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Avoiding Adversarial Adjudication

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AVOIDING ADVERSARIAL ADJUDICATION

MICHAEL T. MORLEY*

ABSTRACT

There are a variety of procedural vehicles through which litigants may seek a substantive court ruling or order that declares or modifies their legal rights and obligations without actually litigating the merits of a case as a whole or particular issues within the case. These alternatives include defaults, failures to oppose motions for summary judgment, waivers and forfeitures, stipulations of law, confessions of error, and consent decrees. Courts presently apply different standards in determining whether to accept or allow litigants to take advantage of each of these vehicles for avoiding adversarial adjudication. Because all of these procedural alternatives share the same underlying structural similarity, however, courts should apply a single, consistent, unified standard to all of them.

Article III's prohibition on hypothetical suits places outer bounds on the range of false factual and legal premises on which a court may base a judgment. Courts should go beyond this constitutional minimum, however, and apply an accuracy-centric approach in deciding whether to issue requested relief when litigants inadvertently or deliberately, expressly or implicitly, seek to have the court avoid considering the merits of a claim, issue, or argument in a case. If the court—based on its background knowledge of the law, experience with similar cases, or independent legal research—harbors doubts about the validity of a litigant's legal premises or contentions, or believes the parties have overlooked a potentially valid claim, issue, or argument, it should decline to grant the requested relief and direct the litigants to brief the matter.

Adopting an accuracy-centric approach helps courts perform not only their law-declaring function of expounding the law and generating accurate precedents, but their dispute-resolution function, as well. Litigants, the public, and courts themselves have a strong interest in having courts resolve cases, and issues in cases, in accordance with the substance of applicable law, even when they are acting primarily in a dispute-resolution capacity.

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I. INTRODUCTION

How wrong may a court be? Or, to be more precise, how *indifferent to being correct* is a court permitted, or even required, to be? There are a variety of procedural vehicles through which litigants may seek a substantive court ruling or order that declares or modifies their legal rights and obligations without actually litigating the merits of a case as a whole, or particular issues within the case. These alternatives include defaults, failures to oppose motions for summary judgment, waivers and forfeitures, stipulations of law, confessions of error, and consent decrees.¹

Depending on the particular procedural vehicle employed, litigants may act deliberately or inadvertently,² expressly or implicitly. All of these alternatives, however, allow litigants to obtain substantive court orders (i.e., not just dismissals³) while avoiding adversarial adjudication of their cases or particular issues within their cases. When litigants invoke one of these procedural vehicles, courts are faced with a stark choice. They may either adjudicate issues and cas-

1. See *infra* Part II.

2. Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 252-53 (2004) (“[P]arties may simply fail to see all of the possible arguments relevant to the issues they have raised, or they may have tactical or strategic reasons for arguing an issue in a particular way that omits relevant legal arguments.”).

3. U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 21-22 (1994) (recognizing that a dismissal for lack of justiciability is essentially a housekeeping order).

es correctly, regardless of the particular arguments or claims the parties raise, or instead allow the parties expressly or implicitly to agree to incorrect factual and legal premises and adjudicate cases on their terms, focusing primarily or solely on claims, issues, and arguments that the parties themselves choose to assert.

The Supreme Court has failed to answer this question in a consistent manner. Despite its repeated insistence that courts should generally consider non-jurisdictional issues only if raised by the parties,⁴ it has decided many important—even landmark—cases based on issues the parties never raised or affirmatively disputed.⁵

This Article explores the extent to which litigants may, expressly or implicitly, through their acts or omissions, induce courts to enter substantive rulings and judgments that declare or change their legal rights and obligations, while failing to consider fully the merits of one or more of the legal issues involved. I contend that when a litigant seeks a substantive court ruling or order while attempting to avoid adversarial adjudication of a case or particular issues within a case, the court should ensure that the litigant's legal premises are correct, regardless of the procedural vehicle the litigant uses. If a court—based on its background knowledge of the law, experience with similar cases, or independent legal research—harbors doubts about the validity of a litigant's legal premises or contentions, or believes the parties have overlooked a potentially valid claim, issue, or argument, it should decline to grant the requested relief and direct the litigants to brief the matter.

Part II begins by offering a descriptive overview of current doctrine. Surprisingly, under current law, a litigant's ability to obtain a substantive ruling or order while avoiding adversarial adjudication of either specific issues or the case as a whole turns primarily on the procedural vehicle the litigant uses. That is, whether a court is permitted to reach the merits of a legal issue, as well as the degree of scrutiny the court may or must apply, depends on whether the court is faced with a default, failure to oppose a summary judgment mo-

4. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (“In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”); *United States v. O'Brien*, 391 U.S. 367, 390 (1968) (Douglas, J., dissenting) (noting that, except in “exceptional cases,” the “Court will not consider issues not raised by the parties” (citation omitted)); *see, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972) (“There is no reason for the Court to consider that point since it is not an issue in the case. . . . The State has at no point tried this case on th[at] theory . . .”).

5. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 254-59 (2002); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity To Be Heard*, 39 SAN DIEGO L. REV. 1253, 1288-96 (2002).

tion, waiver, forfeiture, stipulation of law, confession of error, or consent decree. This Part explores the dramatically varying legal standards that apply to each of these procedural alternatives. It devotes special attention to the previously overlooked evolution of the Court's standards for reviewing confessions of error, which has run the gamut from full-merits review to virtually unquestioning acceptance.

Part III briefly distinguishes these vehicles for avoiding adversarial adjudication from settlement agreements, which are private contracts that do not result in either substantive court rulings that resolve legal issues or judgments that declare or modify the litigants' respective legal rights and obligations.

Part IV then turns to this Article's central prescriptive claims. Courts should apply a single, uniform standard whenever litigants deliberately or inadvertently seek to avoid adversarial adjudication of a case or issues within a case. The standard should be accuracy-centric, allowing courts to identify and invite the litigants to address claims, issues, and arguments that appear to be pertinent, in order to ensure that the court's rulings and judgments are based on the applicable law to the greatest extent possible. This Part begins by demonstrating that Article III's prohibition on hypothetical suits places outer bounds on the range of false factual and legal premises on which a court may base a judgment. It goes on to explore the various reasons why courts should go well beyond this floor of constitutionally required accuracy by acting affirmatively to ensure the accuracy of their rulings and adjudications. It concludes by looking at the unique issues that arise in the context of issue creation by appellate courts.

Part V addresses the major objections to this Article's proposed accuracy-centric approach to adjudication, and Part VI briefly concludes.

II. PROCEDURAL VEHICLES FOR AVOIDING ADVERSARIAL ADJUDICATION

Litigants may implicitly or explicitly consent to have a court resolve a case, or particular issues within a case, without adversarial testing in a variety of ways, including: defaults, failures to oppose motions for summary judgment, waivers and forfeitures (including failures to raise timely objections or potentially meritorious arguments in response to most types of motions), stipulations of law, confessions of error, and consent decrees. This Part examines the surprisingly unrecognized and potentially troubling disparities that exist among the standards that courts apply when faced with these various alternatives for offering legal concessions.

A. Defaults

A court may enter a judgment imposing legal obligations on a defendant, enjoining certain conduct, or declaring the litigants' respective rights without adversarial adjudication of the underlying legal issues if the defendant fails to enter an appearance and respond to a complaint. Typically, a court will treat a party's failure to enter an appearance or file a responsive pleading⁶ as a default⁷ and deem the complaint's well-pled factual allegations admitted.⁸ When such defaults occur, the court still must assess the validity of the complaint's allegations of law⁹ and determine whether the plaintiff has stated valid causes of action.¹⁰ Likewise, if the plaintiff seeks injunctive relief, the court must exercise its equitable discretion and decide for itself whether the requested relief is appropriate.¹¹

The burdens on the plaintiff are even higher when a federal agency or official defaults, extending to factual issues as well.¹² Under

6. See FED. R. CIV. P. 12.

7. *Id.* at R. 55(a).

8. *Id.* at R. 8(b)(6); see also *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint." (quoting *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir. 2004))); *Angelo lafrate Constr., LLC v. Potashnick Constr., Inc.*, 370 F.3d 715, 722 (8th Cir. 2004).

9. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("[A] defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." (emphasis omitted)).

10. *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009) (holding that, even if a defendant is in default, a court is "required to determine whether the [complaint's] allegations establish [the defendant's] liability as a matter of law"); *DirecTV, Inc. v. Huynh*, 503 F.3d 847, 855 (9th Cir. 2007).

11. 13 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 65.03 (3d ed. 2013) ("[A] plaintiff is not entitled to a permanent injunction simply because a default judgment has been entered; the court must engage in an 'inquiry' to determine whether the plaintiff has demonstrated that injunctive relief is appropriate."); see also *Thomson v. Wooster*, 114 U.S. 104, 113 (1885) ("[A] decree *pro confesso* is not a decree as of course according to the prayer of the bill . . . [but] is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true.").

12. A complete default by a government official or entity is rare and most often the product of inadvertence, backlog, or lack of agency personnel. See, e.g., *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1046 (1st Cir. 1980). Sometimes, the Department of Justice will decline to defend the constitutionality of a law, but it typically will notify the court (and Congress) of its intentions, rather than completely defaulting in the underlying case. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) ("The Department of Justice has submitted many [28 U.S.C.] § 530D letters over the years refusing to defend laws it deems unconstitutional . . ."). Numerous scholars have debated whether the executive branch may validly attempt to avoid adversarial adjudication of constitutional issues in this manner. Compare Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 510 (2012) ("There is no plausible argument that the Constitution obliges the President to press constitutional claims that he finds unpersuasive or objectionable . . ."), Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1206 (2012) ("[T]he Executive Branch should not defend challenged statutes when it . . . has questions about the statute's constitutionality-").

Federal Rule of Civil Procedure 55(d), “A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.”¹³ As one court explained, “[T]he natural intentment of this language is that, after entry of default against the government, the quantum and quality of evidence that might satisfy a court can be less than that normally required.”¹⁴ Courts nevertheless apply Rule 55(d)’s evidentiary requirements vigorously,¹⁵ refusing to enter a default judgment against the Government unless the plaintiff has established entitlement to relief on the merits.¹⁶

Thus, before entering a default, the court *must* engage in a full merits review of the legal issues involved in the case—even in the absence of adversarial presentation. Likewise, if the plaintiff has requested equitable relief, the court must exercise its independent discretionary judgment as to whether to grant it. When the defaulting defendant is a government agency or official, the court’s obligation to confirm the validity of the plaintiff’s claims are even greater.

B. Failures to Oppose Summary Judgment Motions

A court also may issue a substantive ruling in a case without adversarial adjudication of the underlying legal issues if a party fails to oppose a motion for summary judgment. In general, when a party

ty.”), and Dalena Marcott, Note, *The Duty to Defend: What Is In the Best Interests of the World’s Most Powerful Client?*, 92 GEO. L.J. 1309, 1321 (2004) (arguing that the President’s oath and the Take Care Clause prevent him from defending the constitutionality of statutes that he believes to be unconstitutional), with Charles Fried, *The Solicitor General’s Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549, 550 (2012) (arguing that the Executive should defend the constitutionality of federal laws “unless no colorable argument can be made in their defense or unless they trench on prerogatives of the executive branch”), and Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1235 (2012) (“[T]he executive branch should enforce and defend statutes such as Don’t Ask, Don’t Tell and DOMA—even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection.”).

13. FED. R. CIV. P. 55(d).

14. *Alameda*, 622 F.2d at 1048. The court went on to caution, “[I]f the district court and we have been put in the predicament of flying on one wing”—that is, deciding a case without adversarial presentation of the issues due to governmental intransigence—“the flight need not be lengthy.” *Id.* at 1049.

15. See, e.g., *Harvey v. United States*, 685 F.3d 939, 946 (10th Cir. 2012) (holding that, because the plaintiff “did not provide satisfactory expert evidence to establish his claims, he is not entitled to default judgment”); *Camacho-Rodriguez v. Potter*, 136 F. App’x 378, 379 (1st Cir. 2005) (per curiam) (affirming judgment for Postmaster General of the United States, despite his default, because plaintiffs “failed to establish an ADA violation”); *United States v. Jacobs*, No. 93-3795, 1994 WL 667008, at *1 (7th Cir. Nov. 29, 1994).

