THE LAW OF ISSUES

*John F. Muller**

INTRODUCTION

In various areas of procedural doctrine, courts must define the content of an "issue." Consider a few examples.

The doctrine of collateral estoppel—also known as issue preclusion—is perhaps the most familiar. Under this doctrine, an "issue" of law or fact actually decided in one suit and essential to the judgment in that suit typically may not be relitigated in a later suit.[1] Accordingly, courts assess whether issues advanced before them were advanced and decided in prior suits. This inquiry demands that courts define the scope of the issues presented in the two suits and then assess how they overlap.[2]

A parallel inquiry arises in class actions. In order for a class action to be maintained under Rule 23, the "questions of law or fact common to class members predominate over any questions affecting only individual members."[3] Put another way, the "individual issues" among class members may not "overwhelm[] the common ones."[4] This predominance requirement echoes elements of issue preclusion: courts must define the issues that arise for different class members and evaluate their similarity.

Amicus curiae participation raises a similar set of questions. Typically, amici may advance novel "arguments" in support of existing "issues" raised by the parties, but they may not advance novel issues.[5] When does a creative amicus cross the line from new

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* Associate, Munger, Tolles & Olson LLP. My thanks to Bruce Ackerman, Anya Berstein, Bo Burt, Guido Calabresi, Seth Davis, Jake Gersen, Richard Fallon, Christine Jolls, Adriaan Lanni, John Manning, Dan Meltzer, Martha Minow, Sparkle Sooknanan, Susannah Barton Tobin, Joe Singer, and participants in Climenko Fellows' workshops. All errors are mine.

1. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

2. *See, e.g.*, Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) ("[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.").

3. FED. R. CIV. P. 23(b)(3).

4. Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988).

5. *Compare* Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev., 980 F.2d 1043, 1049 (5th Cir. 1993) ("[A]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties."), *with* Corrosion Proof Fittings v. EPA, 947 F.2d

argument to new issue? To answer this question, courts define the contours of the issues advanced by the parties and ask whether amicus submissions move beyond them.[6]

The definition of an issue need not be identical in these three contexts. In this sense, it is quite different from a related concept: the idea of a case. Article III of the Constitution, of course, only extends the judicial power to "Cases" and "Controversies."[7] It follows that a central task of defining the judicial power—across doctrines like standing, ripeness, intervention, pendent jurisdiction, and the like—lies in defining the idea of a case. There is no comparable constitutional mooring for the idea of an issue.[8] The aforementioned procedural doctrines, moreover, do not derive their requirements from some other articulation of the notion of an issue.

Nevertheless, the doctrines possess a common strand, and one that has grown increasingly tangled over time. Neither courts nor scholars have advanced a clear definition of an issue.[9] In each of these doctrinal areas, courts speak in a vague and conclusory fashion, advancing decisions either by fiat or as all-things-considered pronouncements.[10] The result is, at best, a lack of judicial accountability and, at worst, inconsistent decision making.

1201, 1208 (5th Cir. 1991) (considering amici "arguments" that were "variations of arguments also raised by petitioners").

6. *See, e.g.*, Eldred v. Ashcroft, 255 F.3d 849, 852 (D.C. Cir. 2011) (Sentelle, J., dissenting) (arguing that "[a] new 'argument'" advanced by an amicus was "not a new 'issue,'" as it "elaborat[ed] upon arguments made by the parties *and* present[ed] arguments [by the amicus] that [bore] upon the issues raised by the parties themselves").

7. U.S. CONST. art. III, § 2.

8. *Cf.* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 227 (1990) (attempting to unify these doctrines, and others, around a single definition of a case).

9. Perhaps the most detailed effort has come in case law concerning collateral estoppel, where courts have defined it thusly: "An issue is a single, certain and material point arising out of the allegations and contentions of the parties. It may concern only the existence or nonexistence of certain facts, or it may concern the legal significance of those facts." Cincinnati Ins. Co. v. Beazer Homes Invs., LLC, 594 F.3d 441, 445 (6th Cir. 2010) (quoting Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 518 n.66a (E.D. Mich. 1974)), *vacated on other grounds*, 399 Fed. App'x 49 (6th Cir. 2010); *see also* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4417 n.2 (2d ed. 2002) (highlighting the definition in *Overseas Motors, Inc.*). This definition does not say much, however, as to what "point" emerges from a set of party allegations, or whether one set of party allegations make the same "point" as another.

10. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982) (explaining that "[o]ne of the most difficult problems" in issue preclusion doctrine is "to delineate the issue on which litigation is, or is not, foreclosed by the prior judgment" and laying out a multitude of factors and questions courts have considered); 32B AM. JUR. 2D *Federal Courts* § 1723 (2007) (laying out the various tests courts employ for predominance of issues in class actions and placing great doctrinal weight on "a pragmatic evaluation of the interests of the

This Article begins the task of filling the resulting doctrinal void. It does so by exploring a fourth doctrinal area that requires precision about the idea of an issue: appellate preservation requirements. An "issue" not presented before a lower court will not be preserved for appeal. Unpreserved issues, moreover, usually will not be considered. In other words, appellate courts generally will not decide issues advanced by appellants for the first time on appeal.[11] Under this doctrine, appellate courts must assess whether an appellate submission offered on appeal merely elaborates preexisting issues or adds new ones.

Scholars have not turned their attention to such assessments, which can be quite difficult.[12] Consider, for instance, a litigant who argues before a trial court that her property was taken in violation of the Takings Clause of the Fifth Amendment. Specifically, the litigant argues that a rent control ordinance effected a physical taking of her property. On appeal, however, she also asserts that the law effected a regulatory taking. Is the regulatory taking challenge preserved? In other words, has the litigant advanced a new regulatory takings issue, or has she merely advanced an additional facet of the takings issue she advanced below?

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class members"); Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 275–82 (2004) (describing the uncertain state of the doctrine governing amicus participation by way of a case study of *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001)).

11. For an overview of these requirements, see generally Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1525–27 (2012) and Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1024–25 (1987). Steinman and Martineau's treatment of appellate preservation requirements compose nearly the entirety of the literature on the topic. The only other comprehensive treatment consists of a trio of articles published by Richard Campbell in the 1930s. *See generally* 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); 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); 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). Beyond Campbell's work, the literature consists of several student pieces. *See, e.g.*, Dennerline, Rhett R., Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985 (1989); Prior, Christopher R., 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).

12. Steinman, for instance, expressly avoided this matter of "definitional lines." Steinman, *supra* note 11, at 1526–27. Instead, she noted that "[t]here is no bright line for determining whether a matter was raised below, and there is likely a spectrum from old issues to new issues, rather than the two being polar opposites," and limited her analysis to "situations in which it is posited that a new issue is proffered." *Id.*

The Supreme Court addressed just this situation in a 1992 case, *Yee v. City of Escondido*,[13] on appeal from the California state courts. *Yee* held that both the regulatory takings challenge and the physical takings challenge had been preserved for appeal.[14] It explained that both challenges were part of a single issue: whether the ordinance in question effected an unconstitutional taking.[15] Because the plaintiffs in the case had raised this general takings issue in the state courts below, the Court explained, the plaintiffs "could have formulated any argument they liked" in support of that issue on appeal.[16]

This distinction—between issues and arguments—is a common one. It is also much too facile, empowering courts to define issues and arguments in a circle, each with reference to the other. An issue contains a number of possible arguments. An argument is a component of an issue. The result is a façade. Appellate courts may define the issue below broadly, so as to include a novel argument first made on appeal, or they may define it narrowly, so as to exclude the novel argument. In *Yee*, the Court could have defined the issue below as whether a physical taking had occurred, such that a regulatory taking challenge would be part of a new issue. Instead, it defined the issue below broadly, as whether any sort of taking had occurred, so that the regulatory taking challenge was part of a preexisting issue.[17]

In this Article, I propose an alternative regime. I argue that appellate courts should define the issues advanced before lower courts to consist only of those arguments that the lower court had an obligation to consider. Arguments that the lower court had no obligation to consider should be deemed beyond the issue below and thus unpreserved on appeal. Under this regime, courts would not make semantic comparisons between issues and arguments. They would ground preservation doctrine in the lower court's duty of responsiveness and, where relevant, its duties to act sua sponte.

It may sound like I am proposing a narrowing of the scope of appellate review. I am not. Decisions about appellate preservation do not determine, once and for all, what will be considered on

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13. 503 U.S. 519 (1992).
14. *Id.* at 534.
15. *Id.* at 534–35.
16. *Id.*
17. Ultimately, the determination in *Yee* was not of great import: the *Yee* Court ultimately did not consider the regulatory takings challenge because it held that the challenge had not been raised in the petitioner's certiorari petition. *Id.* at 536–38. I use the example here for ease of explicating the doctrine, rather than as a cautionary tale. For a more outcome-oriented application of the doctrine, discussed below, see the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310, 329–31 (2010) (holding that a First Amendment claim preserved a challenge to governing Supreme Court precedent not made below).

appeal. Courts may consider unpreserved issues. At present, they typically may do so only in "exceptional cases" where considering the unpreserved issue would further the purposes of appellate review.[18] Under my proposed regime, courts might well consider unpreserved issues more frequently. Issues deemed preserved under current doctrine—or, more precisely, *some* issues deemed preserved under current doctrine—would not be so deemed under my proposal, but they would be considered on appeal nevertheless.

One might wonder: if an issue will be considered on appeal, why does it matter if the court deems it preserved or unpreserved? Either way, the issue is considered. The virtue of my proposal lies in removing the veil that presently shrouds decisions about preservation. Litigants and courts will face greater pressure to explain why, given the obligations of lower courts and the purposes of appellate review, additions to the submissions offered below warrant consideration on appeal. They will face that pressure upon moving away from the notion that labeling counts as reasoning. The idea of an issue, on its own, can do very little work in this body of doctrine.

The same insight holds promise for the regimes described at the outset. In their discussions of collateral estoppel, class certification, and amicus participation, courts have been most convincing when they have looked to the purposes underlying comparisons between issues.

The remainder of this Article proceeds as follows. Part I outlines the purposes of appellate preservation doctrine. It argues that those purposes do not dictate any particular definition of an issue, or any particular approach to comparing the issues advanced in a lower court with the issues advanced on appeal. Parts II and III turn to existing doctrine governing when an issue has been preserved and when an unpreserved issue may be considered. These Parts illustrate that the current regime affords courts wide discretion to resolve questions about preservation beyond public view.

In Part IV, I advance and defend my proposed reform, which would deem unpreserved all elements of an appellant's submission that the lower court did not have an obligation to consider. I argue that the distinction between preserved issues and unpreserved ones best rests on a distinction between review for lower court errors and review for a proper result. In other words, when courts assess preserved issues, we should see them as asking whether the lower court ruled incorrectly, given the proceedings before it. When courts assess unpreserved issues, by contrast, we should see them as

18. *E.g.*, Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam) (quoting Duignan v. United States, 274 U.S. 195, 200 (1927)).

asking whether the lower court should be reversed for reasons it had no obligation to recognize on its own.

Part V considers and rejects a pair of alternative regimes: one based on intuition and another based on formalism. Finally, I conclude by discussing how courts should approach the idea of an issue elsewhere in the law.

To confine this Article to a manageable scope, I limit my discussion of preservation to the federal courts. I focus, as well, on briefed motions in those courts, rather than trial objections and the like. It does not appear that these constraints alter the analysis in any substantial way, but they help with ease of exposition. I also limit my attention to the application of preservation rules to appellants, those challenging the judgment in the lower court. Appellate courts often state that they will affirm on any grounds apparent from the record, which suggests looser preservation requirements for appellees.[19] I leave that wrinkle for a later day.

I. PRESERVATION'S PURPOSES

Courts rarely offer any reasoning in support of their decisions regarding whether an issue was preserved below. In most cases, they simply state that the issue advanced on appeal was not advanced below—full stop.[20] This sort of analysis typically proceeds without any clear definition of the issue advanced on appeal or the issue advanced below. Instead, courts simply identify portions of the party submissions offered on appeal as beyond the scope of the party submissions offered in the lower court.[21] Sometimes they support this point by describing the briefing below and on appeal.[22] More commonly, courts present their conclusions as fact.

Indeed, courts do not employ consistent terms about what, exactly, has been preserved. Most commonly, they ask whether an

19. *E.g.*, Glynn v. EDO Corp., 710 F.3d 209, 218 n.1 (4th Cir. 2013).

20. *See, e.g.*, Glover v. United States, 531 U.S. 198, 205 (2001) ("We need not describe the arguments in great detail, because despite the fact the parties have joined issue at least in part on these points, they were neither raised in nor passed upon by the Court of Appeals."); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 n.3 (1999) ("Because th[e] argument was neither raised nor considered below, we decline to consider it."); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued.").

21. *See, e.g.*, Alamo-Hornedo v. Puig, 745 F.3d 578, 582 (1st Cir. 2014) ("[A]rguments presented for the first time in an appellant's reply brief are deemed waived.").

22. *See, e.g.*, Cortés-Rivera v. Dep't of Corr. & Rehab. of Puerto Rico, 626 F.3d 21, 27–28 (1st Cir. 2010) (summarizing in detail the submissions in the lower court).

