, and the appeals court believed that the appropriate disposition was clear).

presented to the district court but that the district court did not address. Consider the institutional and functional justifications for each of these positions.

The general rule maintains the trial as the “main event.”<sup>331</sup> Limiting appellate courts to issues that the district court did address, or that the district court at least had the opportunity to address, has been thought to encourage parties to raise their issues and voice their objections in the trial court, where the judge can take immediate steps to avoid or correct party errors or proposed conduct by the court itself that would be erroneous.<sup>332</sup> Party motions and objections also provide the occasion for trial courts to explain their rulings. All of this assists appellate courts in their work. The general rule also has been championed as avoiding prejudice to the adverse party that might result from the belated raising of an objection or an issue, when it is too late for the adverse party to respond effectively with additional evidence or argument.<sup>333</sup> It avoids reversals of a trial judge on the basis of points that were not brought to his or her attention. And it helps to lead to a trial that is complete and the record of which is complete, so that the appellate court has a fully developed record to consult when it reviews the issues that the parties bring to it. The

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331 The Supreme Court often refers to the trial as “the main event.” *See, e.g.,* *Beard v. Kindler*, 130 S. Ct. 612, 614 (2009) (noting that the federal system often grants the trial judge broad discretion when his ringside perspective at the main event offers him a comparative advantage in decisionmaking); *McFarland v. Stott*, 512 U.S. 1256, 1263 (1994) (noting that the trial is the main event, where adversaries battle to reach a presumptively reliable result); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (“[T]he state trial on the merits [should be] the ‘main event,’ so to speak, rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing.”).

332 *See Pfeifer v. Jones & Laughlin Steel Co.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982) (“For there to be reversible error, it is mandatory for the appellant properly to identify the error to the trial court and to suggest a legally appropriate course of action. The reasons for this requirement go to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court’s action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review.”). *See generally* Dennerline, *supra* note 15, at 987 (finding one of the modern justifications for the general rule discouraging appellate courts from hearing new issues on appeal to be that it encourages correction and avoidance of errors in the trial court).

333 *See Pfeifer*, 678 F.2d at 457 n.1. *See generally* Dennerline, *supra* note 15, at 987–88, 990–92, 998 (finding additional modern justifications for the general rule discouraging appellate courts from hearing new issues on appeal to be that it avoids prejudice and facilitates appellate review, but questioning the cogency of these justifications).

general rule also limits the number and scope of appeals by limiting the issues that the appellate court will entertain and, insofar as it operates, it ensures that every issue that comes before an appellate court has been teed up for, if not actually passed upon by, a trial court.

Furthermore, even assuming that federal appellate courts pursue worthy goals when they take the first stab at issues, practical problems, as well as structural issues, are raised by appeals courts' addressing issues that were not raised before or ruled upon in the trial court. Some problems derive from appellate courts' procedures: They are not built to take new evidence, for example, though they occasionally do so. Other problems derive from appellate courts' presumptively inferior competence to do certain tasks: They are less experienced than trial judges at making fact-findings and in making discretionary judgments of the kind that trial judges often have to make. They are perceived to be inferior to trial courts in resolving questions of fact, particularly those that depend on witness credibility.<sup>334</sup> Thus, at the level of function, it is questionable for appellate courts to reach new issues that would require fact-gathering, initial fact-finding—particularly that which must be based in whole or in part on oral testimony—or the exercise of discretion as to certain kinds of issues.

At the same time, the implications of the rationales listed above have limits too. Federal appellate courts need to assure that they have jurisdiction over an appeal and that the district court had jurisdiction over the case so that the federal courts do not act beyond their constitutionally and statutorily limited powers, in violation of separation of powers and states' rights. Many would say that it is important that the federal appellate courts do justice, and that they act efficiently, particularly in these times of strained judicial resources. To the extent that appellate courts are taking more first stabs than they used to, this may be a product of the "crisis of volume" and of a resulting effort to dispose of cases without remand to trial courts, when possible. Yet, federal appellate courts do not necessarily have to take the first stab at *district* court jurisdiction over a case, even if the issue is raised for the first time on appeal. Federal appellate courts do not necessarily have to take the first stab at issues that arise for the first time on appeal in order for justice to be done. Taking these first stabs *may* be most efficient but there are competing arguments if the goal is to make the federal judicial system as a whole work most efficiently. And, of

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334 See, e.g., *Gall v. United States*, 552 U.S. 51, 52 (2007) (acknowledging trial judges' superior position to find facts and evaluate their import); *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (noting trial courts' particular ability to assess the credibility of witnesses).

course, it is a question whether increased efficiency can justify appellate first stabs when such efforts exceed the appellate courts' paradigmatic role and alter the balance of power between trial and appellate courts.

Do the exceptions that the federal appellate courts have made to the general rule make sense in terms of appellate procedure, appellate court competencies and functions, and in light of other relevant considerations?