16. See, e.g., *Marziliano v. Heckler*, 728 F.2d 151, 158 (2d Cir. 1984) (affirming default judgment against the Secretary of Health and Human Services because “we have no reason to believe that the requirements of Rule 55(e) were not satisfied”).

does not respond to a motion, the matter is deemed conceded.¹⁷ Summary judgment, however, “cannot be granted by default even if there is a complete failure to respond to the motion.”¹⁸ If a litigant fails to oppose a motion for summary judgment, the court must decide for itself whether the moving party’s claims or defenses are legally valid and the evidentiary record entitles it to judgment.¹⁹ Circuit courts will vacate judgments that are based solely on a litigant’s failure to oppose a summary judgment motion and are not supported by any legal or factual analysis.²⁰

Interestingly, this is a stricter standard than courts apply to complete defaults. As discussed above, when a private defendant fails to respond to a complaint, the court will accept the complaint’s well-pled factual allegations as true and review only the legal sufficiency of the plaintiff’s claims.²¹ If a defendant has entered an appearance and filed a responsive pleading but fails to oppose a motion for summary judgment, however, the court not only must satisfy the requirements for entering a default judgment, but must go a step further and ensure that the plaintiff has introduced at least some admissible evidence to support its material factual allegations. This most closely resembles the standard that courts apply to defaults in cases against government entities.²²

It is not clear why a court should apply a higher standard for issuing a judgment when a defendant fails to oppose a motion for summary judgment than when the defendant completely fails to respond to a complaint.²³ If anything, one could imagine that the standard for

17. See, e.g., *Hershey v. United States*, No. 89-15262, 1991 WL 80326, at *2-3 (9th Cir. May 16, 1991).

18. FED. R. CIV. P. 56 advisory committee’s note subdiv. (e) (2010); see also *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993) (“A local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served . . . would be inconsistent with Rule 56, [and] hence impermissible . . .”).

19. See, e.g., *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (“[T]he failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the district court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law.”); *United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir. 2004) (“[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion.”).

20. See, e.g., *Patterson v. City of Utica*, 514 F. App’x 55, 56 (2d Cir. 2013) (vacating grant of an unopposed motion for summary judgment because “the district court provided no reasons or citations to evidence in the record to justify dismissing [the plaintiff’s] claims”).

21. See *supra* notes 8-10 and accompanying text.

22. See *supra* notes 12-16 and accompanying text.

23. It could be argued that the heightened standard is a type of “reward” for participating in the litigation process up until the point of summary judgment. Courts’ willingness to hold that litigants who have actively litigated a case have waived or forfeited poten-

granting a default would be higher than for granting an unopposed summary judgment motion. Even a properly served defendant²⁴ might inadvertently overlook a complaint or not fully understand its legal significance; when the defendant is an entity, the complaint might get lost in the bureaucracy, be misrouted internally,²⁵ or never be brought to the attention of the proper officials. A defendant who has litigated a case through the summary judgment stage, in contrast, indisputably is aware of the case and what is at stake. Indeed, a defendant who has engaged in discovery often will have a much more accurate conception of the nature, strength, and validity of the plaintiff's claims than at the outset of a case, immediately after being served with a complaint. Thus, the heightened standard that applies to unopposed summary judgment motions is somewhat puzzling.

Regardless, as is the case with default judgments, in order to grant an unopposed summary judgment motion, whether for the plaintiff or the defendant, a court is *required* to engage in a full merits review of the legal issues involved in the case and must at least consider the record evidence.

C. *Waivers and Forfeitures*

When a defendant enters an appearance in a lawsuit, files a responsive pleading, and opposes the plaintiff's motions, the court generally is no longer required to identify for itself possible problems with the plaintiff's causes of action or legal contentions. Rather, it becomes the defendant's responsibility to identify legal deficiencies in the plaintiff's claims,²⁶ demonstrate the lack of evidentiary support for them,²⁷ and assert affirmative defenses.²⁸ Each litigant also is responsible for opposing motions its opponent may file, responding to the arguments contained in those motions,²⁹ and presenting coun-

tially dispositive legal arguments largely undermines that interpretation, however. See *infra* Part II.C.

24. See FED. R. CIV. P. 4.

25. See, e.g., Erin Geiger Smith, *Pepsi Nailed with \$1.26 Billion Judgment After Secretary's Mistake*, BUSINESS INSIDER (Oct. 28, 2009, 8:02 AM), <http://www.businessinsider.com/pepsi-nailed-with-126-billion-judgment-after-secretarys-mistake-2009-10>.

26. See, e.g., FED. R. CIV. P. 12(b).

27. *Id.* R. 56(c)(1)-(2).

28. *Id.* R. 8(b)(1)(A), (c)(1).

29. See, e.g., Carr v. JP Morgan Chase Bank, NA, No. 13-11573, 2013 WL 5450291, at *3 (E.D. Mich. Sept. 30, 2013) ("A party waives opposition to a motion if the party fails to respond to arguments raised in the motion."); Chevchyan v. Bank of Am., N.A., No. ED CV 13-1105 PA (OPx), 2013 WL 3819681, at *5 (C.D. Cal. July 19, 2013) ("Plaintiff's Opposition does not even address Defendants' challenge to the viability of her FD CPA claim. Plaintiff has therefore waived any argument that the FD CPA claim can survive Defendants' Motion to Dismiss.")

terarguments.³⁰ Litigants likewise must ensure that the proceedings are conducted in accordance with the applicable rules by lodging timely objections.³¹

A court must consider and adjudicate any issues the litigants choose to raise or contest,³² but any arguments or objections that a litigant fails to assert in a timely manner are deemed waived or forfeited. A forfeiture occurs when a party “fail[s] to make timely assertion of the right” before the court,³³ while a waiver occurs when a litigant “‘intentional[ly] relinquish[es] or abandon[s]’” a claim, argument, or right,³⁴ although the terms sometimes are used interchangeably.³⁵

Courts generally are not required to consider waived or forfeited arguments, unless they concern the court’s subject-matter jurisdiction³⁶ or the justiciability of the case.³⁷ Based on litigants’ waivers

30. See, e.g., *Schneider v. Cont’l Serv. Group, Inc.*, No. 13-CV-5034 (JG) (MDG), 2013 WL 6579609, at *2 (E.D.N.Y. Dec. 16, 2013) (“I will not consider [Defendant]’s statute-of limitations argument in deciding the instant motion. [Defendant] waived this argument for the purposes of the motion by failing to raise it in its opening brief.”); *Scottsdale Ins. Co. v. Knapp*, No. 13 C 988, 2013 WL 3811613, at *4 (N.D. Ill. July 22, 2013) (“In their reply brief, defendants argue that [plaintiff] is a ‘volunteer’ in payment and thus is not entitled to equitable subrogation. This argument is forfeited for purposes of the motion to dismiss, because defendants did not assert it in their opening brief . . .”).

31. FED. R. CIV. P. 46, 51(c) (requiring contemporaneous objections); see also FED. R. CRIM. P. 51(b) (same).

32. See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 172 (2005) (arguing that courts have a duty to be “weakly responsive” to the parties’ arguments, by “provid[ing] some form of response to” them and, if the court chooses to rule on some other basis, “explain[ing] why it believes [the litigants’ arguments] provide inappropriate grounds for resolution” of the case). The Supreme Court has stated that, depending on the nature of a legal issue, a court is not necessarily required to provide a reasoned explanation for its ruling:

The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word “granted” or “denied” on the face of a motion while relying upon context and the parties’ prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge’s own professional judgment.

Rita v. United States, 551 U.S. 338, 356 (2007).

33. *Yakus v. United States*, 321 U.S. 414, 444 (1944).

34. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

35. *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004).

36. *Educ. Credit Mgmt. Corp. v. Kirkland (In re Kirkland)*, 600 F.3d 310, 314 (4th Cir. 2010) (“Subject matter jurisdiction cannot be forfeited or waived, and can be raised by a party, or by the court *sua sponte*, at any time prior to final judgment.”); *Athens Cmty. Hosp., Inc. v. Schweiker*, 686 F.2d 989, 992 (D.C. Cir. 1982) (“It is axiomatic that subject matter jurisdiction may not be waived, and that courts may raise the issue *sua sponte*.” (internal citations omitted)).

37. *Flournoy v. Trust Co. of Columbus (In re Weaver)*, 632 F.2d 461, 462 n.6 (5th Cir. 1980) (“Because standing is an element of the constitutional requirement of ‘case or controversy,’ . . . objections to standing are never waived and must be raised by an appellate

and forfeitures, courts have adjudicated cases without first ascertaining the standard of review that earlier decisionmakers should have applied,³⁸ confirming the constitutionality of the statute to be applied³⁹ or the validity of the regulations to be applied,⁴⁰ determining whether the underlying statute creates a private right of action,⁴¹ assessing alternate constructions of key language in the underlying statutes⁴² or patents,⁴³ examining potentially applicable affirmative defenses or exceptions to general rules that might have applied,⁴⁴ or otherwise considering potentially meritorious or dispositive arguments.⁴⁵

court *sua sponte*.”); Singleton v. Eagleton, No. 2:12-cv-02339-GRA, 2013 WL 4436409, at *1 n.2 (D.S.C. Aug. 15, 2013) (same for mootness).

38. See, e.g., Suarez-Valenzuela v. Holder, 714 F.3d 241, 249 n.2 (4th Cir. 2013) (“[Appellant] also argues for the first time in his reply brief that the [Board of Immigration Appeals] improperly reviewed the immigration judge’s factual findings under a *de novo* standard of review rather than a clearly erroneous standard. . . . [W]e consider this argument waived because he failed to raise it in his opening brief.”); Goletz v. Prudential Ins. Co. of Am., 383 F. App’x 193, 197 (3d Cir. 2010) (“[Appellant] argues, for the first time on appeal, that the District Court should have applied a *de novo* standard of review because the language in the Plan does not make clear that [the ERISA plan administrator] has discretion. . . . ‘[A]bsent exceptional circumstances, an issue not raised in district court will not be heard on appeal.’” (citation omitted)).

39. See, e.g., Christensen v. Park City Mun. Corp., 462 F. App’x 831, 834 (10th Cir. 2012) (“We agree with the district court that [Plaintiff] waived any argument that the [challenged] Ordinances were facially unconstitutional either by themselves or in concert with [another Park City Ordinance,] § 4-3-16(C).”); Sacred Heart Hosp. v. Dep’t of Pub. Welfare (*In re Sacred Heart Hosp.*), 133 F.3d 237, 241 n.6 (3d Cir. 1998) (“[W]e need not address this argument and, thus, the constitutionality of 11 U.S.C. § 106(c), because [the debtor] failed to raise this issue below and, therefore, for purposes of this appeal, has waived it.”).

40. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 279 (2001) (“We do not inquire here whether the DOJ regulation was authorized by § 602,” because the petition for certiorari raised only the issue of “whether there is a private cause of action to enforce the regulation.”).

41. See, e.g., TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002) (“[S]ince [Defendant] does not argue that there is no private cause of action, we need not reach the issue.”).

42. See, e.g., Prussner v. United States, 896 F.2d 218, 223 (7th Cir. 1990) (“Since [Appellee] does not argue that the statutory concept differs from the common law concept, we need not consider them separately.”).

43. See, e.g., McDavid, Inc. v. Nike USA, Inc., 892 F. Supp. 2d 970, 975 n.3 (N.D. Ill. 2012) (“[Defendant] does not present any arguments in support of its interpretation, however, so its argument for an alternative construction is waived.”); Info. Tech. Innovation, LLC v. Motorola, Inc., 391 F. Supp. 2d 719, 724 (N.D. Ill. 2005) (“Defendants have waived their right to present alternative constructions of the [patent’s] terms.”).

44. See, e.g., United States v. Galletti, 541 U.S. 114, 120 n.2 (2004) (finding that a taxpayer had forfeited the argument that the statute of limitations protects him from the IRS’s attempt to collect taxes, because the taxpayer “fail[ed] to raise it in the courts below”); Knowles v. Iowa, 525 U.S. 113, 116 n.2 (1998) (finding that State had waived its res judicata argument “by failing to raise it in its brief in opposition to the petition for certiorari”); Gaither v. Ark. Found. for Med. Care, No. 4:11-CV-00576-KGB, 2013 WL 4496439, at *4 (E.D. Ark. Aug. 20, 2013) (“[Plaintiff] does not argue for the application of any equitable doctrines. Accordingly, the Court need not consider these equitable doctrines.”).