"issue" advanced on appeal was preserved below.[23] They also ask, however, whether an "argument" was preserved, and on occasion, whether a "question," "claim," "theory," or "ground of decision" was preserved.[24] When courts address appellate challenges to rulings at trial, moreover, they ask whether litigants preserved any "objection" before the lower court.[25] Typically, courts employ these various terms interchangeably, often in the same breath.[26] In doing so, they avoid the need to define what litigants must preserve. Instead, courts create an echo chamber, defining one term with reference to another, and then another with reference to the first.[27]

What, then, underlies the notion of preservation? As a first pass, one might seek to answer this question by posing another: why have rules about preservation at all? More precisely, why have a rule that appellate courts generally will not consider certain things—call them what you will—advanced for the first time on appeal? This rule, as applied, often seems unjust. When invoked, it raises the possibility of rejecting an otherwise just result for reasons seemingly grounded in semantics and formalism.

Courts and scholars offer a variety of reasons for preservation doctrine. They emphasize, for instance, the risk of unfair surprise to litigants who face new arguments late in the litigation; the importance of affording lower courts an opportunity to rule on trial objections at the moment when a litigant's concerns can be rectified; the danger of unfair surprise to lower courts reversed on grounds they did not consider; the general value of finality in court judgments; the risk that appellate courts will rule on matters without a complete factual record; and the importance of encouraging litigants to present their best arguments throughout litigation.[28]

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23. Scholars reflect this usage. *See, e.g.*, Martineau, *supra* note 11 (addressing preservation with reference to "new issues"); Steinman, *supra* note 11, at 1526 (same).

24. *See, e.g.*, Granite Rock Co., v. Int'l Bhd. of Teamsters, 561 U.S. 287, 309 n.15 (2010) (argument); United States v. Stevens, 559 U.S. 460, 473 n.3 (2010) (claim); Archer v. Warner, 538 U.S. 314, 323 (2003) (question); Nelson v. Adams USA, Inc., 529 U.S. 460, 469 (2000) (ground of decision); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 384 (1991) (theory).

25. *See, e.g.*, Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 256 n.9 (2010).

26. *See* Cravens, *supra* note 10, at 257 n.21 (summarizing language from decisions employing the terms interchangeably).

27. For instance, while courts state that litigants may advance new "arguments" on appeal in support of a claim advanced below, *see, e.g.*, Citizens United v. FEC, 558 U.S. 310, 330–31 (2010), they also state that litigants may not advance new "arguments" on appeal absent exceptional circumstances, *see, e.g.*, Aaron v. Target Corp., 357 F.3d 768, 779 (8th Cir. 2004).

28. For general statements encompassing many of these concerns, see, for example, Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 958 (2006) and Daniel J. Meltzer, *State Court Forfeitures of*

This panoply of rationales can be boiled down to three justifications. First, preservation requirements serve the division of labor between trial courts and appellate courts, whereby trial courts find facts and appellate courts focus on law. When a litigant raises an issue on appeal that he did not raise in the trial court, his adversary may not have had an opportunity to introduce evidence she believes relevant to the issue. By considering the new issue, therefore, the appellate court will run the risk of prejudicing the party unable to introduce evidence. This justification is not, alone, sufficient to warrant refusing to consider a new argument on appeal. In theory, appellate courts could simply remand for further lower court proceedings whenever a litigant advanced an argument on appeal that might warrant further factual development. Courts do not, however, follow this approach because of the second justification for preservation rules.

The second justification is as follows: preservation requirements limit the costs of litigation, both for parties and for courts. Litigation, as the Supreme Court has stated, is a "winnowing process," and preservation rules are "part of the machinery by which courts narrow what remains to be decided."[29] When litigants may advance new issues on appeal, they can impose more burdens on appellate courts, and they can increase the number of reasons for appellate courts to reverse and remand. Reversals are costly, both in time and resources, particularly when the lower court must throw out one trial and begin another. This justification, too, is not sufficient to warrant refusing to consider a new argument on appeal. Sometimes litigants advance new issues that render it unnecessary for courts to address other, more onerous issues.[30] Consideration of a new issue can, likewise, make it unnecessary to hold a new trial or supplemental proceedings.

Third, preservation requirements help ensure that courts are exposed to the strongest possible arguments as they craft decisions

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Federal Rights, 99 HARV. L. REV. 1128, 1134–35 (1986). *See also* Singleton v. Wulff, 428 U.S. 106, 120 (1976) (stating that preservation requirements are "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] 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" (quoting Hormel v. Helvering, 312 U.S. 552, 556 (1941))); United States v. Atkinson, 297 U.S. 157, 159 (1936) (justifying preservation requirements with reference to "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact").

29. Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 n.6 (2008) (quoting Poliquin v. Garden Way, Inc., 989 F.2d 527, 531 (1st Cir. 1993)).

30. *Cf.* Neese v. S. Ry. Co., 350 U.S. 77, 78 (1955) (per curiam) ("[W]e follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties.").

applicable beyond the parties to the dispute. In the course of presenting their case before a lower court, litigants often both sharpen their arguments and hone their understanding of the best arguments on the opposing side. On appeal, litigants can be more precise in couching their arguments. Similarly, redundant proceedings give the reviewing court the benefit of the expertise of the judge below. Of course, litigants may raise an issue below, and the lower court may find it unnecessary to reach that issue. Likewise, the more litigants hone their arguments, the more likely they will present new issues and run afoul of preservation requirements. At the margin, however, preservation rules encourage better-reasoned appellate decisions.

These rationales, compelling as they are, say little about how courts should assess whether a given party submission advances a new issue or merely a variation on an existing one. The rationales offer reasons for appellate courts to be wary of new issues, but when is an issue new?

Suppose a litigant, on appeal, simply produced the record below and requested that the appellate court assess the district court's response to a particular motion. For instance, suppose the litigant argued that the lower court should have granted its motion for summary judgment, and then on appeal, the litigant reproduced the motion for summary judgment along with any briefing it made before the district court in support of that motion. This appellate submission plainly would not run afoul of any of the justifications for forfeiture doctrines just described. It would also be quite difficult to argue that it presented a new issue. And yet, in our procedural system, one would expect the appellate court would not be pleased with this maneuver. What, it would probably ask, was wrong with the decision below?

Of course, litigants do not simply reproduce on appeal the submissions that they produced below. Hence the probable reply by the appellate court. As soon as litigants start trying to explain what was wrong with the decision below, the justifications for forfeiture doctrine begin to come to the fore. If the litigant's adversary had been aware of his eventual submission on appeal, would the adversary have produced additional evidence below? If the litigant had made his case before the district court as he made it on appeal, would the litigation have come to a more expeditious resolution? If the litigant may advance this error, will his doing so place an unwarranted burden on the appellate court or lead to a poorly reasoned result?

These questions are all a matter of degree. Considered together, they will point toward whether the appellate court should consider the appellant submissions in full. One might imagine a functional analysis in which courts assess each appellant brief against these three concerns and thereby determine which portions of the brief move too far beyond the arguments in the lower court.

This analysis surely would not be easy, and it would run into many of the problems common to functionalism. Nonetheless, it would inform courts as to what matters they should and should not consider on appeal.

The distinction between preserved and unpreserved issues, however, muddies these waters. The foregoing analysis would yield an answer as to what courts should *consider* on appeal. But courts consider both preserved and, albeit more rarely, unpreserved issues on appeal. So which issues are preserved and which are not? If preserved issues are issues that were advanced in the lower court, we return to the baseline question posed above: at what point does an appellant's submission move sufficiently far beyond its submission below that the appellant has advanced a new issue? In other words, when is the issue presented on appeal the same as the issue below?

One might simply eliminate the distinction between preserved and unpreserved issues, and along with it the need to compare the issues below and on appeal. Yet the doctrine has not even hinted at such a move. The notion of preservation is firmly ingrained within our current procedural regime, as is the notion that some unpreserved issues may be considered on appeal. What is lacking, however, is a conceptual basis for each of these layers of doctrine, and for the distinction between them.

II. THEORIES OF PRESERVATION

Although appellate courts rarely explain their decisions as to what, exactly, was preserved in the lower court, the doctrine is not completely barren on this front. In a few areas of the law, courts have offered more extensive explanations for their decisions. It bears emphasis that even these explanations are extremely rudimentary. Indeed, the example of *Yee*, described above, presents much more reasoning than most.[31]

Caveats aside, courts have employed two primary metrics in assessing whether a given portion of a party submission was preserved in the lower court. First, they have looked to some notion of formal logic, asking if the litigant's submissions on appeal are subsidiary, in some deductive sense, to the litigant's submissions in the lower court. Second, courts have looked to a vague concept of notice, asking if the submissions below sufficiently apprised the lower court of the submissions later advanced on appeal.

In this Part, I lay out these two theories, explicating the case law in which they have emerged. The case law, at present, is unsatisfying. While each of these two accounts provides a theory of preservation, courts have not explored the metes and bounds of these theories. Indeed, their analysis under each account remains

31. Yee v. City of Escondido, 503 U.S. 519, 533–38 (1992).

under-determined to the point that one may wonder whether the theories are doing any work in resolving cases.

A. Logic

There are two primary strands of existing preservation doctrine that look to whether party submissions advanced at one stage of litigation are logically antecedent to party submissions advanced at a prior stage. First, courts at times state that litigants may advance new "arguments" on appeal in support of a preexisting "claim" advanced below.[32] In this line of doctrine, courts eschew the typical interchangeability of the various terms to which I refer collectively as "issues."[33] Second, in policing its certiorari practice, the Supreme Court will only consider issues "fairly included" within the issues presented in a petitioner's certiorari petition.[34]

Each of these lines of doctrine affords courts wide discretion to decide, beyond public view, what has been preserved. The two sets of doctrines assume that formal distinctions can be made between the submissions at different stages of litigation. This assumption might be warranted in a formalistic legal regime—perhaps one akin to the common law writ system. In our present procedural system, however, the notion that one submission may be "subsidiary" to another does not withstand scrutiny. It does not surprise, then, that when courts draw on formal logic in assessing preservation, they do more to obscure their decisions than to illuminate them.

1. "Claims" and "Arguments"

The poster child of the distinction between claims and arguments, at least in recent years, is *Citizens United v. Federal Elections Commission*.[35] *Citizens United* famously held that political speech could not be restricted based on the corporate identity of the speaker.[36] In doing so, it overruled *Austin v. Michigan Chamber of Commerce*,[37] a decision issued twenty years earlier.[38] En route to overruling *Austin*, the Court split 5–4 on whether the challenge to the decision had been preserved below. The litigants in *Citizens United* had not focused on *Austin* until the Supreme Court requested that they do so in ordering reargument in the case.[39]

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32. *Id.* at 534.
33. *See, e.g.*, *id.* at 534–36.
34. SUP. CT. R. 14.1(a).
35. 558 U.S. 310 (2010).
36. *Id.* at 365.
37. *Id.*
38. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. at 310.
39. In its initial merits brief before the Supreme Court, Citizens United argued that "*Austin* was wrongly decided and should be overruled." Brief for

Justice Kennedy, writing for the majority, found the challenge preserved. "[T]hroughout the litigation," he wrote, "Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech."[40] Justice Kennedy continued: "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."[41] The challenge to *Austin* was "not a new claim," but rather a "new argument to support what has been a consistent claim: that the FEC did not accord Citizens United the rights it was obliged to provide by the First Amendment."[42]

In reaching this conclusion, the *Citizens United* majority drew on a line of Supreme Court precedents dating back to an 1899 decision: *Dewey v. City of Des Moines*[43] In *Dewey*, the plaintiff failed to pay a city assessment on his property.[44] An Iowa state trial court ordered the property forfeited and found the plaintiff personally liable for the value of the assessments exceeding the value of his property.[45] In his state appeal, the plaintiff argued that he had not received personal notice of the assessment proceedings and that the trial court's finding of personal liability violated the Due Process Clause.[46] On appeal to the Supreme Court, he also argued that the assessment violated the Takings Clause.[47]

A federal question not pressed in state court will be preserved, the Court held, if it is "only an enlargement of the one mentioned" in the lower court, or if it is "so connected with [the prior question] in substance as to form but another ground or reason for alleging the invalidity" of the lower court judgment.[48] Litigants, therefore, are not confined to the "same arguments which were advanced in the courts below upon a Federal question there discussed."[49] The Court, however, found the takings issue unpreserved.[50] The due process

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Appellant at 30, *Citizens United*, 558 U.S. 310 (No. 08-205). It made this argument in only two paragraphs of its brief, however, choosing to shift away from a broad attack on *Austin* based on First Amendment considerations to argue that even if *Austin* applied, its own case was not barred by that precedent. *Id.* at 31–32.

40. *Citizens United*, 558 U.S. at 330.

41. *Id.* at 330–31 (quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995)) (internal quotation marks omitted).

42. *Citizens United*, 558 U.S. at 331 (quoting *Lebron*, 513 U.S. at 379) (alterations and internal quotation marks omitted).

43. 173 U.S. 193 (1899); *Citizens United*, 558 U.S. at 331 (quoting *Lebron*, 513 U.S. at 379 (quoting Yee v. City of Escondido, 503 U.S. 519, 534 (1992) (quoting *Dewey*, 173 U.S. at 197–98 providing the proposition))).

44. *Dewey*, 173 U.S. at 194–95.

45. *Id.* at 195–96.

46. *Id.* at 196.

47. *Id.* at 197.

48. *Id.* at 197–98.

49. *Id.* at 198.