*B. The Fit of Exceptions to Competence, Role, and Justification, and the Value of Exceptions in Fostering Efficiency*

1. Of Obvious Errors, Factual Records, and Legal Issues

In making exceptions to the general rule that appellate courts will not entertain new issues, conditions should have to be satisfied that relate to the competence and role of appellate courts. In addition, appellate courts should consider the relative efficiency of their making a decision as a matter of first impression rather than remanding to trial courts or adjuncts to do that, subject to appellate review. If the answer to a question appears to be obvious (as it is under the "plain error" doctrine), that tends to argue for appellate self-help, but the answer can be obvious only if the factual record is complete and the parties have been given a full and fair opportunity to be heard on the legal issues.<sup>335</sup> If these conditions are satisfied and an error was obvious, it would seem that the opposing party should have seen it coming and taken steps to avoid it, even without the error having been pointed out by another participant below. It would seem not to be unfair for the appellate court to conclude that a party waived its objection to an appellate court's correction of an obvious error. However, more is involved than that.

Being a question of law, or a mixed question of law and fact as to which the parties had a full and fair opportunity to make the factual record complete, does seem to be a *necessary* condition for an appellate court to answer a question that the trial court did not address.

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<sup>335</sup> Professor Martineau seems to question the notion that it ever will be of little use for the trial court to have weighed-in and to argue that appellate decision of a new issue will deprive the opposing party and the trial court of the opportunity to avoid an alleged error. See Martineau, *supra* note 14, at 1040. I am not convinced of the former point in its extreme form and sandbagging will be infrequent so long as the general rule of rejecting new arguments on appeal remains the general rule, for then withholding an argument for appeal will be very risky. Moreover, once an issue is raised for the first time on appeal, the opportunity for the trial court to avoid the alleged error already will have been lost.

But is it a *sufficient* condition, a sufficient reason for an appellate court to address such a question? Even when review is de novo—as it is for questions of law and for some mixed questions of law and fact<sup>336</sup>—I submit that, *without more*, an appellate court exceeds the scope of its role when it addresses such questions.

One might argue that the efficiency and judicial economy that is gained by having the appellate court address a legal issue, de novo, is adequate justification for an appellate court to answer a question that the trial court did not address. But this position is untenable. Taken to the extreme, its logical implication would be that district courts routinely should save their resources and punt on all questions that the appeals court would review de novo. Even if that would be efficient and judicially economical, that is not how our system is designed to work. At a practical level, the trial court would not get to the final judgment that ordinarily is a prerequisite to appeal, if the trial court were not deciding issues of law and mixed questions subject to de novo review. In addition, the appellate court would not enjoy the benefits of knowing the trial judge's thoughts on such issues. The appellate court would no longer be reviewing a lower court's decision, and the appellate court might formulate the issue differently than the trial court would have done. Thus, one would be changing not only the identity of the initial decision maker (who), but potentially precisely what was being decided (what), the process by which it was being decided—given the absence of district court thinking to inform the appellate court (how), and the timing—the temporal context—of the decision within the course of the litigation (when).<sup>337</sup> As Professor Rutledge's exposition on decisional sequencing reveals, this has a variety of consequences, and (I would argue) should be avoided absent very good reason.<sup>338</sup>

One also should question the premise that such a system would be more economical and efficient than a system that requires trial judges to make the initial determinations of (even) questions of law and mixed questions that are subject to de novo review. From a short-sighted perspective, economies and efficiencies appear to be gained—

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336 For mixed questions that are subject to review for clear error, having the appellate court decide the questions without benefit of district court decision would make the applicable standard of review impossible to apply. It would reallocate decision-making authority from the trial court to the court of appeals, and significantly change the question that the appellate court has to address. The same would, of course, be true for pure questions of fact.

337 Of course, the "where" of the decision also would change from the district court and its location to the appellate court and its location.

338 See Rutledge, *supra* note 38, at 7–10.

remands and possible second appeals are avoided—but a system that freely allowed appellate courts to address new issues would change the trial from the “main event” and would encourage appeals. In creating such a system, we would shift a burden from the trial courts to the courts of appeals. More appellate judges would be needed, all appellants and appellees would experience delays in the resolution of their cases and, whenever the opportunity to raise a new issue on appeal resulted in appellate consideration that otherwise would not occur, three or more judges would consider an issue that a single trial judge could have resolved, perhaps finally.

The impropriety of having appellate courts freely decide questions that the trial court did not address whenever review is *de novo*, and the failure of wisdom in doing so, is reflected in the many statements that appeals courts should review new questions only in exceptional or extraordinary circumstances.<sup>339</sup>

In the usual case, where the factual record was not fully developed or the proper resolution of a legal question is not obvious, there are even clearer institutional reasons to allow the trial court to take the first stab. True, there are problems of cost and delay entailed in moving cases back and forth between the trial and appellate courts, and it may be that in today’s world those costs are sufficiently great that we should be willing to accept more flexibility and a less rigid division of labor between the trial and appellate courts. Our notion of an ideal division of labor may be changing or already have changed. But doubt should be resolved in favor of remand to the district court so that the record can be fully developed and district courts can fulfill the functions that ordinarily are theirs.