45. See, e.g., Sundaram v. Cnty. of Santa Barbara, 39 F. App’x 533, 536-37 (9th Cir.

In *Singleton v. Wulff*, the Supreme Court explained that courts have discretion to address issues that litigants have not timely raised:

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. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where “injustice might otherwise result.”⁴⁶

Some lower courts have described their power to consider waived or forfeited arguments as almost completely discretionary,⁴⁷ while others will adjudicate such issues only when “necessary to avoid a manifest injustice.”⁴⁸ Numerous commentators have pointed out that courts exercise this authority unpredictably, inconsistently, and based on unavoidably subjective preferences and priorities.⁴⁹

Despite courts’ broad discretion to consider waived or forfeited issues, a litigant wishing to bring such an issue to the court’s attention generally must show that the alleged problem constitutes “plain error.”⁵⁰ In *United States v. Olano*, the Court established a four-factor test for plain error, explaining that “[t]here must be [i] an error [ii] that is plain and [iii] that affects substantial rights. Moreover . . . [iv]

2002) (holding that each of the appellant’s claims either were “not meritorious” or “ha[d] been waived”); see also *United States v. Proulx*, No. 93-1269, 1994 WL 90636, at *2 (7th Cir. Mar. 22, 1994) (“Even if [Defendant]’s severance motion were meritorious, however, he has waived the issue.”); *Kotoshirodo v. Brennan (In re Lull)*, No. 11-00349 SOM-BMK, 2011 WL 6941487, at *6 (D. Haw. Dec. 30, 2011) (holding, in a dispute over whether a debtor made an avoidable preference, that “because the Trustee does not argue that [the recipient of funds from the debtor] is a nonstatutory insider, the court need not consider whether [that recipient] fits into this second category”).

46. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations omitted).

47. *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013) (“[I]t is within our discretion to consider an issue that the parties did not raise below.”).

48. See, e.g., *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (“[W]e may exercise discretion to consider waived arguments where necessary to avoid a manifest injustice”); cf. *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005) (exercising “discretionary power to address issues that have been waived” because “failing to consider [Appellant]’s arguments would result in the substantial injustice of deporting an American citizen”).

49. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 463-64 (2009) (“[J]udges have not articulated a clear set of conditions that lead them to deviate from their typical practice of letting the parties frame the dispute. . . . The absence of principled guidelines governing judicial issue creation has led some to accuse judges of raising new issues when doing so accords with their personal preferences.”); Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1024 (1987) (“[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.”); Miller, *supra* note 5, at 1287 (“[A]part from questions of jurisdiction, courts are more likely to raise an issue sua sponte if they think a case is really important or if the judges really want to reach a particular result.”).

50. See FED. R. CIV. P. 51(d)(2); FED. R. CRIM. P. 52(b); FED. R. EVID. 103.

the error [must] seriously affect[] the fairness, integrity or public reputation of judicial proceedings.”⁵¹ This burden is exceptionally difficult to meet in civil cases.⁵²

Thus, under most circumstances, a court has discretion to consider a non-jurisdictional issue or argument that a litigant waives or forfeits, but it is not required to do so.

D. Stipulations of Law

Stipulations of law are yet another vehicle litigants may use to obtain a substantive court ruling or judgment without contesting the merits of one or more legal issues involved in the case. A litigant may enter into a stipulation of law expressly by filing a written agreement signed by the opposing parties,⁵³ embracing an opponent’s legal assertions in its own filings,⁵⁴ or making a concession at oral argument.⁵⁵ A litigant also may effectively enter into an implicit stipulation by failing to contest an opponent’s legal assertion or argument, such as where a litigant does not challenge its opponent’s assumption that the law of a particular jurisdiction applies. There may not be a firm distinction between an implicit stipulation and a forfeiture; if a litigant fails to contest one of its opponent’s legal arguments, the litigant can be said to have either forfeited its right to oppose that argument or implicitly stipulated to it.

The Supreme Court has expressly rejected the notion that courts are required to confirm the accuracy of stipulations of law before accepting them or necessarily must reject inaccurate ones. In *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, the parties disputed the proper meaning of 12 U.S.C.

51. *United States v. Olano*, 507 U.S. 725, 732 (1993) (quotation marks and citation omitted).

52. *See, e.g., Perry v. City of Chicago*, 733 F.3d 248, 253 (7th Cir. 2013) (“In most civil cases, plain error review is unavailable; if a party fails to object at trial, the issue cannot be raised on appeal.”).

53. *See, e.g., Rosario v. United States*, 824 F. Supp. 268, 276 n.19 (D. Mass. 1993) (“The parties filed with the Court a *Joint Stipulation of Rulings of Law* . . . in which they agreed to the application of certain legal principles.”); *Mather v. Northfield Freezing Sys. (In re S. Star Foods, Inc.)*, 202 B.R. 784, 787 (Bankr. E.D. Okla. 1996) (“On October 15, 1996, the parties filed their ‘Agreed Stipulations of Law and Fact’ . . .”).

54. *See, e.g., Frank v. Frithiof (In re James)*, 463 B.R. 719, 727 n.13 (Bankr. M.D. Pa. 2011) (“In their briefs, the parties stipulate that the law of Pennsylvania should govern the resolution of this matter.”); *Inter-Am. Ins. Co. v. Ketchum*, No. 89 C 1753, 1989 WL 88382, at *2 (N.D. Ill. July 28, 1989) (“In their briefs on [Defendant]’s motion, however, the parties refer solely to Illinois law. For purposes of this motion this court will treat this as a stipulation that Illinois law governs this dispute.”).

55. *In re Bomb Disaster at Roseville*, 438 F. Supp. 769, 774 (E.D. Cal. 1977) (discussing the parties’ stipulation at oral argument that the *Restatement (Second) of Torts*, § 402A set forth the standard for strict liability in the case).

§ 92.⁵⁶ None of them, however, contested § 92's continued existence and enforceability at any point in the proceedings, offering "what in effect was a stipulation on a question of law" on that issue.⁵⁷ The D.C. Circuit *sua sponte* held that § 92 was no longer enforceable because Congress had repealed it several decades earlier.⁵⁸ Explaining that "courts 'are not bound to accept, as controlling, stipulations as to questions of law,'" ⁵⁹ the D.C. Circuit concluded that courts "not only have the right to inquire into [the statute's] validity . . . [but] have the duty to do so."⁶⁰

The Supreme Court declined to endorse this reasoning.⁶¹ Although it agreed that the D.C. Circuit had the power to consider § 92's continued existence and enforceability, the Court was careful to frame the issue as an exercise of discretion rather than obligation. It explained:

[T]he Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law. We need not decide whether the Court of Appeals had, as it concluded, a "duty" to address the status of section 92 (which would imply error in declining to do so), for the court's decision to consider the issue was certainly no abuse of its discretion.⁶²

The Supreme Court's decision to recede from the D.C. Circuit's holding by concluding that courts have the discretionary power to review stipulations of law, rather than a mandatory duty to do so, leaves important aspects of the standard governing such stipulations unaddressed. There does not appear to be any case law explaining when it is an abuse of discretion for a district court to accept a stipulation of law. Typically, a court "by definition abuses its discretion when it makes an error of law."⁶³ If this meant that it would be an abuse of discretion to accept an erroneous stipulation of law, whether explicit or implicit, then a court would have to review and assess the validity of all such stipulations. Because the Supreme Court rejected the D.C. Circuit's imposition of such a duty, it is unclear what, if any, affirmative obligation a court has to identify and reject invalid stipulations of law.

56. 508 U.S. 439, 447-48 (1993).

57. *Id.* at 448.

58. *Indep. Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992), *rev'd sub nom. U.S. Nat'l Bank of Or.*, 508 U.S. 439.

59. *Id.* at 733 (quoting *Estate of Sanford v. Comm'r*, 308 U.S. 39, 51 (1939)).

60. *Id.* at 734.

61. *U.S. Nat'l Bank of Or.*, 508 U.S. at 448.

62. *Id.* (citation omitted).

63. *Koon v. United States*, 518 U.S. 81, 100 (1996).

Thus, a court has discretion to consider the merits of a stipulation of law, and apparently may do so *sua sponte*, regardless of the litigants' wishes.⁶⁴ A court generally is not required to confirm the accuracy of a stipulation before accepting it, however, unless it relates to subject-matter jurisdiction or justiciability.⁶⁵

E. Confessions of Error

Confessions of error—which typically, though not always, are offered by government entities—are yet another method of obtaining a substantive court ruling or judgment while avoiding adversarial adjudication of particular issues. A confession of error acknowledges that a lower court's opinion or judgment contains a defect or error that requires a higher court, usually the Supreme Court, to reverse or vacate it, and most often to remand the case for further proceedings.⁶⁶ As then-Solicitor General Kenneth Starr explained, the Government confesses error “if on reflection, we believe that we were wrong in the lower courts.”⁶⁷

The Supreme Court has changed its position several times concerning both whether it will review the merits of the underlying legal issue before accepting a confession of error, as well as the precedential effect of a ruling based on a confession of error. Indeed, these questions continue to spark controversy among the Justices. Although there are no sharp dividing lines and some exceptions exist, the Court's case law concerning confessions of error can be divided into three main epochs.

1. The Early Years (1890s–1942)

The earliest reported Supreme Court cases involving confessions of error from the Government, dating from the end of the nineteenth century through the early 1940s, accept them as a matter of course. Following a confession of error, the Court would reverse the lower court's ruling and typically remand for further proceedings, without considering either the merits of the case or the substance of the confession.⁶⁸ These rulings almost always stated tersely, “Judgment re-

64. See *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917) (“[T]he court cannot be controlled by agreement of counsel on a subsidiary question of law.”).

65. As mentioned earlier, different rules apply to jurisdictional issues. See *supra* notes 36-37.

66. Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 78 (1995).

67. Edward N. Beiser, Kenneth W. Starr & Gerhard A. Gesell, Remarks, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 484-85 (1990).

68. See *Sherwin v. United States*, 312 U.S. 654, 654 (1941) (per curiam); *Loveland v. United States*, 278 U.S. 665, 665 (1929); *United States ex rel. Fink v. Tod*, 267 U.S. 571, 571 (1925); *Albers v. United States*, 256 U.S. 706, 706 (1921); *Kornmann v. United States*,

versed, upon confession of error by the defendant in error [i.e., the United States], and cause remanded,”⁶⁹ often with directions to set a new trial.

These rulings do not suggest that the Court’s decision to accept a proffered confession of error either was discretionary or involved consideration of its merits, and there do not appear to be any examples during this half-century period of the Court rejecting one. Due to the brevity of nearly all of these rulings, there was no reasoning to act as a holding or precedent in future cases. Of course, as a practical matter, a confession of error locked in the Government’s position on remand, resolving how the underlying legal question would be addressed throughout future proceedings in the case.

*Goodrich v. Edwards*⁷⁰ was one of the only cases from this era in which the Court traversed a confession of error, considered the merits of the issue, and established a precedent. In *Goodrich*, the Government confessed error regarding the lower court’s interpretation of a tax law concerning the date to be used in determining the cost basis of personal property.⁷¹ When the case reached the Supreme Court, the Government agreed with the taxpayer that his tax assessment had been erroneously high.⁷² After noting the confession of error, the Court went on to analyze and interpret the statutory text for itself, ultimately “agree[ing] with the Solicitor General” concerning the proper method for calculating cost basis under the statute at issue.⁷³

A few years later, when faced with a related tax issue in *United States v. Flannery*, the Court emphasized that *Goodrich* represented the Court’s independent interpretation of the statute, despite the

248 U.S. 594, 594 (1918); *Overton v. United States*, 239 U.S. 658, 658 (1915); *Gilland v. United States*, 223 U.S. 709, 709 (1911) (per curiam); *Stearns v. Youngworth*, 209 U.S. 552, 552 (1908); *De Baca v. United States*, 189 U.S. 505, 505 (1903); *Kettenring v. United States*, 168 U.S. 703, 703 (1897); *Hohenstein v. Hedden*, 149 U.S. 776, 776 (1893); *Ballin v. Magone*, 140 U.S. 670, 670 (1891); *Metro. Nat’l Bank of N.Y. v. Conn. Mut. Life Ins. Co.*, 24 L. Ed. 1011, 1012 (1878). These cases are a representative sample to show the continuity of the Court’s approach throughout this era; a complete list would be many times as long.

69. *Luckey v. United States*, 163 U.S. 692, 692 (1896). It appears that, in many of these early cases, the Government confessed error by filing a motion in the Court to reverse and remand. See, e.g., *Sherwin*, 312 U.S. at 654 (“On the Government’s confession of error, its motion to reverse is granted.”); *Loveland*, 278 U.S. at 665 (noting that the ruling was “on motion of Solicitor General Mitchell for the United States” (emphasis omitted)).

70. 255 U.S. 527 (1921).

71. *Id.* at 534-35.