50. *Id.* at 199–201.

issue regarding the sufficiency of notice to the plaintiff, it explained, could "be raised and argued without in any manner touching the question as to the invalidity of the assessment on the lots."[51]

The preservation question in *Dewey* was jurisdictional: by statute, the Supreme Court did not have jurisdiction to consider appeals from state courts on federal questions not preserved before those courts.[52] The case law concerning the Supreme Court's appellate jurisdiction over state courts has grown murkier with time; it now appears that the Court may well have jurisdiction, on appeal from state courts, to decide issues not preserved before those courts.[53] At any rate, federal courts face no jurisdictional barrier to addressing issues not preserved in lower federal courts, though they will only address such issues under exceptional circumstances.[54]

Since *Dewey*, the Supreme Court has turned to this distinction between claims and arguments particularly in addressing preservation in appeals from state courts. Perhaps the most commonly cited of those decisions is *Yee*: "Once a *federal claim* is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."[55] The distinction also appears in strictly federal appeals. Indeed, in *Citizens United*, a case on appeal from the federal court system, the majority quoted *Yee* in explaining that litigants may advance new arguments in support of federal claims already properly presented.[56] The federal courts of appeals have followed suit.[57]

The trouble with this line of analysis becomes clear after a glance at Justice Stevens' opinion for the four dissenters in *Citizens United*. The dissenters concluded that the challenge to *Austin* had not been preserved in the lower court.[58] They did not, however, take on the majority's analysis concerning the relationship between a "claim" and an "argument" in support of a claim. Instead, Justice Stevens simply stated that *Citizens United* had not "injected its

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51. *Id.* at 198.

52. *See* Crowell v. Randell, 35 U.S. (10 Pet.) 368, 391–92 (1836).

53. *See* Illinois v. Gates, 462 U.S. 213, 219 (1983) (noting that several Supreme Court decisions have treated this requirement as prudential but declining to pass judgment on whether those decisions were correctly decided).

54. *See* Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam).

55. Yee v. City of Escondido, 503 U.S. 519, 534 (1992) (emphasis added).

56. Citizens United v. FEC, 558 U.S. 310, 331–32 (2010).

57. *See, e.g.*, United States v. Robinson, 744 F.3d 293, 300 n.6 (4th Cir. 2014); *In re* Air Cargo Shipping Servs. Antitrust Litig., 697 F.3d 154, 161 n.3 (2d Cir. 2012); United States v. Guzman-Padilla, 573 F.3d 865, 877 n.1 (9th Cir. 2009); Pugliese v. Pukka Dev., Inc., 550 F.3d 1299, 1304 n.3 (11th Cir. 2008); Teva Pharm., USA, Inc., v. Leavitt, 548 F.3d 103, 105 (D.C. Cir. 2008); United States v. Billups, 536 F.3d 574, 578 (7th Cir. 2008); Isr. Bio-Eng'g Project v. Amgen, Inc., 475 F.3d 1256, 1265–66 (Fed. Cir. 2007).

58. *Citizens United*, 558 U.S. at 396–97 (Stevens, J., concurring in part and dissenting in part).

request to overrule *Austin*" until its merits briefing before the Court.[59] He then cited the black letter rule that federal courts will only review "questions not pressed or passed upon below" in exceptional circumstances.[60] *Citizens United* "did not so much as assert an exceptional circumstance," Justice Stevens continued, "and one searches the majority opinion in vain for the mention of any."[61]

At bottom, neither the *Citizens United* majority nor the dissent offered an argument in support of its view as to whether the challenge to *Austin* was somehow contained, as a matter of logic, within the submissions below. The majority defined the issue below broadly—as a "First Amendment right to free speech" issue—such that it included the challenge to *Austin* even though that challenge was not expressly made.[62] The dissenters, meanwhile, defined the issue below more narrowly, such that the challenge fell beyond it.[63] Neither explained how it arrived at its framing of the issue, and each approach is plausible. So, which framing was correct?

Without more, it is difficult to say. There is no formal list of all the possible "claims" a litigant may make, nor is there a formal list of all the possible arguments a litigant might offer in support of those claims. One can imagine a regime built on such formalism. The old forms of action, for instance, constrained review in a similar fashion, based on particular verbal formulas. Without something akin to the old forms of action, however, a regime built on the logical relationship between different premises within arguments would need to be defined one case at a time. In essence, courts would need to develop a working list of claims and a working list of the possible arguments contained within each of those claims.

That task would be a tall order, and courts have done little to attempt it. Consider, in that vein, a decision two years prior to *Citizens United*: *Exxon Shipping Co. v. Baker*.[64] In *Exxon*, the Supreme Court heard a challenge by the oil company to a maritime punitive damage award entered against it in wake of the Exxon Valdez oil spill in Alaska.[65] In the district court, Exxon had unsuccessfully argued that a federal statute, the Trans-Alaska Pipeline Authorization Act, preempted maritime common law and

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59. *See id.* at 397.

60. *Id.* at 398 (quoting Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam)) (internal quotation marks omitted).

61. *Id.*

62. *See id.* at 329–30 (majority opinion).

63. *See id.* at 396–407 (Stevens, J., concurring in part and dissenting in part) (arguing that the majority opinion was incorrect in interpreting the issue as a facial and not an "as-applied" challenge, and was also incorrect in not choosing to decide the case on narrower grounds).

64. 554 U.S. 471 (2008).

65. *Id.* at 476, 481.

thus foreclosed the availability of punitive damages.[66] On appeal to the Ninth Circuit, Exxon also argued that the Clean Water Act preempted maritime punitive damages.[67] It had not relied on the Clean Water Act in making its preemption argument in the district court.[68]

The Ninth Circuit, reasoning much like Justice Kennedy would in *Citizens United*, found this "new" argument preserved.[69] It explained that Exxon had "clearly and consistently argued statutory preemption as one of its theories for why punitive damages were barred as a matter of law."[70] It also stated that "[b]ecause the issue is massive in its significance to the parties and is purely one of law, which requires no further development in district court, it would be inappropriate to treat it as waived in the ambiguous circumstances of this case."[71] The court then held that the Clean Water Act did not preempt maritime common law regarding punitive damages, rejecting Exxon's argument on the merits.[72]

The Supreme Court rejected this reasoning.[73] It noted, first, that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim."[74] In the Court's view, however, this principle "stops well short of legitimizing Exxon's untimely motion."[75] It continued: "If 'statutory preemption' were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had 'consistently argued' that a challenged regulation was unconstitutional."[76] This result, the Court suggested, would be contrary to various decisions in which it had found that litigants had not preserved arguments under one constitutional provision merely by virtue of their arguments under another.[77]

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66. *Id.* at 485.

67. *Id.* at 486.

68. *Id.* at 485–86. Exxon advanced the Clean Water Act argument in the district court as well, but it did not do so until months after the stipulated motions, in a request to file a new motion notwithstanding the passing of the deadline. *Id.* The district court summarily denied the request before it entered final judgment. *Id.*

69. *In re* Exxon Valdez, 270 F.3d 1215, 1229 (9th Cir. 2001).

70. *Id.*

71. *Id.*

72. *Id.* at 1230.

73. *Exxon Shipping Co.*, 554 U.S. at 486.

74. *Id.* at 487 (quoting Yee v. City of Escondido, 503 U.S. 519, 534 (1992)) (internal quotation marks omitted).

75. *Id.*

76. *Id.*

77. *Id.* (citing *Yee*, 503 U.S. at 533, which "reject[ed] [a] substantive due process claim by takings petitioners who failed to preserve it below," and Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 277

Exxon sets bounds on the extent to which a "new" argument may be deemed part of an existing "claim," but not in a way that can help in a case like *Citizens United*. It is clear enough that the Court could not have defined the "claim" below in *Citizens United* merely as a "constitutional claim." It is not clear, however, exactly what this limit means, beyond the fact that the Court has disallowed litigants from invoking, for instance, the Due Process Clause on appeal where they only invoked the Eighth Amendment or the Takings Clause below. Accordingly, it is not clear how the Court should analogize between these cases and others, except by employing conclusory definitions of a "claim."

After all, one might ask why an argument under the Takings Clause is part of a different "claim" from an argument under the Due Process Clause. The source of the relief is different, surely, but such distinctions are only a matter of degree: relief under *Austin* and its progeny is different from relief not under *Austin* and its progeny. Suppose a litigant invokes Title VII in the lower court. Has she preserved challenges to the construction of any portion of the statute's text and regulations? Or suppose the litigant sues under state contract law. If she sought expectation damages in the lower court, has she preserved a reliance argument? If she argued about contract interpretation below, has she preserved a contract formation argument?

2. "Fairly Included"

The Ninth Circuit's decision in *Exxon* points to a somewhat more functionalist analysis in assessing the logical relationship between party submissions. It emphasized the public importance of the Clean Water Act preemption argument advanced on appeal, and it noted that addressing the issue would not require any further factual development.[78] The Supreme Court has looked to these sort of functionalist considerations in assessing when a petitioner's arguments are "fairly included" within the certiorari petition submitted to the Court.[79] Under Rule 14.1(a) of the Supreme Court's rules, "[t]he statement of any question presented is deemed to comprise every *subsidiary* question fairly included therein."[80]

This doctrine, unlike the doctrine parsing "claims" and "arguments," has the benefit of a fixed definition of the preexisting question presented. The Court simply looks to the brief text of the

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n.23 (1989), which "reject[ed] [a] due process claim by Eighth Amendment petitioners").

78. *In re* Exxon Valdez, 270 F.3d 1215, 1229 (9th Cir. 2001) (finding that "it would be inappropriate" to treat the Clean Water Act preemption issue as waived, in part, because "the issue is massive in its significance to the parties").

79. *See, e.g.*, *Yee*, 503 U.S. at 535 (citing Berkemer v. McCarty, 468 U.S. 420, 443 n.38 (1984)).

80. SUP. CT. R. 14.1(a) (emphasis added).

"question presented" that accompanies a certiorari petition. Accordingly, the Court's analysis does not turn quite so much on how broadly or narrowly it defines the prior party submissions. It turns, more often, on how the Court defines the relationship between those brief, initial submissions and the content of the party's later submissions. But when, exactly, is a petitioner's briefing before the Court "subsidiary" to the question identified in its certiorari petition?

A pair of decisions defines the doctrinal landscape in this realm: *Yee*,[81] which addressed Rule 14.1(a)'s preservation requirements in addition to general appellate preservation, and *Lebron v. National Railroad Passenger Corp.*[82] Prior to these two decisions, the Court couched Rule 14.1(a) and its predecessors in terms of essentiality. When consideration of an issue "is essential to the correct disposition of the other issues in the case," one decision explained, "we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari."[83] The Court had not, however, attempted to define when an issue is "essential," let alone when one issue is different from another. It moved toward answering these questions in *Yee* and *Lebron*, but with only marginal success.

In *Yee*, mobile home owners petitioned for certiorari to challenge a California rent control ordinance as a taking under the Fifth Amendment.[84] The Court granted certiorari on a single question, which the mobile home owners outlined as follows:

> Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute[s] an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?[85]

The two federal appeals courts, the Court noted, "held that mobile home ordinances effected physical takings, not regulatory takings."[86] According to the Court, then, the petition, "fairly

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81. *Yee*, 503 U.S. at 536–38.

82. 513 U.S. 374 (1995).

83. United States v. Mendenhall, 446 U.S. 544, 551 n.5 (1980) (plurality opinion); *see also* Procunier v. Navarette, 434 U.S. 555, 560 n.6 (1978) ("Since consideration of these issues is essential to analysis of the Court of Appeals' reversal of summary judgment on claim 3 of the complaint, we shall also treat these questions as subsidiary issues 'fairly comprised' by the question presented.").

84. *Yee*, 503 U.S. at 519.

85. *Id.* at 536–37.

86. *Id.* at 537 (referencing Pinewood Estates of Mich. v. Barnegat Twp. Leveling Bd., 898 F.2d 347 (3d Cir. 1990); Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1987)).

construed," "presented . . . the equivalent of the question 'Did the court below err in finding no physical taking?'"[87]

Following the Court's grant of certiorari, however, the petitioners asserted that the ordinance effected a regulatory taking in addition to a physical one.[88] The Court first held that, for purposes of general appellate preservation, the regulatory takings "argument" had been preserved as part of the broader takings "claim" advanced below.[89] It then held, however, that the regulatory takings argument had not been preserved for purposes of Rule 14.1(a), as it was not fairly presented by the certiorari petition.[90]

In reaching this latter conclusion, the Court noted two purposes underlying Rule 14.1(a). First, the Rule "provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted."[91] Second, it "assists the court in selecting the cases in which certiorari will be granted," forcing the litigants to "focus on the questions the Court has viewed as particularly important, thus enabling [the Court] to make efficient use of [its] resources."[92]

Neither of these purposes gives much guidance as to when, exactly, an argument falls outside of a petition. On that more particular matter, the Court held that it is not enough for an argument to be "*related*" or "*complementary*" to the one presented in the petition.[93] Instead, the argument must be logically subsidiary to the question within the petition. "Consideration of whether a regulatory taking occurred," the Court held, "would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other."[94] The Court noted that a regulatory taking claim and a physical taking claim "might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other."[95]

Yee did not explain when one question can "assist" in resolving another. *Lebron*, decided three years later, delved a bit deeper. In *Lebron*, an artist had sought to lease a billboard space in New York's Pennsylvania Station in order to post political art.[96] When Amtrak disallowed the lease under a policy barring political advertising, the petitioner sued, alleging that the policy violated his rights to free

87. *Id.*
88. *Id.* at 532–33.
89. *Id.* at 534–35.
90. *Id.* at 537–38.
91. *Id.* at 535–36.
92. *Id.* at 536.
93. *Id.* at 537.
94. *Id.*
95. *Id.*
96. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 376–77 (1995).

speech under the First Amendment.[97] The petition for certiorari in *Lebron* asked whether the Second Circuit had erred in holding that Amtrak's rejection of the artist's application did not amount to state action. The petition identified four factual indicators of state action:

> (a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all members of its Board;
>
> (b) the United States-appointed Board approved the advertising policy challenged here;
>
> (c) the United States keeps Amtrak afloat every year by subsidizing its losses; and
>
> (d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities.[98]

In his briefing before the Court, the petitioner also argued that Amtrak was itself a government entity—not, as he had argued in the lower federal courts, merely a private entity exercising governmental power.[99] The Court held this assertion preserved by the certiorari petition. It distinguished *Yee* in two primary ways.