An alternative way to reduce remands to trial courts would be to establish doctrine that, in recognition of the difficulties that face appellate courts to whom new issues are brought, district courts (in their discretion) should rule on multiple grounds so that appellate

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<sup>339</sup> See, e.g., text at note 159; see also *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 413 (9th Cir. 2011) (vacating judgment and remanding to the district court with instructions that it consider the parties’ motions to confirm and to vacate an arbitration award, under the appropriate standard of review, noting the appellate court’s entitlement to the benefit of the district court’s judgment, and citing *Thomas v. Arn*, 474 U.S. 140 (1985), in support of the appropriate roles of trial and appellate courts). In *Arn*, the Supreme Court upheld a circuit rule under which failure to file, with the district judge, a written objection to a magistrate’s report barred appellate consideration of the objection, citing judicial efficiency including the appropriate division of trial and appellate court functions. *Arn*, 474 U.S. at 140–45. The Ninth Circuit cited cases in which courts of appeals remanded where a district court’s opinion was too sparse to serve as a basis for review, even where review would be *de novo*. *Johnson*, 635 F.3d at 413.



courts that may disagree with one ground can affirm on another, without having to decide an issue in the absence of a district court decision of the point to review. While this would burden district courts, it would lighten the load of appellate courts, and would leave more “first looks” on the shoulders of those who are intended to be taking them.<sup>340</sup> When district courts perceive themselves to be even busier than the appellate courts or, in their discretion, decide not to base their decision on multiple grounds for other good reasons (such as prudential doctrines that counsel avoidance of constitutional questions), appellate courts could take on legal issues that were presented but were not decided below, so long as the record is adequate to permit the appeals court to render a well-grounded decision, proper resolution of the legal issue is obvious, appellate jurisdictional requisites are satisfied, and other factors that should influence the exercise of discretion favor a decision by the court of appeals. Professor Martineau has argued that

[t]o suggest that an appellate court can look at the record and conclude that no additional, relevant evidence could have been introduced on a completely new legal issue had the parties known it would be decisive . . . flies in the face of what we know about the trial process . . . [and that f]orcing the appellee to show prejudice . . . places the appellee in an almost impossible position.<sup>341</sup>

I agree that an appellee should not have to show that it would be prejudiced by appellate court resolution of an issue in the first instance. That showing usually *would* be impossible, and to require it misses the point that the problem with an appellate court taking the first stab is structural as well as personal to the parties. Instead, the burden should be on the party who seeks to have the appellate court address an issue that the trial court did not address to demonstrate that all parties had the opportunity to enter all relevant, admissible material into evidence, and that the other relevant considerations make initial resolution by the court of appeals proper and desirable.

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340 See, e.g., *Beer v. United States*, 131 S. Ct. 2865 (2011). In *Beer*, the Supreme Court granted certiorari, vacated the decision below and remanded. *Id.* at 2865–66. The Federal Circuit had entered judgment against a group of federal judges who sought cost-of-living salary adjustments to which they asserted entitlement pursuant to the Ethics Reform Act of 1989. *Beer v. United States*, 361 F. App'x. 150, 150–52 (Fed. Cir. 2010), *vacated*, 131 S. Ct. 2865 (2011). The Supreme Court directed the Federal Circuit to decide whether the judges' suit also was barred by *res judicata* because “[t]he Court consider[ed] it important that there be a decision on th[at] question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits.” *Beer*, 131 S. Ct. at 2865.

341 Martineau, *supra* note 14, at 1037–38.

Faced with good reasons to remand—for the taking of additional evidence, because of the non-obviousness of proper resolution of legal issues, or otherwise—the appeals court should remand, and refrain from deciding a proffered new issue. If an appellate court decides to entertain a new legal issue, despite all of the foregoing arguments, it should freely exercise its discretion to allow the opposing party sufficient time to respond to any issue that the opposing party previously was not on notice of the need to research and consider, as applied to the facts of its case.<sup>342</sup>

## 2. Of Importance, Probable Recurrence, and Miscarriages of Justice

The public importance of an issue, while it might well provide a further reason to decide an issue the proper resolution of which is obvious, is inadequate *alone* to justify an appellate court's taking the first stab. The court cannot competently do so if the record is not complete, for example. Similarly, the fact that the new issue is likely to arise in other cases is not a good reason to consider the issue when it was not timely raised in the instant case. There will be time enough to address the issue in a case that properly presents it, and doing so will have the advantages of likely presenting a more complete record, avoiding any surprise to the opposing litigant, and offering the appeals court the benefit of the district court's thinking on the matter, among other things. And, of course, this "reason" to consider a new issue cannot be independent; it can have weight only if the new issue is otherwise suitable for an appellate court to hear because the new issue is a legal question that is presented in the context of an adequately developed record and its proper resolution is obvious or the benefits of having a district court decide the issue in the first instance are outweighed by an urgent need for precedential resolution or by other factors.