72. *Id.*

73. *Id.* at 535; see also *Gen. Motors Acceptance Corp. v. United States*, 282 U.S. 805, 805 (1930) (per curiam) (“On inspection of the record . . . and the confession of error by the Government . . . it is ordered that the judgment be, and the same is hereby, reversed, and the cause is remanded . . . with instruction to dismiss . . .” (internal citation omitted)). *General Motors Acceptance Corp.* appears to be the first case in which the Court declared that it examined the record before accepting a confession of error.

Government's confession of error.⁷⁴ The appellant in *Flannery* argued that the Court should not apply *Goodrich* as binding precedent, since it was based on a confession of error.⁷⁵ Rejecting that argument, the Court explained that *Goodrich* "was not based on the confession of error," but rather "embodied the reasoned judgment of the court."⁷⁶ *Goodrich* was an outlier ahead of its time;⁷⁷ the far more common practice prior to the 1940s was for the Court to simply reverse based on the confession of error without considering the merits or establishing a precedent.

2. *The Young Era (1942–1970s)*

The Court's first sustained discussion of the consequences of a confession of error came in 1942 in *Young v. United States*,⁷⁸ well over a half-century after its first express acceptance of one.⁷⁹ The Solicitor General conceded that a statute requiring vendors of certain drugs, "including dispensing physicians," to keep records did not apply to physicians who personally administered the drugs to patients they were treating.⁸⁰ The Court stated:

[A confession of error] does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . . [O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.⁸¹

74. *United States v. Flannery*, 268 U.S. 98, 103-04 (1925).

75. *Id.*

76. *Id.*

77. Toward the end of the Early Years, when the Solicitor General admitted there was a problem with the lower court's ruling but declined to formally confess error, the Court followed the *Goodrich* approach of independently examining, and ruling on the merits of, the underlying legal issue before reversing and vacating the lower court's ruling. See *Johnson & Higgins of Cal. v. United States*, 287 U.S. 459, 461 (1932) (engaging in independent determination of whether the petitioner had properly been hired by the Government where the Solicitor General did not "formally confess[] error," but admitted that "the proper officer of the Government was authorized to employ petitioner"); *Taylor v. United States*, 286 U.S. 1, 5 (1932) (engaging in independent determination of whether a search was unconstitutional when the Solicitor General "prefer[ed] not to enter a confession of error," but admitted that "the entry by the agents was wrongful and the search and seizure unreasonable"); *Waite v. United States*, 282 U.S. 508, 508 (1931) (considering whether the plaintiff was entitled to interest from the Government when "[t]he Government, without formally confessing error, state[d] its belief that interest should have been allowed").

78. 315 U.S. 257 (1942).

79. See *Metro. Nat'l Bank of N.Y. v. Conn. Mut. Life Ins. Co.*, 24 L. Ed. 1011 (1878).

80. *Young*, 315 U.S. at 258-59.

81. *Id.* (citation omitted).

It then parsed the language of the provision at issue, including the meaning of the term “dispensing physicians;” reviewed other sections of the statute; and discussed its legislative history before concluding that the statute did not apply to the petitioner.⁸² The Court reversed his conviction, consistent with the Government’s confession of error.⁸³

Young was the Court’s first express recognition that it was not bound by a confession of error and instead was required to review the underlying legal issue for itself before accepting a confession. Under this approach, a ruling based on a confession of error was a holding of the Court on the merits of the issue, just as if the parties had continued to dispute it. Neither *Young*, nor the cases that followed in the decades immediately afterward, recognized the potential Article III concerns that this approach raised. The Court often overruled lower courts, issued precedential rulings without adversarial presentation of the main legal issues, and adjudicated appeals despite the apparent absence of any controversy between the parties on the issue purportedly being appealed.⁸⁴

In the decades following *Young*, the Court largely abandoned its earlier practice of automatically reversing when the Government confessed error without considering the underlying issue. Rather, the Court would acknowledge the confession of error but go on to either engage in a detailed analysis of the issue, as if the Government had not made a confession,⁸⁵ or instead state that it was reversing based on both the “confession of error and the record.”⁸⁶ As Justice Douglas

82. *Id.* at 259-61.

83. *Id.* at 261.

84. *Cf.* *United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam) (holding that “the ‘honest and actual antagonistic assertion of rights’ to be adjudicated [is] a safeguard essential to the integrity of the judicial process” and is “indispensable to adjudication of constitutional questions by this Court” (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892))); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (“That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants.”).

85. *See, e.g.*, *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233, 237-39 (1968); *Remmer v. United States*, 347 U.S. 227, 228-30 (1954); *Gordon v. United States*, 347 U.S. 909, 909-10 (1954) (per curiam); *Orloff v. Willoughby*, 345 U.S. 83, 87-88 (1953); *Gibson v. United States*, 329 U.S. 338, 344-50 (1946); *Hoover Co. v. Coe*, 325 U.S. 79, 80-90 (1945); *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (per curiam).

86. *Fogel v. United States*, 335 U.S. 865, 865 (1948) (per curiam); *see, e.g.*, *Penner v. United States*, 399 U.S. 522, 522 (1970) (per curiam); *Rogers v. United States*, 376 U.S. 188, 188 (1964) (per curiam); *Janko v. United States*, 366 U.S. 716, 716 (1961) (per curiam); *Shelton v. United States*, 356 U.S. 26, 26 (1958) (per curiam); *Lightfoot v. United States*, 355 U.S. 2, 2 (1957) (per curiam); *Jost v. United States*, 347 U.S. 901, 901 (1954) (per curiam); *Shelton v. United States*, 346 U.S. 270, 270 (1953); *Chiarella v. United States*, 341 U.S. 946, 946 (1951) (per curiam); *see also Cruz v. Colorado*, 368 U.S. 4, 4 (1961) (per curiam) (reversing and remanding the lower court judgment based on “consideration of the entire record and the confession of error of the Attorney General of Colorado”); *Nicholson v. Boles*, 375 U.S. 25, 25 (1963) (per curiam) (same with confession of error from West Virginia Attorney General); *Marino v. Ragen*, 332 U.S. 561, 562 (1947) (per cu-

explained, the Court would mention its examination of the record to underscore the fact that it was not “blind[ly] accept[ing] . . . confession[s] of error.”⁸⁷ Several of these cases also reiterated *Young*’s admonition that the Court was obligated to traverse a confession of error and consider the merits of the issue for itself.⁸⁸

In one case, the Court was even more explicit, stating that the lower courts had “accepted the Government’s argument as then made and, if they were right in doing so, we should affirm.”⁸⁹ Thus, the Court expressly contemplated rejecting confessions of errors that it concluded were erroneous.⁹⁰ Even after *Young*, however, there were a handful of outlier rulings in which the Court accepted a confession of error without either engaging in a merits analysis or indicating that it was basing its ruling on the record,⁹¹ but those were the rare

riam) (accepting a confession of error from the Illinois Attorney General on a state-law issue and concluding that the petitioner “was denied the due process of law which the Fourteenth Amendment requires”).

87. *Casey v. United States*, 343 U.S. 808, 810 (1952) (per curiam) (Douglas, J., dissenting).

88. *Sibron v. New York*, 392 U.S. 40, 58 (1968) (“It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained.”); *Orloff*, 345 U.S. at 87 (“This Court, of course, is not bound to accept the Government’s concession that the courts below erred on a question of law.”); *Gibson*, 329 U.S. at 344 n.9 (quoting *Young v. United States*, 315 U.S. 257, 258-59 (1942)); see also *Evola v. United States*, 375 U.S. 32, 33 n.* (1963) (Clark, J., concurring in part and dissenting in part); *Petite v. United States*, 361 U.S. 529, 533 (1960) (Brennan, J.).

89. *Orloff*, 345 U.S. at 87; see also *Casey*, 343 U.S. at 811-12 (Douglas, J., dissenting) (“We sit in this case not to enforce the requests of the Department of Justice but to review the action of a lower court. . . . Once we accept a confession of error at face value and make it the controlling and decisive factor in our decision, we no longer administer a system of justice under a government of laws.”).

90. See, e.g., *Weber v. United States*, 119 F.2d 932, 934 (9th Cir. 1941) (rejecting the Government’s confession of error because the Ninth Circuit disagreed with the Government’s contention that its successful argument in the lower court was erroneous), *aff’d by an equally divided Court*, 315 U.S. 787 (1942) (per curiam); see also David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2081 (1994) (citing *Weber*).

91. See *Gordon v. United States*, 345 U.S. 968, 968 (1953) (per curiam) (“The judgment is vacated and the case is remanded to the Court of Appeals for consideration in the light of the Government’s confession of error.”); *Bailey v. United States*, 329 U.S. 670, 670 (1946) (per curiam) (“The Court having given consideration to the Government’s confession of error, the petition for writ of certiorari is granted and the judgment of the Circuit Court of Appeals is reversed.”). One such exception is *Casey v. United States*, 343 U.S. 808, 808 (1952) (per curiam), concerning the constitutionality of a search. The Court noted that adjudicating the matter would require it to resolve several questions of fact and law. *Id.* Observing that the Solicitor General had confessed error, the Court stated, “To accept in this case his confession of error would not involve the establishment of any precedent. Accordingly we reverse the judgment as to all the petitioners.” *Id.*; see also *Fortson v. Toombs*, 379 U.S. 621, 625 (1965) (Harlan, J., concurring in part and dissenting in part) (suggesting that a confession of error may “reliev[e] th[e] Court of the necessity of making a definitive exposition of its views” on the underlying legal issue).

Casey is remarkable because the Court acknowledged that it was accepting the confession of error without ascertaining the operative facts or the law and emphasized that

exceptions during this period.⁹²

3. *The Modern/Chater Era (1970s–present)*

A sharp dividing line does not exist between what I term the *Young* Era and the *Modern/Chater* Era,⁹³ in which the Court has embraced a variation of the pre-*Young* approach. When the Solicitor General either makes an express confession of error⁹⁴ or otherwise changes the Government's position to argue that the lower court erred by ruling in the Government's favor,⁹⁵ the Court almost invari-

its ruling did not constitute binding precedent. 343 U.S. at 808. It is consistent with both pre-*Young* practice and more modern cases, but was a departure from the Court's overall approach from 1942 to 1970. Indeed, *Casey* was such a departure from the Court's established practice in the *Young* Era that it drew a harsh dissent from Justices Douglas and Reed and Chief Justice Vinson. 343 U.S. at 810 (Douglas, J., dissenting) ("Unlike today's *per curiam*, our recent *per curiam* orders and opinions have been careful to note that our reversal of a court of appeals judgment is based upon consideration of the record, not blind acceptance of a confession of error.").

92. In cases where the Government confessed error, but an agency with independent litigating authority such as the Interstate Commerce Commission wished to defend the lower court's decision, the Court would accept the confession of error but allow the other agency to take over the appeal. *See, e.g.*, *Am. Trucking Ass'ns v. United States*, 326 U.S. 77, 81 n.2 (1945); *McLean Trucking Co. v. United States*, 321 U.S. 67, 69 (1944). The confessions of error in those cases were not dispositive; the Court adjudicated the merits of the underlying issues based on the adversarial presentations of the independent agency and the private litigant.

93. This Article uses the label "Modern/*Chater* Era" because, although the Court's ruling in *Lawrence v. Chater*, 516 U.S. 163, 170-71 (1996) (*per curiam*), articulates and forcefully defends the Court's most recent (and still current) doctrine, the Court actually started applying that new standard, instead of *Young*, in the early 1970s.

94. *See, e.g.*, *Smith v. United States*, 549 U.S. 1106, 1106 (2007); *Rosales v. Bureau of Immigration & Customs Enforcement*, 545 U.S. 1101, 1101 (2005); *Saldano v. Texas*, 530 U.S. 1212, 1212 (2000).

95. *See, e.g.*, *Bennett v. United States*, 553 U.S. 1029, 1029 (2008); *Collier v. United States*, 552 U.S. 1092, 1092 (2008); *Duarte v. Mukasey*, 552 U.S. 1036, 1036 (2007); *Hohn v. United States*, 537 U.S. 801, 801 (2002); *Hoover v. United States*, 519 U.S. 1052, 1052-53 (1997); *Polsby v. Shalala*, 507 U.S. 1048, 1048 (1993); *Williams v. United States*, 500 U.S. 901, 901 (1991); *Chappell v. United States*, 494 U.S. 1075, 1075 (1990); *Gray v. United States*, 484 U.S. 807, 807 (1987); *Brown v. United States*, 445 U.S. 922, 922 (1980); *Singer v. U.S. Civil Serv. Comm'n*, 429 U.S. 1034, 1034 (1977); *Joseph v. United States*, 405 U.S. 1006, 1006 (1972); *Griffin v. United States*, 402 U.S. 970, 970 (1971).