First, the Court stated that whereas "it was possible to consider the existence of a physical taking without *assuming* (as one of the premises of the inquiry) the *nonexistence* of a regulatory taking," it was "quite impossible . . . to convert private-entity Amtrak into a government actor without first assuming that Amtrak is a private entity."[100] In other words, the Court reasoned that the success of the petitioner's preexisting arguments—which flowed from the premise that Amtrak was a private entity with substantial government contacts—necessarily assumed the failure of the petitioner's new argument that Amtrak was a government entity.[101]

Second, the Court reasoned that whereas the legal tests bearing on regulatory takings and physical takings are "quite different," the elements that bear on whether a private entity qualifies as a governmental actor "also bear" on whether an entity is not private at all.[102] It emphasized the factual elements of these overlaps. Both inquiries, for instance, would look to the constitution of Amtrak's board of directors. The Court then noted that when a question is

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97. *Id.* at 377.
98. *Id.* at 380 n.1.
99. *Id.* at 378–80; *see generally* Lebron v. Nat'l R.R. Passenger Corp., 12 F.3d 388, 390–93 (2d Cir. 1993) (instructing the district court to dismiss Lebron's complaint on remand because Amtrak's refusal to run the advertisement was not government action).
100. *Lebron*, 513 U.S. at 381.
101. *Id.* at 381–82.
102. *Id.* at 382.

"dependent upon many of the same factual inquiries," as the preexisting question, "refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous."[103]

There are substantial holes in each of these strands of analysis, which Justice O'Connor surveyed in her dissent.[104] In countless cases, the Court has decided questions without interrogating the logical premises of those questions.[105] Indeed, principles of judicial minimalism call on the Court to do just that.[106] In that same vein, the Court rarely addresses questions waived or forfeited by the parties, even if those questions might be deemed antecedent to the questions presented before it.[107] The factual overlaps across inquiries can be equally artificial. Litigants possess extensive power to stipulate to facts, including ones that might be shown to be "ridiculous."[108] It is also difficult to know what discovery a litigant might have pursued at trial had it been aware that a new theory would later be entertained on appeal. The similarity of a pair of legal tests does not necessarily track when litigants would have wanted additional discovery.[109]

Ultimately, the Supreme Court's subsidiarity analysis under Rule 14.1(a) runs into the same shortcomings as its distinction between "claims" and "arguments." While the Court has offered reasons in deeming particular questions "subsidiary" to others, its reasons thus far have proven hollow. In the absence of any consistent requirement that courts address particular premises underlying legal conclusions, the notion of antecedence employed within the doctrine has no mooring. Unless the law turns to a deeper formalism—via a return to the old forms of action or some similar regime—a broader set of considerations must underlie the

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103. *Id.*

104. *See id.* at 406–08 (O'Connor, J., dissenting).

105. *Id.* at 404–05 (analyzing cases).

106. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999) (advocating for minimalism in Supreme Court decision making).

107. *See, e.g.*, Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1210 (2011) ("[P]arties can choose to waive legal claims . . . and courts will generally not address waived claims."); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 693–94 (2012) ("The standard assumption is that the resulting forfeiture limits the law-declaring authority of the Court in the same way that it binds the litigants.").

108. *See* Lawson, *supra* note 107, at 1203–09 (discussing when courts will allow stipulations of fact).

109. *Cf. Lebron*, 513 U.S. at 406 (O'Connor, J., dissenting) (arguing that there is a "certain circularity" inherent in asking whether a new argument depends on the same factual inquiries as another argument "because the Court must first answer the omitted question in order to determine whether its answer turns on" those factual inquiries).

notion of subsidiarity. Perhaps the factual basis of different questions, but also whatever else, explains how courts distinguish between which legal premises warrant interrogation and which may be assumed.

B. Notice

In the course of their discussions of the logical relationship between party submissions at different stages of litigation, courts have alluded to an independent analytic framework for preservation: the concept of notice, and more particularly, judicial notice. This framework has taken root in a few doctrinal areas, most notably under 28 U.S.C. § 1257,[110] which governs when the Supreme Court may consider federal questions on appeal from state courts, and under 28 U.S.C. § 2254,[111] which governs when federal courts may consider federal questions on habeas review of state court decisions.

Within each of these doctrinal areas, appellate courts look to whether the lower court had notice of the argument later advanced on appeal, such that it would be "fair," in some largely undefined sense, to reverse the lower court for failing to see the merit of that argument. Neither line of doctrine, however, does much to explain when lower courts should have known of matters not expressly stated before them—which is to say, when lower courts should have acted sua sponte. Accordingly, analyses that invoke notice are no more convincing than analyses that invoke logic.

1. 28 U.S.C. § 1257

Return to *Dewey v. City of Des Moines*, the 1899 property forfeiture case often invoked for the proposition that appellate litigants are not confined to the arguments they made below, so long as the argument is in support of a preexisting federal question.[112] In explaining the scope of this proposition, the Court elaborated that there must have been "something in the case before the state court"—recall that *Dewey* was an appeal from Iowa state court—to "call its attention to the Federal question as one that was relied on by the party."[113] In other words, *Dewey* defined the federal question below based on whether the state court would have been apprised of it by the relevant litigant.[114] By giving this notice to the lower court, the litigant would preserve all arguments underlying that question.

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110. 28 U.S.C. § 1257 (2012).
111. 28 U.S.C. § 2254 (2012).
112. 173 U.S. 193, 198 (1899).
113. *Id.* at 199.
114. *Id.*

When the Court decided *Dewey*, it was well established that the Supreme Court could only review federal questions on appeal from state courts if those questions had been actually decided by the state court.[115] Accordingly, *Dewey* continued to say that federal questions would only be considered on appeal if it appeared "from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law."[116] The lower court needed to have been apprised of the federal question later advanced on appeal because it also needed to have decided the federal question later advanced on appeal.

Since *Dewey*, the Court has made clear that a federal question will be preserved on appeal from a state court judgment even if the question was not "squarely considered and resolved" in that court.[117] The question solely needs to have been "raised" before the state court.[118] Nonetheless, the Court has continued to apply the notice standard in some cases on appeal from state courts. The most sustained analysis is in *Illinois v. Gates*.[119]

In *Gates*, a 1983 decision, a pair of criminal defendants persuaded the Illinois state courts to exclude, under the Fourth Amendment, evidence seized by police officers in a search of their car and home.[120] In the state courts, the State argued that the defendants could not meet the Fourth Amendment's exclusionary standard. On appeal to the Supreme Court, however, the State also argued that the Fourth Amendment should not require the exclusion of evidence obtained by officers acting on the reasonable belief that the search was valid.[121]

Was the new argument preserved? There are echoes of *Citizens United* in *Gates*: here is another case in which a litigant challenged the substance of an established constitutional standard for the first time on appeal to the Supreme Court. The Court in *Gates*, however, did not reach the conclusion reached by the Court in *Citizens*

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115. *See* Crowell v. Randell, 35 U.S. (10 Pet.) 368, 391–92 (1836).

116. *Dewey*, 173 U.S. at 199.

117. Illinois v. Gates, 462 U.S. 213, 218 n.1 (1983) (referencing State Farm Mut. Ins. Co. v. Duel, 324 U.S. 154, 160 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 435–36 (1940)).

118. *Id.*

119. *See id.* at 221.

120. *Id.* at 227.

121. *See id.* at 217. The shift was due, in large part, to prodding by the Court. After initial briefing and argument, the Court requested that the parties brief the "additional question" of:

> [W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Id.

United. Instead, it found the State's argument regarding the exclusionary rule unpreserved.[122]

The Court began by summarizing its holding in *Dewey*. That decision's application to *Gates*, the Court continued, was "not entirely straightforward."[123] It explained that while the litigants had vigorously disputed whether the Fourth Amendment had been violated, the State had never "raised or addressed the question whether the federal exclusionary rule should be modified in any respect," and "none of the opinions of the Illinois courts give any indication that the question was considered."[124] In essence, the Court needed to decide whether the new challenge to the exclusionary rule was merely a new argument in support of the existing Fourth Amendment question, or a new question altogether.

In addressing this question, the Court identified three rationales underlying the rule against deciding questions "not pressed or passed upon" below.[125] First, it noted that the evidentiary record will often be inadequate for such questions. Indeed, the record in *Gates* contained little evidence about the good faith of the police officers who conducted the searches.[126] Second, the Court reasoned that respect for state courts requires giving them an opportunity to consider the application and development of federal law.[127] Finally, it asserted that state courts should have the opportunity, in the face of possible reversal on federal law, to rest their decisions on independent and adequate state grounds rather than on federal grounds.[128]

The Court then held that considering the State's argument regarding the exclusionary rule would be contrary to these rationales.[129] It emphasized, in particular, two points. First, in the Court's view, the state courts had applied the exclusionary rule as a "routine act" that followed the finding of a Fourth Amendment violation.[130] In applying the rule, the courts had not conveyed a "considered judgment . . . on the question whether application of a modified rule would be warranted on the facts of this case."[131] Second, the Court pointed to social convention. The exclusionary rule's remedy, the Court explained, had "long been regarded as an issue separate from the question whether" a litigant's Fourth Amendment rights had been violated.[132] In other words, there was

122. *Id.* at 222–23.
123. *Id.* at 220.
124. *Id.* at 220–21.
125. *Id.* at 221–22.
126. *Id.* at 221.
127. *Id.* at 221–22.
128. *Id.* at 222.
129. *Id.*
130. *Id.* at 223.
131. *Id.*
132. *Id.*

good reason that the Illinois state courts had not inquired into the validity of the exclusionary rule.

Each of the rationales in *Gates* does not touch on the broader question suggested by a notice standard: when should lower courts decide cases based on arguments not made before them? Instead, the Court asked whether the state courts below acted within prevailing conventions. One wonders why courts—and, presumably, litigants—typically view the exclusionary rule's remedy separately from substantive Fourth Amendment rights. How should courts assess social convention in later cases? In what doctrinal realm do courts typically act sua sponte? Federal courts are required to inquire into their own subject matter jurisdiction, but beyond that, they typically cast sua sponte inquiries as extraordinary.[133]

Prior cases under § 1257, moreover, muddy the standard even further. Take another case from Illinois, *Stanley v. Illinois*.[134] In *Stanley*, a 1972 case, the petitioner challenged a state law providing that children of unwed fathers became wards of the State upon the death of their mothers, regardless of the parental fitness of their fathers.[135] Both in the state courts and the Supreme Court, the petitioner challenged the law's sex-based distinctions under the Equal Protection Clause.[136] The Court, however, struck down the law under the Due Process Clause, explaining that this "method of analysis" had been "readily available" to the state court.[137] When is a "method of analysis" not "available" to the state court, so long as the court has jurisdiction to act? Justice Burger, in dissent, surely had it right in saying that the majority's analysis amounted to reading the "Equal Protection Clause as a shorthand condensation of the entire Constitution."[138]

Surely the Court could give some specificity to existing conventions by identifying them one question and one case at a time. It could also clarify when "readily available" amounts to "apprise[d]," or perhaps repudiate the analysis of preservation in *Stanley*.[139] At present, though, none of this seems particularly likely. Since *Gates*, the Court has not engaged with when a state court has been "apprise[d]" of a federal question for purposes of § 1257. Instead, it has turned to the conclusory distinction between "claims" and "arguments" employed in *Yee*.[140]

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133. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 455, 461–63 (2009). For an overview of the doctrine in this area, see *id.* at 455–70.

134. 405 U.S. 645 (1972).

135. *Id.* at 646.

136. *Id.* at 646–47.

137. *Id.* at 658 & n.10.

138. *Id.* at 660 (Burger, C.J., dissenting).

139. *Id.* at 658 n.10 (majority opinion).

140. *See id.* at 658 & n.10; *see also* Yee v. City of Escondido, 503 U.S. 519, 534–35 (1992); *cf.* Clark v. Arizona, 548 U.S. 735, 787 (2006) (Kennedy, J., dissenting); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 495 (1993)

2. 28 U.S.C. § 2254

While deciding *Stanley*, the Court distinguished the first of a series of decisions it has handed down regarding state habeas exhaustion under § 2254. That decision, *Picard v. Connor*,[141] also involved a question about the relationship, for purposes of preservation, between the Equal Protection Clause and the Due Process Clause.[142] *Picard* attempted to define when state courts have notice of particular arguments, and later decisions provide case law applying that definition.