The oft-stated requirement of a miscarriage of justice requires, at a minimum, a reversible error; harmless error would result in no miscarriage of justice.<sup>343</sup> But some courts may intend an even higher

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342 *See id.* at 1039 (decrying the few days that an appellee has to research and develop theories and arguments that it might have had months or more to develop, had the issue been raised in the trial court). FEDERAL RULE OF APPELLATE PROCEDURE 31(a) allows an appellee thirty days after the appellant's brief is served to serve and file its response brief. FED. R. APP. P. 31(a).

343 "Harmless error" is an error that does not affect the substantial rights of the parties, and is to be disregarded by the courts. *See, e.g.*, 28 U.S.C. § 2111 (2006): Harmless Error ("On the hearing of any appeal . . . the court shall give judgment after an examination of the record without regard to errors or defects which do not affect

standard; it is difficult to be sure. In any event, like the considerations whether a new issue is “important” or likely to recur, this criterion for considering a new issue cannot be independent; it can have weight only if the new issue is otherwise suitable for an appellate court to hear.<sup>344</sup> Moreover, as discussed earlier,<sup>345</sup> the fact that justice would be ill-served if an error newly raised in the court of appeals were not corrected does not necessarily imply that it is the appellate court that needs to do the correcting. Justice may be better served by remand to the district court for correction of the error.

### 3. Intervening Changes in the Law

One of the exceptional circumstances that sometimes is cited as justification for having appellate courts reach new issues is the presence of a change in the law that intervened between the district court’s decision and the forthcoming appellate decision. As Professor Aaron-Andrew Bruhl recently has noted, however, “[w]hat retroactivity giveth, plain error often taketh away.”<sup>346</sup> That is to say, although new law theoretically applies to all cases still pending on direct review when the new law is made, unless the losing litigant was sufficiently prescient or discerning to object to the judicial conduct that became erroneous under the new law, the losing litigant will not have made the necessary argument below, and the appellate court will review the newly complained-of behavior only to determine whether it constituted “plain error.”<sup>347</sup> As described above, this is a demanding stan-

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the substantial rights of the parties.”); FEDERAL RULE OF CIVIL PROCEDURE 61: Harmless Error (“The court . . . must disregard any error . . . which does not affect the substantial rights of the parties.”); FEDERAL RULE OF CRIMINAL PROCEDURE 52(a): Harmless Error (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”). Errors that are not harmless may be grounds for reversal of a judgment.

344 See *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 415–16 (3d Cir. 2010) (agreeing, on appeal of decision that state labor regulations violated the Commerce Clause, to consider argument raised for the first time on appeal that state was acting as a participant in a private market, where the public interest weighed heavily in favor of deciding the issue because the trial court’s decision cast into doubt the constitutionality of the regulatory schemes of many states, no party had a plausible claim or surprise or prejudice, and, because the issue was closely related to arguments raised in the district court and neither party suggested that further development of the record would be helpful, further fact-finding was unnecessary, leaving a pure question of law); Martineau, *supra* note 14, at 1043–44.

345 See *supra* notes 202–03 and accompanying text.

346 Bruhl, *supra* note 177, at 213.

347 *Id.*; see also Waldman, *supra* note 18, at 523–26 (discussing the challenges presented when a litigant in a federal court case seeks to have a circuit court of appeals apply post-trial legal developments to a case on appeal).

dard.<sup>348</sup> Hence, an exception that permits appellate courts to consider issues raised for the first time on appeal, based upon arguments that the judgment should be reversed because the trial judge erred under law that developed post-trial, rarely will result in reversal. That does not mean that the exception is inappropriate; it just means that it will have little impact.<sup>349</sup>

But do we need an exception to the general rule for situations of intervening change in the law? Once the appellant makes the argument, the court of appeals could remand for the district court judge to reconsider its own earlier decision. Moreover, in opening the time within which a Federal Civil Rule 60(b) motion may be made, that Rule now permits a litigant to present a motion for relief from judgment to the district court while an appeal is pending. Under Federal Civil Rule 62.1(a)(3), if the district court recognizes that the motion raises a substantial issue or states that it would grant the motion, the litigant can seek a limited remand from the court of appeals to restore the district court's authority to rule.<sup>350</sup> If the district court judge then decides that he or she committed reversible error in light of the change in law, the case can proceed—to settlement or new trial, or whatever else might be necessary—without further immediate use of the resources of the appellate court.<sup>351</sup> And if the district court judge

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348 See *supra* text accompanying notes 280–83.