Occasionally, the Government agrees with the lower court's ultimate judgment but argues that its reasoning was erroneous and that a remand is necessary to allow it to adopt an alternate, legally correct theory. *See, e.g.*, *Stephenson v. United States*, 554 U.S. 913, 913 (2008) (vacating and remanding case because the Solicitor General conceded that the lower court misinterpreted the defendant's collateral-review waiver, even though the Government continued to maintain that the defendant's conviction was valid); *Nunez v. United States*, 554 U.S. 911, 911 (2008) (same); *Alvarado v. United States*, 497 U.S. 543, 545 (1990) (*per curiam*) ("If the judgment below rested on an improvident ground, as the Government suggests, the Court of Appeals should in the first instance pass on the adequacy of the Government's reasons for exercising its peremptory challenges."); *cf.* John M. Murray, Note, *Why the Supreme Court Should Stop GVR'ing the Solicitor General's Rationale-Confessions-of-Error*, 62 CASE W. RES. L. REV. 879, 881 (2012) ("[W]hen the Solicitor General confesses error in a lower court's rationale and asks the Court to GVR, the gov-

ably “GVRs” the case: grants certiorari, vacates the lower court ruling, and remands for reconsideration in light of the Government’s new position.

Crucially, under the modern approach, the Court does not “determin[e] the[] merits” of a confession of error before taking action, but instead considers only whether it is “plausible.”⁹⁶ Although the Court has never acknowledged it as such,⁹⁷ this “plausibility” standard—first articulated in 1996 in *Lawrence v. Chater*⁹⁸—is an unavoidable repudiation of the jurisprudence of the *Young* Era. The earliest Modern/*Chater* Era cases from the early 1970s expressly state that the Court’s ruling “intimates no view as to the merits of the Solicitor General’s position”—a sharp contrast from the *Young* Era holdings discussed above.⁹⁹ Although most subsequent rulings lack this admonition, this qualification remains fairly implicit in them.

The Modern/*Chater* Era is also marked by discord among the Justices concerning the proper way to address confessions of error. Chief Justice Rehnquist¹⁰⁰ and, later, Justice Scalia¹⁰¹—occasionally accompanied by a few other Justices—regularly dissented from GVRs based on confessions of error. They instead would have denied the petitions for certiorari and allowed the purportedly erroneous judgments to either stand or be remedied by the circuit courts themselves.

ernment may be motivated by litigation strategy rather than the fair and impartial administration of justice.”).

96. *Chater*, 516 U.S. at 171; see also *Nunez*, 554 U.S. at 912 (Scalia, J., dissenting) (discussing the Court’s “dubious yet well-entrenched habit of entering a GVR order *without an independent examination of the merits* when the Government, as respondent, confesses error in the judgment below”); *Mariscal v. United States*, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting) (same).

97. Cf. *Chater*, 516 U.S. at 182 (Scalia, J., dissenting) (noting that the Court’s current approach to confessions of error is “a relatively new practice” in comparison to how *Young* handled them).

98. *Id.* at 170-71 (majority opinion).

99. *Crosslin v. Mtn. States Tel. & Tel. Co.*, 400 U.S. 1004, 1004 (1971); *Stanley v. United States*, 400 U.S. 936, 936 (1970).

100. See, e.g., *Stutson v. United States*, 516 U.S. 193, 198 (1996) (Rehnquist, C.J., dissenting); *Malone v. United States*, 484 U.S. 919, 919 (1987) (Rehnquist, C.J., dissenting); *Scheer v. United States*, 446 U.S. 932, 932 (1980) (Rehnquist & White, JJ., & Burger, C.J., dissenting); *Tapia-Acuna v. INS*, 449 U.S. 945, 945 (1980) (Rehnquist & White, JJ., & Burger, C.J., dissenting); *Corley v. United States*, 444 U.S. 806, 806 (1979) (Rehnquist & Stevens, JJ., dissenting); *Rubin v. United States*, 439 U.S. 810, 810 (1978) (Rehnquist, J., dissenting); *Hammons v. United States*, 439 U.S. 810, 810 (1978) (Rehnquist & White, JJ., & Burger, C.J., dissenting); *Jackson v. United States*, 434 U.S. 947, 947 (1977) (Rehnquist, J., dissenting); *DeMarco v. United States*, 415 U.S. 449, 451 (1974) (Rehnquist, J., dissenting).

101. See, e.g., *Williamson v. United States*, 130 S. Ct. 3461, 3461 (2010) (Scalia, Thomas & Alito, JJ., & Roberts, C.J., dissenting); *Stephenson v. United States*, 554 U.S. 913, 914 (2008) (Scalia, J., dissenting); *Nunez*, 554 U.S. at 911-12 (Scalia, J., dissenting); *Stutson*, 516 U.S. at 198 (Scalia, J., dissenting); *Chater*, 516 U.S. at 177 (Scalia, J., dissenting).

Then-Justice Rehnquist commented that the Court “should not[] respond in Pavlovian fashion to confessions of error by the Solicitor General.”¹⁰² He explained that it “ill behooves th[e] Court to defer to the Solicitor General’s suggestion that a Court of Appeals may have been in error after another representative of the Executive Branch and the Justice Department has persuaded the Court of Appeals to reach the result which it did.”¹⁰³ He also argued that the “adversarial[] system of justice” is not “well served” by “routinely vacating judgments which the Solicitor General questions without any independent examination of the merits” by the Court.¹⁰⁴

The Justices’ different approaches toward confessions of error came to a head in 1996 in *Lawrence v. Chater*.¹⁰⁵ The Solicitor General, confessing error before the Supreme Court, admitted that the Social Security Administration (“SSA”) should have determined the constitutionality of a state intestacy law before applying it to deny survivors’ benefits to a minor.¹⁰⁶ Without conceding either that the state law at issue was unconstitutional or that the petitioner was entitled to benefits, the Solicitor General asked the Court to vacate the Fourth Circuit’s ruling and remand the case with directions to allow the SSA to resolve these issues in the first instance.¹⁰⁷

The Court held, “[W]e have the power to issue a GVR order, and . . . such an order is an appropriate exercise of our discretionary certiorari jurisdiction.”¹⁰⁸ Citing a range of cases going back to 1971 (i.e., after the end of the *Young* Era), the Court stated, “We have GVR’d in light of . . . confessions of error or other positions newly taken by the Solicitor General . . . and state attorneys general.”¹⁰⁹ The Court further maintained that, unless a confession of error is part of “an unfair or manipulative litigation strategy,” GVR’ing a case based on a “plausible confession[] of error”¹¹⁰ “conserves the scarce resources of this Court”¹¹¹ and “can improve the fairness and accuracy of judicial outcomes”¹¹²—an odd conclusion to draw about a

102. *DeMarco*, 415 U.S. at 451 (Rehnquist, J., dissenting).

103. *Mariscal v. United States*, 449 U.S. 405, 406-07 (1981) (Rehnquist, J., dissenting).

104. *Id.* at 407; *see also* *Alvarado v. United States*, 497 U.S. 543, 545-46 (1990) (Rehnquist, C.J., dissenting); *cf.* *Peretz v. United States*, 501 U.S. 923, 940 (1991) (recognizing that ruling on an issue despite a confession of error deprives the Court “of the benefit of an adversary presentation”).

105. 516 U.S. 163 (1996) (per curiam).

106. *Id.* at 165.

107. *Id.*

108. *Id.* at 166.

109. *Id.* at 166-67 (internal citations omitted).

110. *Id.* at 171.

111. *Id.* at 168.

112. *Id.*

process that does not allow the Court to consider the merits of the underlying legal issue.

Justice Scalia, in a lengthy dissent, challenged several aspects of the majority's analysis. He recognized that GVR'ing cases based on the Solicitor General's confessions of error, particularly "without determining the merits," was "a relatively new practice."¹¹³ He echoed Chief Justice Rehnquist's concerns about the deleterious effects of that practice on the adversarial process,¹¹⁴ although he ultimately conceded that it "is by now well entrenched."¹¹⁵

As with the Court's treatment of confessions of error in earlier eras, exceptions to the prevailing approach exist.¹¹⁶ Especially over the past few years, when a party has confessed error or otherwise refused to defend a particular position, the Court occasionally has appointed an amicus to advocate that view.¹¹⁷ And, on exceedingly rare occasions, the Court will reject a concession from the Solicitor General and adopt the opposite view.¹¹⁸ Nevertheless, the overwhelming majority of confession-of-error rulings demonstrate that the *Young Era* is over, and *Chater* represents the Court's current approach.¹¹⁹ Thus, under current law, a court is required to accept a confession of error that is "plausible," regardless of its ultimate accuracy.

113. *Id.* at 182-83 (Scalia, J., dissenting).

114. *Id.* at 183.

115. *Id.* Justice Scalia further objected to the practice of GVR'ing "where the Solicitor General has *not* conceded error in the judgment below, but has merely acknowledged that the ground, or one of the grounds, on which the lower court relied was mistaken." *Id.* (emphasis in original). He explained that the significance of a confession of error is extremely limited when the Government disagrees only with the lower court's reasoning, rather than its ultimate judgment, because "we should not assume that a court of appeals has adopted a legal position only because the Government supported it." *Id.*

116. *See Moore v. United States*, 429 U.S. 20, 22 n.2 (1976) (per curiam) (adjudicating merits of hearsay issue and not "rely[ing] on the Government's confession of error"); *Rogers v. United States*, 422 U.S. 35 (1975) (examining the permissibility of *ex parte* communications between the judge and the jury in a criminal case, despite the Solicitor General's apparent confession of error on the issue).

117. *See, e.g., Pepper v. United States*, 131 S. Ct. 1229, 1239 (2011) ("Because the United States has confessed error in the Court of Appeals' ruling on the first question, we appointed an *amicus curiae* to defend the Court of Appeals' judgment."); *Forney v. Apfel*, 524 U.S. 266, 268-69 (1998) (same); *see also Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 447 (2009) (adjudicating case because *amici* continued to defend the lower court's position, which the respondents no longer wished to advocate).

118. *See, e.g., Peretz v. United States*, 501 U.S. 923, 940 (1991) (holding that the Federal Magistrates Act allows defendants to consent to having Magistrate Judges preside over jury selection in felony cases, despite the Solicitor General's "conce[ssion] that it was error to make the reference to the Magistrate"). *Peretz* suggests that the Court may be willing to reject confessions of error when necessary to defend institutional interests of the judiciary that none of the litigants have reason to protect. In *Peretz*, the Court arguably was defending the judiciary's interest in allowing Magistrate Judges to relieve district judges of the largely ministerial burden of jury selection, to allow district judges to spend their time on other, arguably more important judicial tasks.

119. *See Shaun P. Martin, Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 561 (2004).

F. Consent Decrees

Consent decrees are the final main procedural vehicle through which litigants can seek a substantive court ruling declaring or changing their legal rights and obligations, without having the court rule on the merits of a case.¹²⁰ A consent decree is a court order that terminates a lawsuit and imposes obligations on one or both litigants.¹²¹ It is enforceable through summary contempt proceedings before the court that issued it,¹²² rather than in a separate breach-of-contract suit like a settlement agreement.¹²³ A court may approve a consent decree among the litigants that agree to it, even if other parties to the lawsuit, including intervenors, object.¹²⁴

The Court has emphasized that a consent decree draws its force from “the agreement of the parties, rather than the force of the law upon which the complaint was originally based.”¹²⁵ Thus, in deciding whether to approve a consent decree, the court does not determine whether “the plaintiff established his factual claims and legal theories.”¹²⁶ A court may enter a consent decree without finding that a statutory or constitutional violation has occurred,¹²⁷ “inquir[ing] into the precise legal rights of the parties,” or “resolv[ing] the merits of the claims or controversy.”¹²⁸ A court also may order broader relief

120. For a discussion of the justiciability problems with consent decrees, as well as the special separation-of-powers issues they raise when government entities enter into them, see Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. (forthcoming 2014). Much of the explanation of consent decrees here is taken from that Article. *Id.*

121. Early Supreme Court cases reject the characterization of consent decrees as contracts, *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), but later cases have acknowledged that such decrees are “hybrid[s]” of judgments and contracts, *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986). Because of their “dual character,” consent decrees “are treated as contracts for some purposes but not for others.” *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 236 n.10, 238 (1975); see generally Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988) (arguing that a consent decree cannot be treated as either a traditional contract or a court order).