In *Picard*, a state prisoner challenged, on federal habeas, the amendment of the Massachusetts grand jury indictment that preceded his state murder conviction.[143] The prisoner (substituted as "John Doe" on the indictment) argued that the amendment had not been in compliance with the procedures required by Massachusetts' fictitious name statute.[144] Given this defect, the prisoner argued that he had been prosecuted in violation of his rights to due process.[145] The District of Massachusetts, like the Massachusetts state courts before it, rejected this argument and denied the petition.[146]

The First Circuit, however, took another tack. It assumed, consistent with the rulings below, that there "is no general due process right to require that prosecution be preceded by an indictment," and thus found relief unwarranted under the Due Process Clause.[147] In its view, however, the issue in the case was whether, "in view of the extent to which Massachusetts affords this protection to others," the procedure of the prisoner's indictment deprived him of his rights under the Equal Protection Clause.[148] The court requested supplemental briefing on that question and found it preserved.[149] It reasoned that the prisoner had "presented the court with an opportunity to apply controlling legal principles to

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(O'Connor, J., dissenting); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 78 n.2 (1988) (holding, on appeal from the Mississippi Supreme Court, that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" (quoting Dewey v. Des Moines, 173 U.S. 193, 198 (1899) (internal quotation marks omitted))).

141. 404 U.S. 270 (1971).

142. *Id.* at 270–71; *see also Stanley*, 405 U.S. at 658 n.10 (distinguishing *Picard*).

143. *Picard*, 404 U.S. at 272–73.

144. *Id.*

145. *Id.* at 273.

146. *Id.* at 271, 273.

147. Connor v. Picard, 434 F.2d 673, 674 (1st Cir. 1970), *rev'd*, 404 U.S. 270.

148. *Id.*

149. *Id.*

the facts bearing upon [his] constitutional claim."[150] The court then granted the petition.[151]

The Supreme Court reversed, finding the equal protection ground unpreserved. The "substance" of a federal habeas claim, the Court held, must have been presented to the state courts.[152] Claiming an indictment "is invalid," it reasoned, is not the "substantial equivalent" of claiming an indictment "results in an unconstitutional discrimination."[153] According to the Court, it did not mean to imply that habeas petitioners needed to cite "book and verse on the federal constitution" in state proceedings in order to present an argument on habeas review.[154] There would be instances when the "ultimate question for disposition" would be the same despite "variations in the legal theory or factual allegations urged in its support."[155]

The Court has struggled to give content to this distinction. *Picard* offered a single example: a coerced confession claim, it suggested, would preserve arguments sounding in both physical and psychological coercion.[156] Why are physical and psychological coercion "substantially equivalent" to a general coerced confession claim? The Court did not offer an answer. Later decisions have not said much on this point either, though they have suggested that some idea of notice underlies it.

Consider, for instance, *Anderson v. Harless*,[157] the Court's first return to the matter of substantial equivalence after *Picard*.[158] There, a state prisoner sought to challenge his Michigan state murder conviction on the ground that a jury instruction regarding the definition of malice—an element distinguishing murder from manslaughter under Michigan law—violated his right to a fair trial under the Sixth and Fourteenth Amendments.[159] The prisoner did not, however, expressly identify those constitutional provisions in the state courts.[160] Instead, he argued that the jury instruction was error under a Michigan Supreme Court decision, *People v. Martin*.[161]

The Sixth Circuit, in granting the petition, held the prisoner's reliance on *Martin* sufficient to preserve his constitutional

150. *Id.* (citation omitted) (internal quotation marks omitted).
151. *Id.* at 676.
152. *Picard*, 404 U.S. at 278.
153. *Id.*
154. *Id.*
155. *Id.* at 277.
156. *Id.* (citing Sanders v. United States, 373 U.S. 1, 16 (1963)).
157. 459 U.S. 4 (1982) (per curiam).
158. *See id.* at 6.
159. *Id.* at 4–6.
160. *See id.* at 6.
161. *Id.* at 7 (referring to People v. Martin, 221 N.W.2d 336 (Mich. 1974)).

argument.[162] In *Martin*, the defendant had challenged his state conviction on the ground that the trial court's jury instructions regarding the distinction between murder and manslaughter—in particular, regarding the definition of malice—violated his rights under state and federal law.[163] The Michigan Supreme Court vacated Martin's conviction on state law grounds, reasoning that the trial court had erroneously defined malice.[164] In the Sixth Circuit's view, *Martin* also tacitly accepted the defendant's constitutional argument that he had been denied a fair trial under the Sixth and Fourteenth Amendments.[165] While *Martin* had not expressly recognized a violation of federal rights, it had explained that "an erroneous or misleading charge denies the defendant the right to have a properly instructed jury pass upon the evidence"[166]—a federal right, the Sixth Circuit noted, guaranteed by the Due Process Clause.[167]

The Supreme Court again reversed, holding that the citation to *Martin* did not preserve the prisoner's federal arguments.[168] It reasoned that his specific constitutional claims were not "the same as the constitutional claim advanced in *Martin*," where the defendant had "asserted a broad federal due process right to jury instructions that 'properly explain' state law."[169] Instead, the Court held, the prisoner sought relief on the more specific ground that a state law presumption—regarding malice under Michigan law—"undermine[d] the prosecution's burden to prove guilt beyond a reasonable doubt" and, for that reason, deprived him of due process.[170] The Court did not explain why this more particular argument was not merely a variation on the broader legal question implicated by *Martin*.

Anderson appears to stand, however, for the idea that a lower court must have been aware of the argument later made on appeal. The Court stated in a footnote: "We doubt that a defendant's citation

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162. Harless v. Anderson, 664 F.2d 610, 612 (6th Cir. 1981), *rev'd*, 459 U.S. 4 (1982).

163. *Martin*, 221 N.W.2d at 338 & n.2.

164. *Id.* at 341–42.

165. *Harless*, 664 F.2d at 612.

166. *Id.* (quoting *Martin*, 221 N.W.2d at 341) (internal quotation marks omitted).

167. *Id.*

168. Anderson v. Harless, 459 U.S. 4, 6–7 (1982) (per curiam).

169. *Id.* at 7 (quoting *Martin*, 221 N.W.2d at 339).

170. *Id.* The Court emphasized that the district court relied on *Sandstrom v. Montana*, a case decided after *Martin*. *Id.* *See generally* Sandstrom v. Montana, 442 U.S. 510 (1979). The Court referred to the petitioner's claim, at one point, as a *Sandstrom* claim. *Anderson*, 459 U.S. at 8. In *Sandstrom*, the Court held that state law presumptions that have the effect of shifting the burden of persuasion to criminal defendants violate the Fourteenth Amendment's requirement that all elements of a criminal offense must be proven beyond a reasonable doubt. *Sandstrom*, 442 U.S. at 524.

to a state-court decision predicated solely on state law ordinarily will be sufficient to *fairly apprise* a reviewing court of a potential federal claim merely because the defendant in the cited case advanced a federal claim."[171] Here, again, is the notion of apprising a court of a potential claim: the state court simply had no good reason to consider the asserted theory, even if that theory was quite similar to the theory advanced in a case cited before it.

A pair of more recent Supreme Court decisions under § 2254, *Duncan v. Henry*[172] and *Baldwin v. Reese*,[173] betrays the same sort of reasoning. In *Duncan*, a 1995 case, the prisoner asserted that evidentiary rulings in the state trial court had violated his due process rights.[174] In his state appeals, however, the petitioner had only challenged evidentiary rulings under the "miscarriage of justice" standard in the California Constitution.[175] The Court ruled that this state law challenge did not preserve the due process challenge.[176] In so finding, it attempted to enter the mind of the trial court, asking how the court would have viewed the prisoner's petition. The Court reasoned that the prisoner's failure to expressly identify a federal due process claim with respect to the evidentiary ruling should be viewed in light of the choice to raise such a claim in relation to a different trial ruling.[177] On those facts, the Court implied that the state courts would have believed that the prisoner did not intend to raise the omitted due process claim.[178]

In *Baldwin*, a 2004 case, a prisoner challenged his conviction on grounds of ineffective assistance of counsel.[179] In the lower Oregon courts, he identified specific constitutional violations arising from the conduct of both his trial and appellate counsels. In seeking discretionary review by the Oregon Supreme Court, however, the prisoner only identified provisions of the federal Constitution in relation to his trial counsel's conduct.[180] The United States Supreme Court rejected the argument that the Oregon lower court rulings sufficiently informed the Oregon Supreme Court of the prisoner's federal claims regarding his appellate counsel.[181] It reasoned that accepting such an argument would impose undue burdens on state court judges to look beyond party briefs.[182] The

171. *Anderson*, 459 U.S. at 7 n.3 (emphasis added).
172. 513 U.S. 364, 366 (1995) (per curiam).
173. 541 U.S. 27, 32 (2004).
174. *Duncan*, 513 U.S. at 365.
175. *Id.* at 364.
176. *Id.* at 366.
177. *Id.*
178. *Id.*
179. Baldwin v. Reese, 541 U.S. 27, 29 (2004).
180. *Id.* at 30.
181. *Id.* at 30–31.
182. *Id.* at 31–32.

Court thereby assumed that state courts have an obligation to consider all arguments later deemed preserved.

These cases, like the cases under § 1257, advance no clear theory as to when a court should be apprised of an argument not expressly made before it. Indeed, in each case the Court rejected the notion that the state court should have been apprised of such an argument. Yet, surely, habeas petitioners are not confined to each individual word, or case, cited in their state briefs. Of what, then, must state courts take notice? Or, what must state courts be on constructive notice of? Once again, courts are left to proceed case by case, argument by argument.

III. THEORIES OF (NON)PRESERVATION

A full assessment of these two theories is not possible without an accounting of the backstop that exists behind them: the law that governs unpreserved issues. What are the consequences when a court deems an issue unpreserved? As I have explained, decisions about whether an issue has been preserved do not resolve whether a court will, ultimately, consider it. Courts consider both preserved issues and, on occasion, unpreserved issues that meet certain preconditions for review.

Courts have been notoriously unclear about when they will consider unpreserved issues. Indeed, the Supreme Court has refused to announce any general rule on the matter, leaving lower courts to look at the "facts of individual cases."[183] Lower courts give a myriad of reasons—and, at times, no reason at all. Robert Martineau's words from 1987 still ring true today: "[I]t is almost impossible to predict in a particular case whether or not the appellate court will consider a new issue raised by the appellant."[184]

Nevertheless, when one steps back from the particularities of individual exceptions, a basic pattern emerges. Courts give two overlapping reasons for considering unpreserved issues. First, they consider such issues when there are interests at stake—like party justice or law declaration—that overshadow the usual justifications for preservation doctrine. Second, they consider unpreserved issues when the purposes for preservation doctrine do not apply with full force—for instance, when the issue is purely legal, easily resolved, or would allow the court to sidestep more difficult issues.

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

184. Martineau, *supra* note 11, at 1024. Steinman is a bit more hopeful about crafting doctrine in this area. Her synthesis of the case law, however, does not hold much promise for such predictions: Steinman offers a thirteen-part test, filled with the sort of normative words courts often use in deciding whether to consider unpreserved issues. *See* Steinman, *supra* note 11, at 1614–16.

A. Overshadowing Reasons

The first set of reasons for considering unpreserved issues subsumes the purposes of preservation doctrine to the purposes of adjudication more broadly. It is by now a truism among proceduralists that adjudication serves two primary purposes: dispute resolution and law declaration.[185] It should not be surprising, then, that courts occasionally depart from the general rule against considering new issues on appeal for one of these reasons, referring either to the interests of justice or the public importance of the issue.

When courts refer to the interests of justice, they employ a variety of standards. Perhaps most commonly, they will consider unpreserved issues when not doing so will yield "a plain miscarriage of justice."[186] The seminal case is *Hormel v. Helvering*, a 1941 decision in which the federal Commissioner of Internal Revenue pressed unpreserved arguments in support of finding that the petitioner, Hormel, owed uncollected taxes.[187] The Supreme Court concluded that permitting the petitioner to escape taxes, "which under the record before us he clearly owes," would serve to "defeat rather than promote the ends of justice."[188] Other decisions have framed the standard more restrictively, applying it only to "horrendous case[s]."[189] No consistent approach has emerged, however.

In a similar vein, courts allow "plain error" review of issues not raised below, allowing reversal when justice so requires. The

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185. The canonical division has often been made by contrasting the views of Lon Fuller, who ostensibly saw adjudication as concerned primarily with dispute resolution, with the views of Owen Fiss and Abram Chayes, who saw it as also concerned with law declaration. *Compare* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978), *with* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307–09 (1976), *and* Owen M. Fiss, *The Supreme Court 1978 Term Foreword—The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). This contrast miscasts Fuller's views, which envisioned a public dimension for adjudication. *Cf.* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1305 (1995). The two models have become firmly ingrained in procedural discourse, under a variety of different names. *See, e.g.*, Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1–3 (1985) (speaking of an "arbitration model" and a "regulation model"); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–40 (1975) (comparing the "Conflict Resolution Model" with the "Behavior Modification Model").

186. Hormel v. Helvering, 312 U.S. 552, 558 (1941).

187. *Id.* at 554–55.

188. *Id.* at 560.