349 As Professor Bruhl further notes, the ability of the injured party to get relief may be hampered even further by appellate forfeiture rules that require issues to be raised in the appellant's opening brief. See Bruhl, *supra* note 177, at 213–14. If the law changes after that brief has been filed, the appellant needs special dispensation from the appellate court to raise the issue in another document. See *id.* Some courts are more permissive than others in this regard. See *id.* at 214; Prior, *supra* note 18, at 249. In view of Professor Martineau's general hostility to exceptions from the general rule, it is perhaps ironic that such difficulties attend something he favors, namely permitting an issue not raised in the trial court to be raised on appeal if the issue could be a basis for relief from the judgment, so long as "the matter upon which relief is sought was not known and could not reasonably have been known in time to have been raised at trial." Martineau, *supra* note 14, at 1060. Dennerline criticized this position of Martineau's on the grounds that this approach would focus too much on whether the trial attorney was guilty of excusable neglect and too little on the prejudice to the litigant-client, and that the law provides too little guidance for determining excusable neglect with respect to failure to raise objections at trial. Dennerline, *supra* note 15, at 1006–10. Moreover, this approach does not take into account the matters that influence an appellate court's capability to fairly address issues that were not raised in the district court.

350 FED. R. CIV. P. Rule 62.1(a)(3); see also FED. R. APP. P. RULE 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.").

351 FED. R. CIV. P. Rule 62.1(a)(3).

decides that he did *not* commit reversible error in light of the change in law, that decision would be reviewable on the renewed appeal.<sup>352</sup> The case could even be maintained on the appellate court's docket while the trial judge decided the Rule 60(b) issue, so that the parties would not have to start all over in the appellate process.<sup>353</sup> By proceeding in this way, the intermediate appellate court would approximate the United States Supreme Court's use of the GVR procedure, granting certiorari, vacating the decision below without finding error, and remanding the case for further consideration by the district court, for it to consider the implications of an intervening change in the law.<sup>354</sup>

## V. A PROPOSAL

### A. *The Baseline*

The story that this Article told about Article III and congressional legislation conferring appellate jurisdiction and appellate powers, the short history of the appeal, and the guidance to be distilled from *The Federalist Papers* and the Supreme Court's actions and words are important because they remind us that constitutionally grounded limits on appellate jurisdiction do exist, and that intermediate appellate courts as well as the Supreme Court itself should keep those limits in mind when they contemplate deciding issues that were not decided by lower tribunals. Until the Supreme Court better delineates the boundaries between appellate and original jurisdiction, however, we are left largely fumbling in the dark when we try to determine whether particular contemporary instances of appellate courts' taking the first stab at issues were or would be constitutional. Hence, the proposal that follows emphasizes discretion, rather than power.

While Professor Martineau and Mr. Dennerline disagreed on a number of matters related to appellate courts' entertaining new issues, they agreed that the "exceptions" place into question whether there is any general rule against appellate consideration of new issues.<sup>355</sup> It probably still is true, as Professor Martineau charged years ago, that the uncertainty that surrounds whether an appellate court will consider a new issue encourages appeals and reduces the value of prevailing in the trial court.<sup>356</sup> Broad discretion makes this inevitable.

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352 *See id.*

353 *See id.*

354 *See Bruhl, supra* note 177, at 217, 263.

355 *See Martineau, supra* note 14, at 1024, 1057-58, 1061; Dennerline, *supra* note 15, at 985, 993, 1003-05, 1012.

356 *See Martineau, supra* note 14, at 1024.

However, refinement of the considerations that govern the exercise of this discretion, and clear announcement of the criteria that an appellate court will use, can help to reduce both the uncertainty and the number and scope of appeals. Both greater uniformity of response from the appellate courts and clearer guidelines would be desirable. Narrowing of the circumstances in which appellate courts will entertain new issues would help even more. Moreover, while appellate courts have to devote some time to deciding whether to consider new issues,<sup>357</sup> the appeals courts can control how much time they will spend making those decisions by narrowly circumscribing the discretion they embrace and by defining as clearly as they can the circumstances in which they will entertain new issues.

Because of the roles and competencies of the respective courts, appellate and trial, and for other reasons elaborated above, including reasons of long-term efficiency, the general rule against appellate consideration of new issues should truly be the presumptive position taken by appellate courts.