122. *Local No. 93*, 478 U.S. at 518.

123. See *infra* Part III.

124. *Local No. 93*, 478 U.S. at 529 (holding that an intervenor “does not have power to block the decree merely by withholding its consent”); accord *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 578-79 (1997).

125. *Local No. 93*, 478 U.S. at 522.

126. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

127. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992); *Armour & Co.*, 402 U.S. at 682.

128. *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983); see also *Lawyer*, 521 U.S. at 579 n.6.

than the plaintiffs originally sought in the complaint or than it could have ordered following an adversarial trial.¹²⁹

In *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*, the Court established four requirements for a consent decree to be approved.¹³⁰ First, the court must have subject-matter jurisdiction of the underlying dispute.¹³¹ Second, the decree must “‘come within the general scope of the case made by the pleadings.’”¹³² Third, the decree “must further the objectives of the law upon which the complaint was based.”¹³³ Finally, the decree cannot affirmatively require “unlawful” action,¹³⁴ although in constitutional challenges the court sometimes will approve consent decrees that require or allow conduct that otherwise would be proscribed by the allegedly unconstitutional legal provision.

Courts apply different, and varying, standards when a government entity attempts to enter into a consent decree declaring a statute or regulation unconstitutional or otherwise unenforceable. Many federal courts refuse to approve such consent decrees without first confirming for themselves that the challenged provision actually is unconstitutional.¹³⁵ The D.C. Circuit, in contrast, has held that a consent decree may override state law if *either* the district court determines that the plaintiffs prove the existence of a federal violation *or* the government defendants admit such a violation.¹³⁶

129. *Rufo*, 502 U.S. at 389; *Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 60-61 (1st Cir. 1993); *see, e.g., Nobels v. Sec. Fin. Corp. of Ga. (In re Consol. 'Non-Filing Ins.' Fee Litig.)*, 431 F. App'x 835, 843 (11th Cir. 2011); *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1539 (3d Cir. 1984) (recognizing validity of consent decree containing terms which “far exceeded the relief available” under the federal statutes at issue).

130. *Local No. 93*, 478 U.S. at 525.

131. *Id.*

132. *Id.* (brackets omitted) (quoting *Pac. R.R. Co. v. Ketchum*, 101 U.S. 289, 297 (1880)).

133. *Id.*

134. *Id.* at 526.

135. *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (vacating consent decree enjoining enforcement of a state billboard law because “the district court could not supersede California’s law unless it conflicts with [a] federal law”); *Kasper v. Bd. of Election Comm’rs of Chicago*, 814 F.2d 332, 342 (7th Cir. 1987) (“An alteration of the statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law.”); *see also PG Publ’g Co. v. Aichele*, 705 F.3d 91, 116 (3d Cir. 2013) (affirming district court’s refusal to approve a consent decree barring enforcement of a state law restricting access to polling places because “the parties cannot circumvent valid state laws by way of a consent decree”); *Large v. Fremont Cnty., Wyo.*, 670 F.3d 1133, 1148 (10th Cir. 2012); *Nat’l Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986).

136. *Cleveland Cnty. Ass’n for Gov’t by the People v. Cleveland Cnty. Bd. of Comm’rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) (holding that state law cannot “stand in the way” of a consent decree if it is remedying “an admitted or adjudged violation” of federal law).

Some courts have gone even further, holding that a government defendant may enter into a consent decree or other settlement declaring a legal provision to be unconstitutional so long as the plaintiff's claim is "substantial."¹³⁷ Despite this diversity of approaches to consent decrees that invalidate or circumvent state laws, courts do not generally take any precautions against consent decrees in which agencies agree to promulgate particular regulations; interpret, apply, or enforce statutes or other legal provisions in particular ways; or take other such actions.¹³⁸ Thus, with the possible exception of consent decrees with government defendants that would declare a legal provision unconstitutional or unenforceable, courts are generally required to approve consent decrees that satisfy *Local No. 93's* relatively lax four-prong test, without considering the merits of the underlying legal issues in any further depth.

In conclusion, there are many procedural vehicles through which litigants may seek a substantive court ruling or judgment that modifies or declares their legal rights and obligations, without adversarial litigation of either the case as a whole or certain issues within the case. The precise vehicle that litigants use determines whether the court is permitted or required to consider the merits of the underlying legal issues and the degree of scrutiny it may or must apply to those issues.

III. SETTLEMENT AGREEMENTS AND DISMISSALS

The various ways of avoiding adversarial adjudication examined in Part II differ materially from yet another alternative that is conspicuously absent from that discussion—settlement agreements. A settlement agreement is a private contract in which the settling litigants agree to drop their claims, typically in exchange for money, a release from liability, or some other consideration. Because a settle-

137. *DEG, LLC v. Twp. of Fairfield*, 966 A.2d 1036, 1045 (N.J. 2009); *see also* *Feeling v. Kelly*, 152 F.R.D. 670, 672-73 (D.D.C. 1994) (reaffirming the propriety of a consent decree that construed the federal statute governing Aid to Families with Dependent Children without assessing the validity of the plaintiffs' allegations, based on considerations of "judicial economy, convenience, as well as fairness to the litigants"); *Midtown Hosp. v. Miller*, 36 F. Supp. 2d 1360, 1369 (N.D. Ga. 1997) ("[T]he Attorney General may settle a case which arises from a god [sic] faith federal challenge to a state law without admitting that the law violates federal law[,] [a]s long as there is sufficient evidence to show that the challenge to the state law is reasonable . . ."); *Summit Twp. Taxpayers Ass'n v. Summit Twp. Bd. of Supervisors*, 411 A.2d 1263, 1266 (Pa. Commw. Ct. 1980).

138. *See, e.g.*, *Berger v. Heckler*, 771 F.2d 1556, 1579 (2d Cir. 1985) (holding that, because the Secretary of Health and Human Services agreed to a consent decree which required "the promulgation of regulations, she cannot now object to th[ose] terms"); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1120-21 (D.C. Cir. 1983) (affirming consent decree "requir[ing] EPA to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants" and "mandat[ing] the use of certain scientific methodologies and decision-making criteria").

ment agreement is a private contract, a litigant voluntarily may agree to provide more substantial relief than its opponent could have received in the underlying lawsuit. Settlement agreements differ from the other procedural vehicles discussed in Part II because, as purely private contracts, they do not result in substantive court orders that declare or modify the litigants' respective legal rights and obligations.¹³⁹ The parties' obligations toward each other are embodied in the agreement itself, rather than a court order, and in most cases the court is not required to review or approve the agreement.¹⁴⁰

As litigants generally may stipulate to dismiss a case without the court's approval,¹⁴¹ a court has little or no opportunity to reject most settlements. Indeed, in most cases, the court may not even see the settlement agreement itself; additionally, many settlement agreements contain confidentiality clauses that prohibit public disclosure of their terms.¹⁴² The resulting dismissal is recognized as a purely administrative housekeeping matter that does not reflect a judicial determination of the merits of the underlying suit.¹⁴³ Thus, unlike the other procedural alternatives discussed in Part II, settlement agreements allow a court to dispose of a case without issuing a substantive ruling, and generally do not lead to rulings, opinions, or judgments based on false, incorrect, or unexamined legal premises.

Owen Fiss famously argued that settlement agreements interfere with the primary role of a court,¹⁴⁴ which he contends is not to resolve disputes among litigants, but rather "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes."¹⁴⁵ A settlement, he argues, "deprive[s] a court of the

139. Elsewhere, I have explained why government defendants who wish to negotiate voluntary resolutions to lawsuits against them should be required to use settlement agreements, rather than consent decrees. Morley, *supra* note 120.

140. Courts must approve settlement agreements only in certain types of cases, such as class actions, FED. R. CIV. P. 23(e)(2).

141. See FED. R. CIV. P. 41(a)(1)(A)(ii).

142. See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 385-87 (1999); Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 946, 950-51 (2010).

143. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21-22 (1994).

144. Fiss also criticized settlements based on the possibility that litigants (particularly the poor) may be pressured into accepting unfair terms, the inability of organizations meaningfully to consent to them, and the difficulties they pose when disputes arise concerning their implementation. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076-85 (1984) [hereinafter Fiss, *Against Settlement*]. It is both conceptually and empirically debatable, however, whether settlements raise such concerns to a greater extent than adjudication, which is the only real alternative to them. See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1197-98 (2009).

145. Fiss, *Against Settlement*, *supra* note 144, at 1085; see also Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) [hereinafter Fiss, *Forms of Justice*].

occasion, and perhaps even the ability, to render an interpretation” of the law.¹⁴⁶ Because litigants negotiating a settlement are primarily pursuing their self-interest, “[t]here is no reason to believe that their bargained-for agreement is an instantiation of justice or will, as a general matter, lead to justice.”¹⁴⁷

Litigants’ decision to enter into a settlement agreement in the midst of litigation does not seem to raise substantially greater concerns, however, than if they avoided litigation altogether by resolving a dispute before a lawsuit is filed. In most cases, when parties settle a lawsuit, they could have entered into the same agreement at the outset of the case, or even before it was filed. Especially since parties generally have no obligation to bring a lawsuit in the first place, it is not clear that the court or the public have a strong interest in encouraging litigants who have reached a mutually agreeable solution to continue litigating for the sake of obtaining a ruling. Moreover, although a settlement may preclude the judiciary from interpreting the law on a given occasion, other lawsuits are likely to give the court

146. Fiss, *Against Settlement*, *supra* note 144, at 1085.

147. Owen M. Fiss, *The History of an Idea*, 78 *FORDHAM L. REV.* 1273, 1277 (2009). The classical law-and-economics model of litigation presents a different, more favorable view of settlements, explaining that they permit litigants to achieve the expected results of a trial (and possibly appeal) without having to incur the transaction costs associated with full litigation on the merits. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1, 4 (1984); *see also* Issacharoff & Klonoff, *supra* note 144, at 1197-98. A settlement’s terms are generally based on the court’s expected ruling, taking into account not only the state of the law and the factual record, but the fact that courts—including appellate courts—are unpredictable and sometimes err or reach otherwise unexpected conclusions. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 *U. CHI. LEGAL F.* 19, 21-22; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

Professor Carrie Menkel-Meadow, arguing forcefully in favor of settlements, contends that parties who settle often can craft more effective remedies than the court could impose, because they are more knowledgeable about their circumstances and can agree to mutually preferable alternatives that the court itself could or would not order. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 *UCLA L. REV.* 485, 487 (1985) [hereinafter Menkel-Meadow, *Mandatory Settlement Conference*] (“Solutions to disputes can be tailored to the parties’ polycentric needs and can achieve greater party satisfaction and enforcement reliability because they are not binary, win/lose results.” (footnotes omitted)); Carrie Menkel-Meadow, *Toward Another View of the Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 775, 795, 836 (1984) [hereinafter Menkel-Meadow, *Another View*]; *see also* Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 *HASTINGS L.J.* 9, 36-37 (1996).

Other scholars have argued that settlements are desirable because they are compromises that require give-and-take between the parties. Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 *ARIZ. L. REV.* 1009, 1013 (2008); Jeffrey R. Seul, *Settling Significant Cases*, 79 *WASH. L. REV.* 881, 968 (2004). Instrumentally, a defendant may be more likely to adhere to a negotiated settlement to which it voluntarily agreed than one imposed by the court. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 *U. ILL. L. REV.* 725, 727.

the opportunity to do so in the future—particularly for important or recurring issues.

Settlements also interfere with the main function of the judiciary—at least as Fiss conceives it¹⁴⁸—to a far less degree than the various procedural vehicles for avoiding adversarial adjudication identified in Part II. Although a settlement prevents the court from expounding the law or implementing public values in that case, it protects the court from issuing a ruling or judgment based on inaccurate or unexamined legal premises.¹⁴⁹ At least as the rules of procedure currently treat them, settlement agreements provide a way of removing disputes from a court's docket, rather than seeking judicial resolution of them. Such agreements typically do not require the court implicitly or explicitly to put its imprimatur on unexamined and potentially incorrect interpretations or applications of the law. Thus, rather than providing an additional means of avoiding adversarial adjudication, akin to those identified in Part II, settlement agreements are meaningfully distinguishable from them.