189. Newark Morning Ledger Co. v. United States, 539 F.2d 929, 932 (3d Cir. 1976); *see, e.g.*, Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

Supreme Court refined this test in *United States v. Olano*,[190] a 1993 decision that adopted a four-part test for plain error applicable in criminal cases.[191] Under *Olano*, an appellate court should reverse the lower court when (1) an error occurred, (2) the error was "clear" or "obvious," (3) the error affects "substantial rights," and (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[192] The courts of appeals have extended this test in an array of civil contexts,[193] and the Federal Rules of Civil Procedure have employed it as well, most notably in Rule 51's standard for appeals concerning jury instructions.[194]

Other exceptions to preservation doctrines focus more completely on the public importance of the unpreserved issue. Think, for instance, of perhaps the most well-known—and most categorical—exception to the rule that courts generally will not consider new issues on appeal: litigants may raise subject matter jurisdiction at any stage of litigation.[195] This doctrine stems from various considerations, but one is particularly paramount: the bounds of the judicial power. Courts may not speak the law when they have no authority to do so. Indeed, they have an obligation to inquire into their own subject matter jurisdiction at every stage of litigation.[196]

Limits on the federal judicial power sound, in part, in considerations of comity: matters not suited for a federal forum may be suited, instead, for a state one. In keeping with this rationale, it appears that federal courts generally exercise, as Judge Posner has observed, a "more relaxed attitude toward failure to preserve issues" in cases concerning "the mutual respect of sovereigns."[197] The Supreme Court, for example, has held that Eleventh Amendment sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar" such that it need not be raised in the trial

190. 507 U.S. 725 (1993).

191. *Id.* at 732–36.

192. *Id.*

193. *See, e.g.*, *In re* Celotex Corp., 124 F.3d 619, 631 (4th Cir. 1997); Rush v. Smith, 56 F.3d 918, 925 (8th Cir. 1995); Highlands Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 27 F.3d 1027, 1032 (5th Cir. 1994); Smith v. Gulf Oil Co., 995 F.2d 638, 646 (6th Cir. 1993).

194. *See* FED. R. CIV. P. 51(d). The amendment notes state that the rule "was revised to conform the plain-error provision to the approach taken in Criminal Rule 52(b)," the rule construed in *Olano*. *Id.* at advisory committee's note.

195. *See, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

196. *See, e.g.*, Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) ("Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.").

197. Eaglin v. Welborn, 57 F.3d 496, 499 (7th Cir. 1995).

court.[198] On the same reasoning, federal courts of appeals have also addressed abstention questions raised for the first time on appeal.[199]

More basically, courts have also explained their decisions to address unpreserved issues by emphasizing the public importance of the issue. As one court has explained, it may be proper to consider unpreserved issues in cases involving "uncertainty in the state of the law" or "novel, important, and recurring question[s] of federal law."[200] Courts rarely explain the contours of this standard—indeed, they rarely state that they are considering unpreserved issues by virtue of their importance. It appears, however, that they look to the public value of resolving the question, weighing that value against, among other things, the possibility of deciding it incorrectly.[201]

B. Undercutting Reasons

In considering unpreserved issues, appellate courts also highlight ways in which the reasons that generally cut against considering new issues on appeal do not apply to the circumstances before them. The justifications for preservation requirements, after all, speak to trends. An appellee often will be prejudiced, for instance, if an appellate court considers a question on which the parties did not introduce evidence. But not always. The appellee might expressly agree, for instance, to the court's addressing the new issue. In such instances, there is less reason to apply the general rule.

Perhaps the most prominent among these sorts of justifications is the doctrine that appellate courts may consider "pure questions of law" even if they were not raised below. Such questions, by assumption, would not have benefited from further factual development in the lawyer court. It follows that when appellate

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198. Patsy v. Bd. of Regents, 457 U.S. 496, 515 n.19 (1982); *see also* Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court[.]").

199. *See, e.g.*, Jiménez v. Rodríguez-Pagán, 597 F.3d 18, 27 n.4 (1st Cir. 2010); O'Neill v. Coughlan, 511 F.3d 638, 641–43 (6th Cir. 2008); San Remo Hotel v. City & Cnty. of S.F., 145 F.3d 1095, 1105 (9th Cir. 1998).

200. Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419 n.5 (D.C. Cir. 1992).

201. *See, e.g.*, Tri-M Grp., LLC v. Sharp, 638 F.3d 406, 416 (3d Cir. 2011) (deciding a forfeited issue given the "public interest" in addressing "unresolved issues of state sovereignty and state procurement spending" and "the limits of the dormant Commerce Clause"); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 116 (3d Cir. 1992) ("Exceptional circumstances have been recognized where the public interest requires that the new issue be heard on appeal."); *cf.* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("[W]here counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, 'important questions of far-reaching significance' are involved." (quoting Ala. Power Co. v. Gorsuch, 672 F.2d 1, 7 (D.C. Cir. 1982))).

courts consider such questions, they do not run the risk of prejudicing appellees that otherwise might have wished to introduce additional evidence in the trial court. Instead, the appellees will be fully able to respond on the factual record already before the court.[202]

The "pure questions of law" exception is hardly ironclad. To start, it is difficult if not impossible to say when an issue could not have benefited from further evidentiary proceedings. Seemingly pure legal challenges may, in fact, turn on factual questions, and courts cannot be certain of what theories a litigant might have brought if they had been aware that another question would be raised.[203] More broadly, even if an issue is purely legal, the other justifications for preservation doctrine may counsel against considering it: the issue might add to the costs of litigation, and the court will not have the benefit of briefing below, or a decision in the lower court.

Accordingly, application of this exception will depend on a broader array of circumstances. If the appellee offers no reasons to introduce additional evidence, then the exception will grow stronger. If considering the issue will allow the court to avoid more difficult issues, or if it is relatively straightforward, the exception will make even more sense. The stronger the briefing of the issue on appeal, the less an appellate court will have to worry about the fact that it

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202. Some courts will only consider new "pure question[s] of law" when their failure to do so would result in a "miscarriage of justice." *See* Magi XXI, Inc. v. Stato della Citta del Vaticano, 714 F.3d 714, 724 (2d Cir. 2013); Chevron USA, Inc. v. Aker Mar. Inc., 689 F.3d 497, 503 (5th Cir. 2012); *In re* Lett, 632 F.3d 1216, 1224 (11th Cir. 2011). Others, however, suggest that a new issue merely needs to be a pure question of law to warrant consideration. *See, e.g.*, Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004) (per curiam) (noting that courts have considered waived arguments "where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding"). Still others speak of various factors, without necessarily requiring any one. *See, e.g.*, Exp.-Imp. Bank of the U.S. v. Advanced Polymer Scis., Inc., 604 F.3d 242, 247–48 (6th Cir. 2010) (looking to "whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts, and whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice" (quoting Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 552 (6th Cir. 2008)) (internal quotation marks omitted)).

203. Purely legal challenges can turn, for instance, on so-called legislative facts—facts about the world. Such facts, found at trial, can warrant deference on appeal and thus define the ground on which a legal challenge—like the challenge to Prop. 8 in California—can be waged. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 963–73 (N.D. Cal. 2010) (making factual findings about the effects of same-sex unions); *cf.* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 4–11 (2011) (noting that appellate courts increasingly have engaged in legislative factfinding on their own motion, and arguing that disputes of legislative fact should be resolved at trial where the parties can ensure they are more rigorously assessed).

will reach an incorrect result should it decide the new issue. Similarly, the more the issue seems to implicate a possible miscarriage of justice—or the more the issue seems to implicate an important federal interest—the more worthy of consideration it may be.

Several other exceptions to the general rule raise the same basic concerns. For instance, courts sometimes consider unpreserved issues whose resolutions are "beyond doubt."[204] Such issues do not raise the possibility of error and presumably raise the possibility of injustice if they are ignored. This doctrine too, however, must be balanced against the other circumstances. For instance, is the issue beyond doubt only because the record below is undeveloped? Likewise, courts sometimes consider unpreserved issues on the assent of the appellee.[205] This justification makes the most sense when the court otherwise believes that the issue may be resolved correctly, and without too great a burden on the judicial system.

It bears notice that the calculus envisioned by these various exceptions depends on a notion of legal truth extrinsic to the party submissions. Courts ask themselves, in essence, whether the decision that will result from considering an issue will align with some ideal decision under proper briefing and evidentiary proceedings. The error courts fear is not an improper result on the briefing before them, but an improper result for the law more broadly, as it would be applicable to third parties. This notion of error renders determinacy in this realm impossible absent an assumption of omniscience on the part of judges. Courts place themselves in the position of weighing the party submissions against abstract legal truth.[206]

There are, of course, ways to avoid this difficulty. One would be to adopt a formalistic regime in which unpreserved issues simply could not be considered—although under such a regime one would expect courts to simply employ their existing analyses under the umbrella of assessing whether an issue advanced on appeal was

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204. *See, e.g.*, Girts v. Yanai, 600 F.3d 576, 586 n.8 (6th Cir. 2010); Newton v. Clinical Reference Lab., Inc., 517 F.3d 554, 557 (8th Cir. 2008).

205. *See, e.g.*, United States v. Metzger, 3 F.3d 756, 757 (4th Cir. 1993). Such decisions amount to a finding of "waiver of the waiver," or a forfeiture of the forfeiture. *See id.*; *see also* United States v. Hicks, 945 F.2d 107, 108 (5th Cir. 1991); United States v. Hall, 843 F.2d 408, 410 (10th Cir. 1988).

206. The literature routinely ignores this tension. It is common for scholars to state that the adversarial process helps ensure a "correct" result. *See, e.g.*, Frost, *supra* note 133, at 499–500 (discussing how the adversarial system advances "truth seeking" and "the correct outcome"). Yet under a purely adversarial system, truth or correctness would be defined internally to the party submissions: the correct result would be the better-argued one. As soon as one begins to measure results against what they would be under the strongest possible arguments for both sides, one must look beyond the litigants to an unknown, and potentially limitless, array of arguments.

advanced below. Or, courts might only allow unpreserved issues through Rule 60(b) motions for relief from judgment,[207] or separate actions, as Robert Martineau has suggested.[208] To date, courts have not moved toward such regimes—they remain firmly ensconced in the present totality-of-the-circumstances regime.

IV. A PROPOSAL

How, then, should appellate courts decide what has been preserved before them? In other words, how should they define an issue? As I have argued, existing doctrine leaves courts with broad and ill-defined discretion to answer this question—and discretion not subject to much public oversight. Existing doctrine lacks a clear conceptual division between preserved and unpreserved issues: courts say that preserved issues, unlike unpreserved issues, were presented below, but absent a definition of a preserved issue, this distinction only leads us around a circle.

In this Part, I propose a conception of preservation that makes sense of the present doctrinal mire. It flows from a close look at the purposes of appellate review. Litigants should be found to preserve for appeal, I argue, every potential holding that the lower court had an obligation to consider. All potential holdings that the lower court did not have an obligation to consider, meanwhile, should be deemed unpreserved.

This approach has two primary benefits. First, it would encourage more consistent results in decisions regarding preservation. A doctrine would emerge defining which holdings lower courts must consider under a given circumstance. Courts would have a more difficult time of deciding by way of definitional sleight of hand. Second, it would encourage transparency, as courts would face greater pressure to explain their decisions. This transparency would not only reinforce consistency: it would enable the public to recognize the true scope of judicial power.

A. Theories of Appellate Review

Preservation doctrine can only make sense in the shadow of a theory of appellate review. What are appellate courts doing when they review lower courts? There are two primary ways to think about this question.

First, appellate courts might be asking if the lower court should have ruled differently. By this view, an appellate court assesses a lower court ruling by placing itself within the shoes of the lower court and asking whether it would have ruled differently under the circumstances. I will call this notion of review *error review*. Under this notion of review, lower courts make errors when their rulings

207. *See* Martineau, *supra* note 11, at 1059–61.
208. *See id.*

are improper or incorrect in some sense that the appellate court deems they should have known.

An appellate court can engage in error review while also deferring to the role and expertise of the lower court. In placing itself in the shoes of the lower court, the appellate court would only conclude that reversal is necessary upon finding that the error below was clear, or perhaps that it is beyond the discretion of the lower court. In other words, the notion of error review does not eliminate the relevance of traditional standards of review: clear error, abuse of discretion, plain error, or the like. Instead, error review limits the set of reasons appellate courts may give for reversal. For instance, a lower court presumably has no obligation to anticipate precedents not yet handed down that might later bear on the question before it. Accordingly, it presumably commits no error in failing to reach a decision implementing those as-of-yet unannounced decisions.

Under the second theory of review, appellate courts assess whether the result reached by the lower court should stand. I will call this notion of review *result review*. For result review, it is irrelevant whether the lower court should have reached a particular ruling. Instead, appellate courts simply seek to ascertain the correct result under the circumstances before them. By this view, appellate litigation consists of a secondary proceeding, confined by the proceedings in the lower court, but not concerned with what the lower court should have done in the course of those proceedings.

While result review does not call on appellate courts to place themselves within the shoes of lower courts, it also does not afford appellate courts the power to ignore lower court proceedings. At the very least, appellate courts defer to the factual record below, given that it is the province of the trial court to find facts. Likewise, an appellate court might assess whether a result should stand while affording deference to the expertise of a trial court to rule on particular types of questions, like those concerning trial oversight. Appellate courts might also limit their consideration of purely legal matters not addressed in the trial court for the sake of ensuring well-reasoned decisions and limited costs of litigation. Pivotally, however, appellate courts would not be constrained by what was available to the lower court—they would be open to the possibility of arguments and authority that the lower court could not have anticipated.