I have submitted that, by virtue of principles of appellate jurisdiction, when a federal appellate court is entertaining an interlocutory appeal, it is a necessary, but not a sufficient, condition to the appellate court's consideration of an issue that was not decided below that the new issue be inextricably intertwined with issues for which there *is* an independent basis of interlocutory federal appellate jurisdiction or be necessary-to-resolve in order to afford meaningful review of the latter. By contrast, after final judgment, when appellate jurisdiction encompasses all of the lower court decisions that led up to and are "merged" in the judgment, the new issue must be necessary-or-appropriate to resolve in order to affirm the judgment *or* in order to avoid manifest injustice in cases in which resolution of the issue would lead to reversal or vacatur of the existing judgment. However, these would be necessary, but not sufficient, reasons for an appellate court to take the first stab at new issues, for we need to design the system so that it maintains or increases litigants' incentives to litigate their cases vigorously and thoroughly in the trial court. If the litigant who raises the new issue had good cause not to raise it below, that circumstance would tend to support the conclusion that the appellate court should hear the new issue.

Based upon the institutional and functional arguments for appellate courts not to decide issues for the first time on appeal, and the responses to those arguments, I propose (in addition to the foregoing) that:

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357 *Id.* at 1032.

I.A. A new issue should be heard on appeal of a civil case only when the party raising the issue shows—or when a court raising an issue sua sponte concludes—that:

(1) Immediate decision by the appellate court would not be inconsistent with lack of entitlement to review of the new issue at the time in question (for example, on an interlocutory appeal that statutes, rules, and doctrines do not authorize);

(2) Immediate decision by the appellate court, in the appellee's favor, would not require the court to modify the district court's judgment so as to expand the appellee's rights or contract the appellant's rights, when the appellee has not cross-appealed;

(3) The new issue goes to the jurisdiction of the court of appeals or the district court (or other lower tribunal), if the new issue does not satisfy (4), below. If the new issue goes to the court of appeals' jurisdiction, that court should, if feasible, use a special master to resolve in the first instance any disputed factual matters that are material to the court's appellate jurisdiction. If the new issue goes to the district court's (or other lower tribunal's) jurisdiction, the appeals court should, if feasible, either use a special master or remand to the district court (or other lower tribunal) to resolve in the first instance any disputed factual matters that are material to the district court's (or other lower tribunal's) jurisdiction, particularly if oral testimony will be proffered.

If an appellate court can reach the same ultimate disposition on other grounds, the court should not consider and decide a quasi-jurisdictional issue, of constitutional dimensions, that the parties did not litigate below.

(4) Outside the realm of jurisdictional issues, no further factual development of the record is necessary or appropriate to assure:

(a) that the record before the appellate court provides an adequate basis for fair and accurate resolution of the new issue, and

(b) that the opposing parties will not be prejudiced by their lack of occasion to present additional evidence,

(c) unless the facts are so dynamic that remand for new factual findings would be futile in that the facts will have changed before another appeal can be heard;

(5) Based on precedent existing at the time of the trial court proceedings, there was no reason to object to the conduct now complained of or to raise the issue in the trial court, or the failure to object or to raise the issue was excusable and the litigant whose attor-

ney now raises the issue should not be penalized for the failure of his/her/its counsel to object or raise the issue below;<sup>358</sup>

(6) Proper resolution of the new issue is obvious, or the benefits of having a district court decide the issue in the first instance are outweighed by an urgent need for precedential resolution or other considerations. Thus, the appellate court should consider whether immediate *appellate* attention is necessary to avoid a miscarriage of justice or prejudice to a party, or whether trial court attention to the new issue, on remand, would suffice.

B. If *all* of those requirements are met, in deciding whether to exercise its discretion to hear a new issue, an appellate court also may consider other factors. These include, without limitation:

(1) how appellate decision of the new issue (as opposed to remand to the trial court) would affect the sequence in which the court system (the appellate and the trial court, collectively) will address the issues presented by the case—and thereby alter other dynamics of the litigation, such as settlement incentives—and how, if at all, the choice between the appellate and the trial court would likely affect the nature of the issue to be resolved, in light of changes in the issue that would more likely occur in the trial court than in the court of appeals;

(2) whether the appellate court's making of a decision would supplant the more institutionally competent decisionmaker in favor of the less institutionally competent decisionmaker or would disrespect the role of the trial judge. The appeals court should consider, for example, whether the district court judge had the opportunity to rule on the issue, and whether the issue is confided to an exercise of the *district court's* discretion or to the district court subject to clear error review. An appeals court ordinarily should decline to address an issue that has been left to the discretion of the district court in particular or that ordinarily is subject to review only for clear error. Other things being equal, an appellate court should allow the district court to take the first cut at an issue that the parties did *not* put before it, and should be more inclined to address an issue that the parties did present to the district court but that it chose not to address;

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358 Dennerline had proposed that a new issue should be heard on appeal only when the party raising the issue could show, *inter alia*, that there was no intentional choice to fail to raise the issue in the trial court below. See Dennerline, *supra* note 15, at 1011. I omit that requirement. Because of the subjective nature of this criterion, establishing its satisfaction could require discovery into matters that would likely be protected by attorney-client privilege and/or work product doctrine, which would create unduly burdensome satellite litigation. The objective can be met by an objective test such as I have proposed.