IV. A NEW APPROACH TO AVOIDING ADVERSARIAL ADJUDICATION

Courts should adopt an accuracy-centric approach toward adjudication in which they take reasonable steps to attempt to ensure that their rulings and judgments are consistent with the law that governs the facts, claims, and issues before them. The various methods of avoiding adversarial adjudication identified in Part II all share the same fundamental structural similarity—they result in a court issuing a substantive ruling or judgment (i.e., something more than a mere “housekeeping” dismissal¹⁵⁰) without fully considering or accurately resolving one or more of the underlying legal issues in the case. Courts nevertheless apply vastly different standards in deciding whether to accept, approve, or otherwise allow litigants to take advantage of each of those procedural alternatives. When a defendant defaults or a litigant fails to oppose a summary judgment motion, the court is required *sua sponte* to confirm the validity of the plaintiff's legal theories.¹⁵¹ When a litigant waives or forfeits an issue or the parties offer a stipulation of law, the court generally has discretion to consider the issue, but is not required to do so unless the concession relates to the court's subject-matter jurisdiction or the justiciability

148. See *supra* note 145 and accompanying text.

149. See generally Fiss, *Against Settlement*, *supra* note 144 (explaining that a settlement agreement prevents the court from articulating and applying public values in the underlying dispute).

150. Cf. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21-22 (1994) (explaining that dismissal of a moot lawsuit is a “matter[] of judicial administration and practice” that does not involve determination of the “merits of a legal question”).

151. See *supra* Part II.A–B.

of the case.¹⁵² Conversely, when a prevailing party confesses error, the Supreme Court considers itself bound to accept the concession so long as it is “plausible.”¹⁵³ Courts apply a similarly deferential standard toward proposed consent decrees, applying a very lax four-prong test that generally does not allow for consideration of the merits of the plaintiffs’ legal theories or the litigants’ concessions.¹⁵⁴

Neither courts nor academic commentators have explained or defended the broad range of divergent standards that apply to the various procedural vehicles for avoiding adversarial adjudication. One main reason for the differences among these standards appears to be that courts generally consider each procedural alternative in isolation, without recognizing or discussing its similarity to the others.¹⁵⁵ Because these procedural vehicles are fundamentally similar to each other, courts should apply a single, consistent standard in determining whether to allow or accept them. The ability of a court to base a ruling or judgment on an incorrect, incomplete, or simply unexamined legal premise should not depend on the largely arbitrary contingency of the particular procedural vehicle through which it is presented.

If one accepts this Article’s fundamental argument that courts should apply a single, consistent standard to the different methods of avoiding adversarial adjudication, the question remains what that standard should be.¹⁵⁶ In crafting a standard, it is necessary to determine both the scope of a court’s latitude to consider or ignore legal questions relating to a case that the parties themselves have not actively contested, as well as the degree of scrutiny the court may (or must) apply when doing so. A court may be required to address legal issues or arguments the parties have overlooked or otherwise failed to contest, have complete discretion to decide for itself whether to address them, or instead be strongly discouraged or even prohibited from doing so. When courts do consider such issues or arguments, they may be permitted to give those issues full *de novo* consideration, or instead be required to apply some lesser standard of scrutiny, such

152. See *supra* Part II.C–D.

153. See *supra* Part II.E.

154. See *supra* Part II.F.

155. See, e.g., *Lawrence v. Chater*, 516 U.S. 163, 170–71 (1996) (per curiam) (discussing confessions of error without considering other methods of avoiding adversarial adjudication); *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447–48 (1993) (same for stipulations of law); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (same for consent decrees); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (same for waived and forfeited arguments).

156. Even if one disagrees that the same standard should apply to all of the procedural vehicles discussed in Part II, one still might be persuaded that this Article’s proposed accuracy-centric standard should apply to some of those alternatives, such as express stipulations of law, confessions of error, or consent decrees.

as determining whether the parties' position is "plausible"¹⁵⁷ or satisfies some variation of the liberal four-factor standard governing consent decrees.¹⁵⁸

Courts should adopt an accuracy-centric approach toward adjudication.¹⁵⁹ When a litigant attempts to avoid adversarial adjudication of a case or issues within a case by affirmatively making an express submission to a court—such as by seeking a default judgment, filing a motion (whether or not dispositive), confessing error, submitting a stipulation of law, or moving for a consent decree—the court should decline to grant the requested relief if it harbors doubts about the accuracy or validity of the movant's arguments or substantive entitlement to relief. Rather, the court should invite the movant to file a brief addressing the court's potential concerns and demonstrating the legal accuracy or validity of its arguments and the requested relief. The court likewise should permit any other interested litigants to present their views on the matter.¹⁶⁰

157. *Lawrence*, 516 U.S. at 170-71.

158. *Local No. 93*, 478 U.S. at 525-26.

159. See, e.g., *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (stating that courts have the "independent power to identify and apply the proper construction of governing law," rather than relying on the "particular legal theories advanced by the parties"); *Cravens*, *supra* note 2, at 251-52 (arguing that judges should exercise "their discretion to improve the law by implementing the most correct reasoning" in the matters before them); *Frost*, *supra* note 49, at 461-62, 516 (identifying a range of circumstances under which courts can examine new issues in order to avoid making "inaccurate or misleading statements of law"); *Oldfather*, *supra* note 32, at 172 (explaining that a court must "come[] to terms with the parties' dispute," but "depart[] from the parties' view of the dispute if they have mischaracterized its nature or overlooked some factor that is key to its resolution"); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 593 (1983) ("Given the importance of the courts' expository role in the federal legislative process and of their role as the guardians and interpreters of fundamental rights, exposition rather than dispute resolution should be viewed as the primary function of the courts."); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 290 (1990) ("Once an issue is framed to the Court's satisfaction, the presence of adverse parties becomes unimportant, whatever the stage of litigation, since the primary goal is to resolve the issue, not to settle a dispute between parties."); William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 639 (1980) ("When it appears in the course of litigation that a lawyer's performance is falling short, it should be the trial judge's responsibility, as the person responsible for the manner in which justice is administered in his court, to take appropriate action."). Professors Michael Abramowicz's and Thomas B. Colby's creative proposal for notice-and-comment judicial decisionmaking, under which judges would post draft opinions on the Internet to solicit responses from members of the public, also is implicitly based on the premise that judicial opinions should be as accurate as possible. See Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1002 (2009).

160. *Milani & Smith*, *supra* note 5, at 263 (arguing that *sua sponte* appellate court rulings violate due process because they "adversely impact the life, liberty, or property of a party without giving that party an opportunity to be heard on the issue that the court deems dispositive."); *Miller*, *supra* note 5, at 1297 ("An appellate court should always ask for the parties' submissions before ruling."). But see *Trest v. Cain*, 522 U.S. 87, 92 (1997) (declining to rule "that a court must always ask for further briefing when it disposes of a case on a basis not previously argued," but holding that requesting supplemental briefing

More broadly, if the court believes there may be a violation of a rule of procedure or evidence, it should alert the parties to the issue to request their views. And if the court identifies on its own an issue that directly bears on the case—such as a potentially meritorious cause of action or defense based on the pleadings or evidence before it—the court should bring it to the parties’ attention and give them the opportunity to litigate it, if they so choose.

The rest of this Part elaborates on and defends these conclusions. Section A begins by discussing the Constitution’s restrictions on the extent to which a court may be indifferent to the legal accuracy of its rulings. It contends that Article III’s prohibition on hypothetical lawsuits, which limits a court’s ability to issue substantive judgments in cases based on faulty factual premises, should be extended to preclude courts from entering judgments based on clearly incorrect legal premises as well. Section B explains that courts should go beyond this Article III minimum by adopting an accuracy-centric approach to adjudication. A court should issue rulings and judgments only if it believes that they rest on valid legal grounds, regardless of the procedural vehicle through which one or more litigants may deliberately or inadvertently attempt to avoid adversarial adjudication of an underlying issue. Finally, because most of this discussion focuses primarily on trial courts, Section C considers how these principles apply differently in appellate courts.

A. Article III Limits on Judicial Inaccuracy

Article III limits a court’s ability to adjudicate cases based on unexamined, incorrect legal premises. It is well-established that courts must confirm their subject-matter jurisdiction, *sua sponte* if necessary, and adjudicate any factual or legal issues relating to it.¹⁶¹ For example, if litigants attempt to stipulate that the amount-in-controversy requirement for a diversity case in federal court is only \$50,000 or try to maintain a diversity case despite the fact that one of the plaintiffs lives in the same state as one of the defendants,¹⁶² the court would be obligated to raise the issue itself and dismiss the case.¹⁶³

Article III likewise requires courts to confirm *sua sponte* that the cases and controversies before them are justiciable. Among other

is “often fairer”); Cravens, *supra* note 2, at 294 (“[T]he process need not be unreasonably delayed by requirements for supplemental briefs or arguments.”).

161. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (“When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived or forfeited.” (citations omitted)).

162. See 28 U.S.C. § 1332(a)(1) (2012).

163. See, e.g., *Bialac v. Harsh Bldg. Co.*, 463 F.2d 1185, 1186 (9th Cir. 1972) (per curiam).

things, Article III's justiciability requirement prohibits courts from adjudicating "hypothetical" disputes.¹⁶⁴ A dispute is hypothetical and non-justiciable if it is based on, or arises from, certain types of incorrect or false factual premises, regardless of whether the litigants themselves choose to dispute those facts.

For example, in *Bartemeyer v. Iowa*, the plaintiff sought to challenge the constitutionality of an Iowa law prohibiting the sale of alcohol under the Fourteenth Amendment's Due Process Clause.¹⁶⁵ To state a valid claim for the deprivation of a property interest, the plaintiff had to show that he had owned the alcohol that he then wished to sell back when the challenged statute went into effect, which was several decades earlier in 1851.¹⁶⁶

The plaintiff had alleged before the trial court that he had owned the liquor at issue before the law's enactment, and the State never contested the allegation.¹⁶⁷ The Supreme Court observed, "It is absurd to suppose that the plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whiskey prior to the prohibitory liquor law of 1851."¹⁶⁸ It went on to hold that the State's failure to challenge that allegation, "which carried on its face the strongest probability of its falsehood, satisfies us that a moot case was deliberately made up to raise the [issue of the law's constitutionality] when the real facts of the case would not have done so."¹⁶⁹ Thus, the Court held that parties could not manufacture a justiciable case simply by stipulating to, or failing to contest, the underlying facts, at least where they seemed facially false.

164. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (distinguishing "[a] justiciable controversy" from "a difference or dispute of a hypothetical or abstract character"); *accord* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 57 (1976) (Brennan, J., concurring); *Benton v. Maryland*, 395 U.S. 784, 788 (1969); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936); *see also* *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (rejecting liberal justiciability standards that "would require federal courts to determine the constitutionality of state laws in hypothetical situations"); *Mistretta v. United States*, 488 U.S. 361, 410 n.32 (1989) ("We do not address the hypothetical constitutional question whether, under the Compensation Clause of Article III, a district judge removed from the Commission must continue to be paid the higher salary.").

165. 85 U.S. (18 Wall.) 129, 132 (1873).

166. *Id.* at 132-34.

167. *Id.* at 134.

168. *Id.* at 135.

169. *Id.* (emphasis omitted); *see also* *California v. San Pablo & Tulare R.R.*, 149 U.S. 308, 314 (1893) (dismissing case as moot after the State acknowledged that the opposing party had paid the taxes at issue, because "[n]o stipulation of parties or counsel . . . can enlarge the power, or affect the duty," of a court to avoid "decid[ing] moot questions or abstract propositions" and to refrain from "declar[ing], for the government of future cases, principles or rules of law which cannot affect the result . . . in the case before it").

The Court reached a similar conclusion in *Swift & Co. v. Hocking Valley Railway Co.*¹⁷⁰ The Interstate Commerce Commission (“ICC”) had issued an order authorizing railroads to charge additional fees for railroad cars that were left unloaded on railroad tracks for more than forty-eight hours, regardless of whether the railroads themselves owned the tracks. Pursuant to this order, the plaintiff railroad levied extra charges against the defendant meat packer for failing to unload its private cars within forty-eight hours after they arrived at their destination.¹⁷¹ The meat packer refused to pay, claiming that the ICC order and additional charges were unconstitutional as applied, because its car had been left on the meat packer’s private tracks.¹⁷² The meat packer maintained that the Due Process Clause prohibits the Government from allowing an entity to be charged fees for leaving a railroad car on tracks that the entity itself owns.