In short, the distinction I draw here concerns the concept of "error."[209] For my purposes, an error is a result that a court, given

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209. For a survey of the possible meanings one might ascribe to the notion of "error," see generally Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49 (2010). Oldfather advances a view of "error correction as derivative dispute resolution," whereby "the appellate court should view its primary task as resolving a secondary dispute between the parties," which functions as a "distinct, derivative dispute in which the appellant asserts a claim of right—

its knowledge of the law and its knowledge of the facts relevant to a particular case, should not have reached. A court does not make an error when it reaches a result that, by no fault of its own, is inconsistent with the law or facts relevant to the case. If a court had no reason to consider an otherwise winning argument, the result may be lamentable, but the court has not erred. In our adversarial system, courts are not charged with abstract legal truth; they are charged with reaching the correct result given the submissions before them.[210]

Neither courts nor scholars are precise about this distinction. Instead, they tend to label as error all results that fail to comport with their view of the proper result. Frequently—perhaps typically—courts and scholars appear to assume the definition I advance above. In finding errors, they speak about what courts should have done, or what they should have held, apparently on the assumption that the court in question made a mistake by not so doing or holding.[211] Yet courts and commentators also identify as error results that either were not advanced before the relevant tribunal or were not even available to that tribunal at the time of its decision.[212] It is, therefore, no surprise that neither the literature nor prevailing doctrine has parsed the difference between error review and result review.[213]

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that it was deprived by the trial court of something to which it was entitled." *Id.* at 52.

210. In speaking about appellate review, many scholars have distinguished between "law declaration" and "error correction." *See id.* at 63 ("Most discussions of the functions of appellate courts suggest that there are two functions: error correction and law declaration."); *see also* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 423–28 (2013) (summarizing the literature on the functions of appellate review). The distinction I advance here is quite different. It concerns the obligations of the lower court, rather than its motivations. If lower courts have an obligation to introduce matters not advanced by the litigants, they might err in failing to introduce those matters otherwise relevant for either law declaration or for the parties themselves. In other words, error review may serve law declaration. Likewise, if lower courts have no obligation to introduce potential holdings not advanced by the litigants, appellate courts might reverse on grounds not advanced below for reasons that are of relevance only to the parties, and not to the public more broadly. Put another way: result review may serve law declaration or traditional conceptions of "error review."

211. Consider, for instance, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). There, the Supreme Court held that the lower court committed "error" in applying *Swift v. Tyson*, 41 U.S. 1 (1842), even though the litigants did not challenge *Swift* before the lower courts. *Erie*, 304 U.S. at 80–82.

212. *See, e.g.*, Henderson v. United States, 133 S. Ct. 1121, 1127 (2013) (holding that "plain error" under *Olano* refers to errors visible at the time of review, not at the time of the lower court's ruling).

213. This conceptual slipperiness may well be driven by the problem of determinacy in law. Often, a matter can go either way, and an appellate court tells a lower court it has "erred" in the course of reaching a plausible, and

This omission is readily apparent when one recalls the present state of preservation doctrine. Consider, first, the logic rationale explored above. When appellate courts state that a particular argument is logically contained within some broader issue, they do not explain whether this judgment derives from a view of what the lower court should have done or whether it derives, instead, from a view of what appellate courts should consider in reviewing lower court decisions. The notice rationale is clearer in a sense: appellate courts speak more unequivocally of what lower courts should have considered. Yet, as set out above, appellate courts have not advanced any clear metric for assessing what lower courts should consider beyond the party arguments advanced before them.

The same conceptual uncertainty underlies the doctrine governing when courts will consider unpreserved issues. Much of this doctrine appears to assume that when appellate courts consider unpreserved issues, they engage in result review. For instance, when appellate courts consider purely legal issues on appeal, they do so on the apparent assumption that the lower court had no obligation to consider those issues. Yet, there are also strands of the doctrine that appear to harbor a conception of error review, rather than result review. Recall, for example, the notion of plain error. In assessing whether an error is "plain," appellate courts might ask whether the lower court should have been on notice of the error even though the litigants failed to highlight the possibility of said error.[214]

Accordingly, existing preservation doctrine provides no answer to the question of what appellate courts do when they review lower courts. It has no answer even though the very purpose of preservation doctrine is to serve the process of appellate review. It is no wonder, then, that courts have found themselves with free rein to fashion preservation doctrine as they wish, and that the doctrine has failed to move beyond conceptual placeholders that collapse upon anything more than the most cursory examination.

B. Conceptual Clarification

The key to unraveling the confusion of existing doctrine governing preservation lies in a rather simple conceptual clarification. When courts consider preserved issues they should be engaged solely in error review. When they consider unpreserved

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permissible, result that the appellate court nonetheless has chosen to reject. Of course, appellate courts often speak as though their choices among permissible alternatives are somehow required. This manner of speaking fuels the rhetoric of error: the lower court erred even if it, in a very real sense, made no mistakes at all, aside from failing to predict the appellate court's ruling.

214. *Cf.* United States v. Olano, 507 U.S. 725, 734 (1993) (noting that plain error "is synonymous with 'clear' or, equivalently, 'obvious'" (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985))).

issues, by contrast, they should be engaged solely in result review. In other words, the boundary between preserved issues and unpreserved issues should mirror the boundary between error review and result review.

Begin with a return to the basics. Typically, preserved issues consist of matters expressly advanced in the lower court. By contrast, unpreserved issues typically consist of matters not expressly advanced in the lower court. There are, of course, exceptions to this dichotomy. A new argument, for instance, may be deemed preserved as part of an existing issue, even though the litigant did not advance it. Similarly, a new argument may be deemed preserved, even though it was not expressly advanced below, if an appellate court believes that a lower court should have considered the argument nonetheless. These exceptions, however, are just that: exceptions. Preserved issues are those the litigant expressly advanced below, and unpreserved issues are those it did not.

The question, then, becomes what to do in the borderline cases, where it is not quite clear whether a litigant made a particular argument before the lower court. Litigants do not simply resubmit their lower court briefs on appeal. One might imagine a system in which they did, whereby appellate courts subjected lower court decisions to a literal secondary review. Our system is not that system, however. Litigants come before appellate courts and advance reasons why the lower court decision should stand or not. They do so, moreover, knowing that appellate courts have the power to bind lower courts and future appellate courts, a power not afforded to trial courts. It follows that while litigants may use language on appeal that they used in the lower court, they have ample reason to expand on the arguments they made below and to employ new language as they address the purported shortcomings, or successes, of the lower court's analysis.

Given this reality, at what point does variation between a litigant's submissions below and on appeal give rise to a new issue, which is to say an issue that was not preserved in the lower court? The answer to this question will only make sense in relation to an account of what it means for an issue to be preserved. As I have noted, appellate courts consider both preserved and unpreserved issues. If an issue is deemed preserved, it will be considered; if an issue is deemed unpreserved, it typically will not be considered, but it may be. Accordingly, the ruling on whether an issue has been preserved or unpreserved does not turn on whether the issue will be considered on appeal. What, then, is the difference between a preserved issue and an unpreserved one?

The most common—yet underdeveloped—response points to the role of discretion in appellate review. It is often said that appellate

courts may, in their discretion, consider unpreserved issues.[215] By contrast, they have an obligation to consider preserved issues.[216] One might define preserved issues as those issues appellate courts have an obligation to consider, and define unpreserved issues as those issues appellate courts may consider in their discretion. This approach requires, however, an account of when appellate courts have an obligation to consider an issue and when they do not. Neither courts nor scholars have developed such an account.[217] At present, it is far from clear which variations on arguments advanced below must be considered and which variations need not be considered.

The distinction between error review and result review provides the conceptual underpinning for this common doctrinal assumption about the relationship between preservation and discretion. When appellate courts find an issue was advanced before a lower court, they typically assume that the lower court should have been aware of it. In other words, appellate courts appear to treat preserved issues as subject to error review. Conversely, when appellate courts find an issue was not advanced before a lower court, they typically assume that the lower court had no reason to be aware of it. That is, appellate courts appear to address unpreserved issues in the course of result review.

While this generalization does not perfectly describe the present state of the doctrine, it is consistent with every strand. Even when appellate courts appear to subject preserved issues to result review, the doctrine can just as easily be read to assess whether the lower court committed an error. For instance, consider a court that finds a new argument contained within an existing, preserved issue. One might read this decision as an example of result review, whereby the appellate court sought to ensure a just result regardless of the lower court's obligations. But one could just as well read it as an example of error review, whereby the appellate court held that the lower court had an obligation to consider the unmentioned argument. The difference lies in the import of the ruling for the lower court.

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215. Singleton v. Wulff, 428 U.S. 106, 121 (1976) ("The 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.").

216. While there is some debate about the extent to which courts must decide such questions, scholars are essentially in agreement that courts must "squarely confront" the party proofs and arguments advanced before them. *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 125 (2005); *see also* Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 413–14 (1978) (advancing the canonical view of the duty of judicial responsiveness).

217. *Cf.* Steinman, *supra* note 11, at 1526 (assuming the division between "new" issues and existing ones).

Likewise, even when appellate courts appear to subject unpreserved issues to error review, one might just as well read their decisions as applying result review. Recall the doctrine of plain error. This doctrine appears to suggest that lower courts have an obligation to make rulings that the litigants did not request or face reversal for committing error. Yet, as I have explained, courts and scholars have been imprecise at best in their usage of the term "error." As the miscarriage of justice standard suggests, appellate courts can be justified in reversing a lower court even when the lower court had no reason to anticipate the possibility of the reversal. One might simply read "plain error" to recognize the same possibility: when appellate courts review a plainly inappropriate result, they should reject that result.[218]

If preserved issues are subject to error review, and unpreserved issues are subject to result review, then appellate courts should deem preserved all issues that the lower court had an obligation to consider. This approach provides a clear metric for assessing whether a variation on an argument made below should be deemed preserved on appeal. If the lower court had an obligation to consider the variation, the variation should be deemed preserved. If the lower court had no such obligation, the variation should be deemed unpreserved. If the variation is deemed unpreserved, the appellate court should then assess whether it should nonetheless be considered.

This approach makes sense of the oft-invoked relationship between preservation and discretion. When appellate courts assess preserved issues, they do so to vindicate party interests in a proper outcome before the lower court. Accordingly, appellate courts have no discretion to decide whether to correct what the lower court missed. By contrast, when appellate courts assess unpreserved issues, they do so to vindicate a broader sense of justice, either for the sake of the parties or for the sake of the public more broadly. This latter task is more understandably discretionary: the appellate court must assess, given the purposes of appellate review and the particular questions before it, whether considering the issue would be proper.

C. Doctrinal Implications

How, then, should appellate courts define the concept of an error? If lower courts can commit error by failing to reach a result not expressly identified by the litigants, then one must conclude

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218. Indeed, the Supreme Court's recent decision in *Henderson* expressly adopted this result review approach. Henderson v. United States, 133 S. Ct. 1121, 1127 (2013). It remains to be seen how intermediate appellate courts apply *Henderson* when they employ plain error review in civil cases, though one would expect that the logic in *Henderson* applies as strongly to the civil context as it does to the criminal one.

that lower courts have an obligation to act sua sponte in certain circumstances. This conclusion may sound improbable. Sua sponte rulings are typically frowned upon.[219] Very rarely, moreover, are they cast as obligatory, except insofar as subject matter jurisdiction is concerned.[220] Under current understandings, therefore, if preserved issues consist only of those matters that the lower court had an obligation to consider, one might expect that few variations on lower court arguments would be deemed preserved on appeal.

This expectation might well be correct, though not at the expense of any great shift in the function of appellate review. Under my proposal, issues that courts presently deem preserved might be deemed unpreserved instead. This result would not necessarily change what issues appellate courts consider: the doctrines governing when courts consider unpreserved issues could adjust commensurately. An issue deemed preserved under existing doctrine but unpreserved under my proposal could still be considered in both regimes. In my proposed regime, the doctrine governing when courts will consider unpreserved issues might need to be more permissive to ensure that the issue in question will be considered.

Rather than yield a wholesale shift in what appellate courts consider, my proposal would fine-tune the conceptual underpinnings of preservation doctrine and thereby enhance the consistency and transparency of this body of law. Courts would no longer be able to deem issues preserved or unpreserved without any clear rationale. Instead, a clear metric would govern. Moreover, with added clarity concerning the distinction between preserved and unpreserved issues, courts could develop a more unified body of doctrine concerning when they will consider unpreserved issues. In building this body of law, appellate courts would have a clear question to ask: when does a lower court ruling warrant reversal on grounds that that the lower court could not have been expected to consider?

Issues designated unpreserved rather than preserved would be considered on appeal only in the discretion of the appellate court. It might appear, therefore, that my proposal would afford appellate courts greater discretion to consider what they wish, rather than

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219. *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 262–90 (2002) (laying out arguments leveled against sua sponte decision making, invoking principles of due process, the adversarial system, and neutrality in decision making).

220. Amanda Frost, however, recently argued that sua sponte practice is a "necessary corollary to the federal judiciary's constitutional obligation to articulate the meaning of contested questions of law." Frost, *supra* note 133, at 447. For a survey of judicial decisions to act sua sponte, see Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1280–86 (2002). These decisions are typically cast as an exercise of discretion. *See id.*

being constrained by doctrine. In practice, however, my proposal would formalize the existing reality of preservation doctrine. Courts possess wide discretion, under the vague standards set out in current doctrine, to decide what to decide. My proposal would make clear where that discretion generally ought to begin and end: at the edge of the law's definition of lower court error.