(3) the increase in appellate resources that would be required if the appellate court took the first stab at an issue rather than reviewing a trial court's resolution of the issue, including whether first-stab appellate decision-making would require careful study of a large record;

(4) whether the appellate court would have to decide an issue *de novo* that it would decide under a more deferential standard of review if the trial court resolved the issue in the first instance and, even if the appellate court would review the issue *de novo* in any event, whether the appellate court would likely benefit from a prior ruling by the trial court;

(5) whether appellate decision-making would allow the appellate court to avoid a complex area of law on which the district court relied;<sup>359</sup>

(6) whether an immediate appellate decision would reduce the likelihood of further litigation<sup>360</sup> or other circumstances make an immediate precedential decision highly desirable. Matters of equity including the length of time the case had been pending, the financial consequences for the litigants, and effects on settlement leverage could be taken into account under this rubric; and

(7) whether appellate decision-making would be supported by a particular statute, Supreme Court directive, or the like.<sup>361</sup>

Because these factors would apply only after a court of appeals determined that the essential prerequisites stated in subsections (1) through (5) were satisfied, they would not turn the decision whether to hear a new issue into a matter of totally unfettered and unpredictable discretion.

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359 See, e.g., *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1302–03 (11th Cir. 2007) (affirming summary judgment in favor of Lil' Joe, finding it “less than clear” that a bankruptcy court’s confirmation order precluded all of Thompkins’ claims, as the district court held, but “find[ing] it unnecessary to enter that thicket,” and affirming on other grounds).

360 The Supreme Court has cited, in support of considering a new issue, the parties having argued the new matter in their briefs and the fact that decision now would reduce the likelihood of further litigation. See *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009).

361 See, e.g., *Quigley v. Winter*, 598 F.3d 938, 958 (8th Cir. 2010) (concluding, after having found that district court abused its discretion in setting attorneys’ fees award to prevailing party, that because “the record before us is clear, [and] remand would be inefficient, . . . it is necessary for us to determine an appropriate attorney fees award in this case in order to comply with the Supreme Court’s command that ‘[a] request for attorney’s fees should not result in a second major litigation’” (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983))).

*B. Should the Analysis that the Supreme Court Conducts Differ from that which the Intermediate Appellate Courts Conduct?*

I will start from the position that the principles proposed above to govern the exercise of discretion in the IFACs ordinarily should govern in the Supreme Court as well. If the Supreme Court has or should have more leeway to reach new issues than do IFACs, the reason must lie outside the definition of appellate jurisdiction in Article III and in the statutes conferring appellate jurisdiction, unless that term is defined differently for the Supreme Court than it is for IFACs. It *could* be defined differently,<sup>362</sup> but there is no apparent reason why it should be. If it is not, then any added latitude would be in the realm of “discretion.” One could argue that, because the Supreme Court’s caseload is almost entirely of its choosing and because the Court can and does choose which issues to address within the cases it chooses to take, the Court has little warrant to address new issues on occasions when it would be improper for IFACs to do so. The Court can avoid taking cases in which the parties have failed to raise all of the relevant legal questions. On the other hand, one might argue that because the Court hears relatively few cases, and yet plays a uniquely important role in making decisions that are binding nationwide, that situation in-and-of itself suggests that the Court should be relatively unfettered in its exercises of discretion to hear new issues.<sup>363</sup> Although it is the Court’s own doing that it takes as few cases as it does, the Court cannot control the course of the lower-court proceedings to assure that all of the issues that the Court would have liked to be raised and decided were in fact raised and decided. In view of the Court’s role in our system, the especial importance of the precedents that the Supreme Court sets and of the pronouncements of law that it makes, as well as its responsibilities to address questions of pressing

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362 Cf. *Honig v. Doe*, 484 U.S. 305, 329–32 (1988) (Rehnquist, J., concurring) (urging an exception to the mootness doctrine for cases that become moot while pending before the Supreme Court). In *Honig*, Chief Justice Rehnquist questioned whether the mootness doctrine truly is compelled by Article III. *Id.* at 330. His conclusion, purportedly drawn from cases and “from the historical development of the principle of mootness, [wa]s that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.” *Id.* at 331. Chief Justice Rehnquist proposed that the Court decide cases that become moot after the grant of certiorari or noting of probable jurisdiction to avoid wasting Court resources already invested in such cases and to fully utilize the opportunities to bind all other U.S. courts by decisions of federal issues that the Court had decided were worthy of its attention. *Id.* at 331–32.

363 These arguments were suggested to me by Professor Aaron-Andrew Bruhl.

national importance and to maintain appropriate balance among the branches of the federal government and between the state and federal governments and the people, on occasion the Court will have good reason to raise, and sometimes to decide, issues that the parties failed to raise below, or that the lower courts did not address.<sup>364</sup> These considerations sometimes might support allowing the Supreme Court more leeway to reach new issues than this Article proposes that IFACs should enjoy.