My proposal would not merely advance consistency and transparency in preservation doctrine. It would also call on courts to be clearer about the extent of their obligations to fill gaps within party arguments. While appellate courts might refuse to recognize even the most rudimentary lower court obligations to act sua sponte, they also might not. It is not unusual for judges to speak as if they have an obligation to construe the law—particularly in matters of statutory construction—in accordance with an abstract measure of truth, rather than in accordance with the particular arguments made by the litigants before them.[221]

Such statements present questions about the scope of what courts are called upon to decide. Suppose, consistent with judicial rhetoric, that an issue consists of an array of arguments and that a litigant may raise an issue by making some of those arguments but not necessarily all of them. Under this regime, a litigant may demand that a court consider arguments that the litigant has not expressly made. In other words, when a litigant makes one argument, the litigant might implicitly raise related arguments, depending on the relevant law and facts. We might think of the court, in considering those implicit arguments, to be acting sua sponte. Or we might think of it as simply responding to what the litigant has raised. On this latter view, we would think of litigants as raising something broader than the precise arguments that they make before the court—an issue.

Regardless of the scope of this set of judicial obligations, my proposal would clarify the content of an issue in just this fashion. An issue, in short, would consist of the arguments that a trial court must consider in light of a litigant's submissions on a given topic. If a litigant advances an argument on appeal that is not contained within the universe of arguments that the lower court should have considered, then the "new" argument is part of a "new" issue, and thus unpreserved on appeal. If an appellate court decides to consider the new issue on appeal, it presumably would need to

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221. *See, e.g.*, United States v. Turner, 689 F.3d 1117, 1130–31 (9th Cir. 2012) (Smith, J., dissenting) ("Lawyers are advocates for their clients' interests, not arbiters of a statute's meaning. Thus, the fact that the Government misstated the law in its answering brief is irrelevant. It should not hinder our task of giving democratically-enacted texts 'their fair meaning.'"); Adams v. Rice, 531 F.3d 936, 960 (D.C. Cir. 2008) (Henderson, J., dissenting) ("Moreover, because the issue is one of statutory construction, I believe we are obligated to construe it accurately.").

consider both the precise new argument advanced before it and related arguments that would have been deemed part of the relevant issue had it been raised in the lower court.

Accordingly, if a litigant makes an argument on appeal that it did not quite make in the lower court, that argument would be considered in one of two ways. First, it would be considered—and deemed part of a preserved issue—if the lower court had an obligation to consider the argument in light of the other arguments made before that court. Second, the argument would be considered—after being deemed part of an unpreserved issue—if the appellate court deems the argument worth considering, notwithstanding the fact that the lower court had no obligation to consider it.

One might ask whether this regime simply repackages the conundrum underlying existing doctrine. How will courts know whether an argument is new in the relevant sense? The answer is straightforward. It will no longer matter whether a court labels an argument—or an issue for that matter—as "new." The inquiry into what the court below should have considered does not turn on this conclusory signifier. Instead, it turns on what the court should have been expected to consider: that inquiry is what defines what is "new," rather than a court's mere assertion, as under existing law.

V. ALTERNATIVE REGIMES

There are two primary alternatives to the regime I have proposed. First, one might argue that courts should adopt formalistic definitions of an issue. Under this approach, the universe of potential issues would be fixed, leaving it quite clear what a litigant has raised, both at trial and on appeal. Second, one might argue that courts should continue reasoning by intuition, as they presently do. This approach would define issues according to some unarticulated notion of the proximity between arguments. While each of these approaches has its merits, both should be rejected.

A. Formalism

A primary virtue of formalism, at least in theory, is its determinacy. So long as we can agree, ex ante, on a definition of a First Amendment free speech claim, for example, it will be clear whether a challenge to *Austin* falls within one.[222] Rather than parse the relationship between the trial and appellate submissions, appellate courts could simply look to whether a litigant took the necessary steps to identify a predefined set of arguments in the lower court. The appellate court would then consider that predefined set of arguments.

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222. *Cf.* Citizens United v. FEC, 558 U.S. 310, 330–31 (2010).

This approach, while conceptually neat, does not match the values that underlie prevailing conceptions of adjudication. In short, the law has abandoned the old forms of action for a variety of reasons.[223] This approach would revive those forms: litigants would need to utter particular verbal formulae in order to trigger a particular set of possible results. Predefining the contours of an issue would yield three problems in particular.

First, this approach would divorce the content of an issue from the particular factual context of a case. It would set out the range of possible legal arguments that a litigant might make independent of the factual record. On appeal, litigants would be held responsible for considering legal arguments for which they did not fully develop a record. In other words, this regime would dictate that litigants develop facts to meet some predefined notion of the law, simply to anticipate their possible relevance on appeal. Litigants would, thereby, lose a substantial measure of their control over the content of litigation. The costs of litigation, moreover, likely would rise with this sort of factual bootstrapping of claims.

Second, a formalist approach would require anticipating a truly staggering set of possible arguments. It may seem manageable to define the holdings a litigant might advance as part of a "First Amendment free speech" issue. Yet, as I noted above, the difficulties of predefining issues becomes clear once one begins to think through the myriad divisions within existing legal doctrine. What would be contained within a contract issue? Could a litigant argue reliance on appeal after arguing only expectation at trial? Or should we speak of a reliance issue and an expectation issue? Likewise, should we speak of a Title VII issue, or a Title VII discrimination issue, or a Title VII gender-discrimination issue? Which categories would we choose, and what metric would guide our choices?

Finally, predefining the contours of an issue would import a static vision of the law at odds with modern jurisprudence. Litigants would face a much steeper climb in advancing new legal theories. The set of predefined issues presumably would derive from past arguments made before courts. Whichever body the law charged with updating this predefined list of issues would need to play catch-up with the ingenuity of litigants. This task would be extraordinarily difficult as an administrative matter. At any rate, even a well-oiled system of this sort would not only lag behind lawyerly innovation, but it would also discourage that innovation in the first place. Courts, meanwhile, would come under pressure to

223. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 63–75 (3d ed. 1990) (explaining the rise and decline of the forms of action).

bend the prevailing formal categories, just as they did under the forms of action.[224]

It follows that formalism would sacrifice too much. As is so often the case, the promise of simplicity likely would yield, instead, uncertainty and underhanded departures from the prevailing standard.

B. Intuitionism

The virtue of an intuitionistic regime is perhaps a counterintuitive one: it lies in the regime's opacity. At times, judges will have the same intuitions about whether an argument advanced on appeal should be deemed part of an existing issue, and at other times they will not. When judges disagree, their disagreements have no clear content: the judges can simply convey their different conclusions without analysis. This state of affairs can help appellate courts hide from the public—and perhaps themselves—the extent to which they control whether to consider a given argument.[225]

Existing doctrine makes this point clear enough. In *Citizens United*, for instance, the disagreement about preservation between Justice Kennedy and Justice Stevens shed no light on what was, in fact, at stake.[226] Justice Kennedy conveyed one possible intuition, couched in formalism, while Justice Stevens conveyed another intuition, without any explanation at all. The same possibility emerges in cases where the court has asked, somewhat more transparently, whether one holding was subsidiary to another, or whether a lower court had been apprised of a holding, given that the Court has not addressed precisely what these distinctions mean.

How could such opacity be a benefit? Perhaps courts would be more outcome oriented if they saw the full extent of their authority.[227] Perhaps the public would be disillusioned if it saw the extent to which courts may shape what they have been asked to

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224. *Cf.* James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1818 (2000) ("[J]udges bent and stretched these forms of actions to make them fit new cases.").

225. Many scholars have criticized intuitionism as a basis for legal analysis. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 349–55 (1980). For a defense of intuitionism, see, for example, David Tracy, *Human Cloning and the Public Realm: A Defense of Intuitions of the Good*, *in* CLONES AND CLONES: FACTS AND FANTASIES ABOUT CLONING 190 (Martha Nussbaum & Cass R. Sunstein eds., 1998). Typically, scholars have not defended intuitionism given its power to deceive. Instead, the debate centers on the extent to which intuitions are worth elevating over reasoned analysis.

226. *See Citizens United*, 558 U.S. at 329–36 (Kennedy, J., writing for the Court); *id.* at 396–408 (Stevens, J., concurring and dissenting).

227. *Cf.* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297–98 (1990) (arguing that while judges should be candid at times, they should not be introspective, as inaccurate beliefs about law constrain judges).

decide.[228] Or perhaps there is some value for courts to be able to obscure this authority in touchy cases—and perhaps this value is worth the costs associated with imprecision and uncertainty elsewhere.[229] At least, that is the argument.

To the extent such benefits exist, the presumption should be for candor.[230] There are ample reasons to doubt that the benefits of opacity would outweigh the costs, even placing the value of candor to one side. The confusion and inconsistency of current doctrine offers more than a thumb on the scale. To the extent it is worthwhile that courts downplay their power to shape the issues before them, they may do so in crafting the doctrine that governs when unpreserved issues will be considered. The lack of a clear conceptual boundary between preserved issues and unpreserved ones is hardly necessary to enable judicial discretion. Absent a stark turn toward formalism, one would expect preservation doctrine to remain vague at best.

Even with a clearly defined doctrine governing when courts will consider unpreserved issues, a departure from the current regime would not wholly preclude courts from acting covertly to shape the issues before them. It is hard to imagine that the *Citizens United* majority would be fully candid about its reasons to consider the challenge to *Austin*. Ultimately, it seems the majority considered the challenge because it wanted to overrule *Austin*. A more clearly defined doctrine governing preservation would put pressure on the Court to explain its actions, but ultimately the Court will say as much as it believes it should.

Importantly, however, intermediate appellate courts are on much more tenuous ground when it comes to deciding what to decide, at least as a matter of prevailing public views. Litigants may appeal to those courts as of right; the courts have no certiorari process.[231] While Alexander Bickel famously argued that the Supreme Court should look to prudential concerns in deciding what to decide, he argued that intermediate appellate courts should not engage in such analysis.[232] An intuitionistic regime enables such

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228. *Cf.* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 195–99 (1978) (arguing that subterfuge may be warranted in law to obscure "tragic choices").

229. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 146–55 (1962) (arguing that courts should employ justiciability doctrines to avoid questions not yet ripe for judicial resolution).

230. For the canonical statement to this effect, see David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987). Proponents of departures from candor share the view that the presumption should be in favor of candor. *See* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1485 (2007).

231. *See* FED. R. APP. P. 3(a).

232. BICKEL, *supra* note 229, at 173 (arguing that lower federal courts must "resolve all controversies within their jurisdiction, because the alternative is chaos").

courts to engage just these sorts of concerns, whereas the regime I advance empowers the public to ensure that they are avoided.

CONCLUSION

This Article began with the task of charting the law of issues, which is to say the procedural doctrines that invoke, as an organizing principle, the idea of an issue. I have focused on preservation doctrine, an area of the law in which appellate courts determine what they may and must consider, based in large part on how they define the "issues" in the litigation. The doctrine in this area of law is notoriously confused, abstruse, and disjointed—indeed, scholars have been consistently despairing in their assessments. This state of affairs affords appellate courts broad leeway to decide, beyond public view, when they wish to consider variations on the arguments made below.

I have advanced a straightforward proposal to clarify this body of law. For purposes of appellate preservation, I argue, an issue advanced before a lower court should consist of all the arguments that the lower court had an obligation to consider. When a litigant advances an argument on appeal that the court below had no obligation to consider, the appellate court should deem that argument unpreserved. This reform would provide a conceptual underpinning for the idea of an issue, and set a clear demarcation between what is preserved and what is not. It would yield, therefore, a more consistent doctrine subject to public oversight.

While this reform might sound like it would constrain the scope of appellate review, it need not. If courts found more issues unpreserved under the regime proposed here, the doctrine governing when courts consider unpreserved issues could adjust commensurately, leaving the same sorts of issues considered on appeal. At any rate, courts would have good reason to reexamine existing assumptions about the extent to which lower courts have an obligation to consider variations on the arguments advanced before them. Courts often do not resolve disputes simply by weighing one side's arguments against the other side's arguments. Instead, they seek to answer questions about the law, as informed by those arguments.

What of other procedural doctrines that rely on the idea of an issue? The definition advanced here might well help organize murky areas of law. It would make a lot of sense to think of amici as helping courts discharge their obligations to decide the questions before them correctly, even if doing so requires grappling with variations on the party arguments. Likewise, it would make a lot of sense to think of issues "actually decided" for purposes of collateral estoppel to consist of all those arguments that the court had an obligation to consider, including ones beyond the party submissions. The doctrine governing class actions similarly might think of the

issues common among class members with reference to what the court ultimately will need to consider if an individual plaintiff was included in the class.

At the same time, these other areas of law bring to the fore concerns different from those relevant to preservation. They also implicate a variety of different considerations when compared with one another. The law of issues need not employ a single definition of an issue, convenient though a single definition would be. At a minimum, however, preservation doctrine suggests that the idea of an issue will only serve a clarifying function when it can be related to the underlying purposes of the doctrine in question. When employed as an empty signifier, the idea has more power to obscure and confuse than it does to illuminate.

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