Another perspective one might bring to bear relates to the dual functions of appellate courts to correct error and to pronounce and harmonize the law. To generalize broadly, IFACs do primarily the former, while the Supreme Court does primarily the latter. In general, the Court purports to care little about error correction for the benefit of the particular parties before it. Perhaps one should infer that the Supreme Court would be more justified than an IFAC would be to hear a new issue for the purpose of declaring the law, whereas an IFAC would be more justified than the Supreme Court would be to hear a new issue for the purpose of correcting an injustice to the particular parties. That reasoning would indicate that the Supreme Court should have more latitude than IFACS to reach new issues for precedent-setting purposes, but less latitude than IFACS to reach new issues for party-specific purposes. This way of thinking also brings to mind the law-equity distinction that the courts of appeals struggle with, with the law-side history focusing on error and the equity-side history focusing on doing justice and operating with “breezier informality,” in the words of Jim Pfander.<sup>365</sup> Once again, the Supreme Court’s prototypical lack of interest in doing justice in the particular case argues against the position that it should enjoy greater discretion than IFACs to hear new issues, insofar as the purpose would be to do such justice in the particular case.

I further propose<sup>366</sup> that:

II. The appellate court should see to it that the opposing parties are afforded a full and fair opportunity to present arguments on any new issue in the court of appeals, if the appeals court is going to consider the issue;<sup>367</sup> and

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364 See Frost, *supra* note 20, at 514–15.

365 See Pfander, *supra* note 91, at 1525.

366 The first proposal is set out in Part V.A, *supra*.

367 Appellate courts should not encourage sandbagging. An appeals court thus should consider whether the parties had a full and fair opportunity to address the issue below or whether there is a good reason, such as changed facts or changed law, for them to be first bringing it now. If the issue arose for the first time while the case

III. If the court of appeals determines that a new issue should be heard but determines that the issue is better suited to being decided, in the first instance, in a trial court, the court of appeals shall remand the case to the district court *inter alia* to ensure full factual development and to ensure that the opposing party is not prejudiced by the raising of the new issue. In its discretion, the court of appeals may maintain the case on its calendar to facilitate resolution of any subsequent appeal.

#### CONCLUSION

Neither the word “review” nor the phrase “jurisdiction of appeals” suggests that appellate jurisdiction encompasses authority to determine issues that no inferior court has reached. On a number of occasions the Supreme Court has sought to confine its own appellate jurisdiction and that of the intermediate federal courts of appeals (IFACs), and to distinguish appellate from original jurisdiction. At additional times, dissenting Justices on the Court have complained that the Court was permitting and even requiring IFACs to exceed the proper bounds of appellate jurisdiction and to exercise what amounted to original jurisdiction. While this history is interesting, instructive, and important, and indicates that there are limits on the activities that fall within appellate jurisdiction, even an exhaustive examination of the Supreme Court’s jurisprudence would not definitively determine whether particular contemporary instances of appellate courts’ taking the first stab at issues are constitutional. Similarly, the scope of the appellate powers of the Supreme Court and the federal IACs that abide in 28 U.S.C. § 2106 is limited, though the limits are unclear. While the Court has read the statute to provide appellate courts with power to consider issues that were not properly raised in the trial court, in the interest of doing substantial justice, the Court also has concluded that the courts must exercise their § 2106 powers consistently with the requirements of the Federal Rules. Because the constitutional and statutory constraints on appellate courts are so unclear with regard to when appellate courts may decide new issues, the realm has been left to discretion. But the Supreme Court can and should do better than it has done in governing itself and in guiding federal IACs in their exercises of discretion to hear or not to hear new issues. And the federal IACs themselves should confine the manner in which they exercise their discretion, to keep their conduct within

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was on appeal as mootness (an aspect of jurisdiction), for example, may do, that would provide a good reason for the parties to raise it then.

constitutional bounds and otherwise appropriate given their competence, their role, and the limits of both.

In this Article, I have examined the constitutional, statutory, and common law constraints on federal appeals courts, surveyed when the Supreme Court and intermediate federal appellate courts in fact do consider new issues, and evaluated the circumstances in which appellate courts should, and the circumstances in which they should not, decide issues that were not ruled upon in the district courts. I have sought to offer theoretically and practically defensible answers to these questions, and made a proposal, bringing to bear insights from sequencing theory and from facets of appellate jurisdiction doctrine that others have not considered. Sometimes I have recommended that appellate courts utilize adjuncts to the appellate branch to make initial determinations that appellate courts can review. I have proposed how the gorilla should be tamed<sup>368</sup> so that appellate courts can perform their functions but remain within their institutional roles and play to their highest competencies. Whether anything will change remains to be seen.

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368 *See supra* Part V.A, B.