The railroad sued to recover the additional fees. At trial, the railroad and meat packer stipulated “that the track on which the cars in question were placed was the private track of [the meat packer].”¹⁷³ The Supreme Court held it was unnecessary to consider the meat packer’s constitutional claims because “the record discloses, contrary to the statement in the stipulation, that the track in question was not a ‘private track.’”¹⁷⁴ Emphasizing that parties may not stipulate to, or avoid contesting, facts in order to obtain a judicial ruling, the Court “treat[ed] the stipulation . . . as a nullity.”¹⁷⁵ Because the railroad company had actually owned the track on which the meat packer had left its railroad cars, the Court concluded that the additional charges were reasonable and constitutionally permissible.¹⁷⁶

This point was reaffirmed more recently in *Poe v. Ullman*, where the Court held that the plaintiffs could not challenge a state contraception law because they did not face a credible fear of prosecution under it.¹⁷⁷ Reaffirming that it was not bound by a plaintiff’s allegations, a defendant’s admissions, or the parties’ stipulations,¹⁷⁸ the Court held that the purported threat of prosecution in *Poe* “collides with plausibility.”¹⁷⁹ Conversely, the Court has “encouraged” parties to conduct litigation “amicabl[y],” such as by “mutually admit[ting] facts *which they know to be true*, . . . without requiring proof,” in or-

170. 243 U.S. 281 (1917).

171. *Id.* at 284.

172. *Id.*

173. *Id.* at 285.

174. *Id.* at 286 (emphasis omitted).

175. *Id.* at 289.

176. *Id.* at 290.

177. 367 U.S. 497 (1961).

178. *Id.* at 501.

179. *Id.*

der to “bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay.”¹⁸⁰ The Court’s qualification is important—it does not extend to stipulations of inaccurate facts.

These cases collectively establish that courts are affirmatively required, at least to some extent, to traverse uncontested facts and stipulations to ensure that a justiciable dispute exists between the parties. Although these cases all involved constitutional challenges, the Court did not rely on any special canon of constitutional avoidance, but rather general justiciability concerns that are equally applicable to non-constitutional cases.¹⁸¹ The duty to ensure the accuracy of the facts necessary for a case to be justiciable is triggered, at the very least, when litigants rely on “absurd”¹⁸² or “[im]plausib[le]”¹⁸³ contentions, or their allegations or stipulations are contrary to other evidence in the record.¹⁸⁴

Although courts distinguish between “facts” and “law” in numerous respects,¹⁸⁵ it seems that, at least to some extent, the legal underpinnings of a lawsuit also must be accurate for a justiciable dispute to exist under Article III. If Article III requires courts to ensure that litigants do not deliberately or inadvertently manufacture a non-justiciable, hypothetical controversy, it should not matter whether they do so by failing to contest a key fact that creates a need for judicial intervention or an inaccurate legal premise.

Article III’s prohibition on hypothetical suits can have many implications for legal issues that the parties do not contest. Most obviously, if litigants assume that a statute exists when in fact it has been repealed, any rulings the court makes concerning the statute would be purely hypothetical.¹⁸⁶ The “law” at issue is not actually binding. Even if the litigants implicitly or expressly have consented to having their dispute adjudicated based on the non-existent statute,

180. *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850) (emphasis added).

181. *Cf.* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

182. *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 135 (1873).

183. *Poe*, 367 U.S. at 501.

184. *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 313-14 (1893).

185. The fact-law distinction is reflected, in part, in the differing roles of the judge and jury. *See* U.S. CONST. amends. VI, VII. Such a distinction also is reflected in the numerous ways that courts treat “adjudicative facts” differently from “legislative facts.” *See* FED. R. EVID. 201; *cf.* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942). Of course, some commentators have challenged the distinction between questions of fact and questions of law. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003); *see also* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 867 (1992) (“Positive propositions about the law are a species of factual claims.”).

186. *Cf.* U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447-48 (1993).

the controversy would be just as hypothetical as if they agreed to have the matter adjudicated based on incorrect or false facts (such as a stipulation that a particular railroad track is “private,” rather than owned by a railway carrier¹⁸⁷).

The same is true if litigants incorrectly interpret or apply a particular element of a legal provision or common-law cause of action, or otherwise fail to point out that a prerequisite or other requirement for relief has not been satisfied. For example, if a defendant neglects to recognize that the alleged duty in the plaintiff’s tort claim does not exist, it can lead the court to engage in unnecessary adjudication of other essentially hypothetical issues. The court would have to determine, *assuming* that the defendant owed a duty to the plaintiff—a duty that the law does not actually impose—whether the defendant breached that duty and what damages the plaintiff suffered as a result. A similar analysis would apply to the elements of a statute or regulation as well.

The Court has applied Article III’s prohibition on “hypothetical” suits somewhat narrowly, requiring courts to reject only facially implausible or incredible facts, or facts that the evidentiary record establishes to be false, when the existence of a justiciable controversy depends upon them.¹⁸⁸ There are several possible ways in which this standard could be applied to inaccurate legal premises upon which a case rests. For example, a court could be required to reject such a premise only if its invalidity would be deemed “plain” under the “plain error” standard in *United States v. Olano*.¹⁸⁹ An error is “plain” if it is “clear,”¹⁹⁰ “obvious or readily apparent,”¹⁹¹ and not “subject to reasonable dispute.”¹⁹²

The “clearly established” standard from the qualified immunity context might be applied instead.¹⁹³ A right is deemed “clearly established” if any “reasonable official would understand that what he is doing violates [it].”¹⁹⁴ “[E]xisting precedent must have placed the statutory or constitutional question beyond debate.”¹⁹⁵ In applying this standard, the court must consider the issue “at the appropriate

187. *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 285-86, 290 (1917).

188. See *supra* notes 182-84 and accompanying text.

189. 507 U.S. 725, 732 (1993); see also *United States v. Young*, 470 U.S. 1, 15 (1985).

190. *Olano*, 507 U.S. at 734.

191. *Young*, 470 U.S. at 17 n.14.

192. *Puckett v. United States*, 556 U.S. 129, 135 (2009).

193. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

194. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

195. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

level of specificity.”¹⁹⁶ A right seldom will be deemed “clearly established” based solely on “general proposition[s]” in earlier, factually distinguishable cases.¹⁹⁷ Rather, there must be close factual similarities between a precedent and a subsequent fact pattern.

Under either of these standards for applying Article III’s prohibition on hypothetical suits, a court would have a duty to ensure that litigants do not base a lawsuit on legal propositions that clearly and specifically have been rejected by binding precedents or that otherwise are clearly inconsistent with such cases.

B. *Accurate or Adversarial Adjudication?*

Courts should go beyond the bare Article III minimum discussed above in Section A and adopt an accuracy-centric approach to adjudication by striving to ensure that legal issues in the cases before them are identified and resolved in accordance with the applicable law. At a minimum, a court should not accept litigants’ attempts to obtain substantive rulings and judgments while avoiding adversarial adjudication of a case or legal issues within a case. When a litigant seeks some form of relief from a court—such as by seeking a default judgment, filing a motion, confessing error,¹⁹⁸ submitting proposed stipulations of law, or requesting judicial approval of a consent decree—the court should not grant the request unless it is persuaded that the litigant is substantively entitled to it. Moreover, if the court identifies for itself a potentially meritorious legal issue, cause of action, or defense arising from the “nucleus of operative fact”¹⁹⁹ that the litigants have presented to it, the court should bring the issue to the parties’ attention and give them the opportunity to litigate it.

Judges can identify potential issues and concerns based on the standard research they typically conduct in connection with the cases before them, their general backgrounds as attorneys, and their experience with other, similar cases and issues.²⁰⁰ Under an accuracy-

196. *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *see also Anderson*, 483 U.S. at 639-40; *cf. United States v. Lanier*, 520 U.S. 259, 271 (1997) (“[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . .”).

197. *al-Kidd*, 131 S. Ct. at 2084.

198. Strictly speaking, a confession of error may not, in itself, seek relief from a court, but such confessions typically arise in the context of requests that a lower court’s ruling be reversed and the case be remanded for further proceedings in accordance with the litigant’s new position.

199. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

200. *Cf. Cravens*, *supra* note 2, at 252 (“[P]ersonal experience, reflection, or research indicates to the judge that there is a better argument than any of those actually presented to the court by the parties.”). Cravens explains, “[T]he reality of judicial resources must preclude an absolute obligation on the part of appellate judges to ensure that all possible arguments or legal reasons have been presented.” *Id.* at 294.

centric approach, judges would not be required to perform extensive independent research or analysis, but also would no longer be permitted to ignore significant issues that they naturally recognize in the course of adjudicating a case. Litigants that wish to exercise complete control over the contours of a case and retain the right to have it adjudicated according to their own premises—regardless of whether those premises actually correspond with the applicable law—are free to either seek private arbitration or negotiate their own private settlement agreement.²⁰¹

To a layperson, the notion that courts should strive to ensure that their rulings and judgments are legally accurate likely would seem uncontroversial. The traditional conception of the American judicial process, however, is that litigants are entitled to shape their lawsuit and determine the issues the court should adjudicate. Under this view, judges must remain in a primarily passive role, addressing only questions that the litigants themselves have raised.²⁰² Lon Fuller, for example, argued that “the distinguishing characteristic of adjudication” is that each affected party may participate by “presenting proofs and reasoned arguments for a decision in his favor.”²⁰³ He explained that courts therefore should resolve lawsuits on the grounds presented by the parties:

[T]he bond of participation by the litigant is most secure when the arbiter rests his decision wholly on the proofs and argument actually presented to him by the parties. . . . [I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant—then the adjudicative process has become a sham, for the parties’ participation in the decision has lost all meaning.²⁰⁴

Owen Fiss and Abram Chayes concur that, under the traditional model of adjudication, the judge is required “to stand as umpire or observer between the two disputants, relying on all their initiatives for the presentation of the facts and the law and the articulation of

201. See *supra* Part III.

202. See, e.g., *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”); Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412-13 (1978) (arguing that a court’s ruling generally “ought to proceed from and be congruent with [the parties] proofs and arguments”); Frost, *supra* note 49, at 449 (discussing the traditional, party-centric view of the judicial role).

203. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

204. *Id.* at 388.

the possible remedies.”²⁰⁵ As Gary Lawson contends, “If the parties agree on a proposition, that proposition simply is not in dispute, and it is far from obvious why a court should try to resolve it.”²⁰⁶ Indeed, Erwin Chemerinsky goes so far as to caution that raising issues that the parties themselves did not place in dispute puts courts “in the position of rendering unconstitutional advisory opinions.”²⁰⁷

Even for those who believe that the adversarial process is a critical, immutable feature of the American judicial system, there are numerous reasons why an accuracy-centric view of adjudication nevertheless may be appealing. Most discussions of whether courts should raise and address issues that the litigants themselves have not identified frame the matter as a clash between a court’s responsibility to declare the law (its “expository” role) and its duty to resolve disputes.²⁰⁸ Under this view, a court should transcend the specific issues and arguments raised by litigants in order to ensure that the precedents it creates are accurate²⁰⁹ and that it properly performs its fundamental constitutional role of “say[ing] what the law is.”²¹⁰

These scholars are absolutely correct in emphasizing the need for courts to ensure the development of accurate precedents. In focusing on the judiciary’s role in law exposition, however, these arguments tend to minimize the proper performance of its dispute resolution

205. Fiss, *Forms of Justice*, *supra* note 145, at 24; *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976).

206. Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1219 (2011). Lawson goes on to explain:

If the parties hired a private arbitrator, they could specify as broad or narrow a function for that arbitrator as they wished, provided that they could agree on the scope of the case. To the extent that courts are, in essence, a form of compulsory arbitration, there would seem to be a *prima facie* case for giving parties the same power, subject only to whatever constraints are imposed by the jurisdictional limits of the relevant tribunal.

Id. at 1221.

207. Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287, 302 (2000); *see also id.* at 304 n.61.

208. *See, e.g.*, Bandes, *supra* note 159, at 234; Chayes, *supra* note 205, at 1282-86; Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1202-03 (2000); Fiss, *Forms of Justice*, *supra* note 145, at 24-31; Frost, *supra* note 49, at 451-52; Oldfather, *supra* note 32, at 137-38; Spann, *supra* note 159, at 585-86.

209. Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part I*, 7 WIS. L. REV. 91, 100 (1932); Frost, *supra* note 49, at 453; Oldfather, *supra* note 32, at 131.

210. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see* Cravens, *supra* note 2, at 251-52 (arguing that courts “serve in some respects as trustees or custodians of the law”); Spann, *supra* note 159, at 593 (arguing that courts’ primary role is “exposition” of the law); *cf.* Fiss, *Forms of Justice*, *supra* note 145, at 2-14 (arguing that the function of the judiciary is to give meaning to public values, particularly constitutional values).

role. Once a case has been brought before a court, the court would seem to have an inherent interest in ensuring that it is resolved accurately, in conformance with the applicable substantive law. Because the judiciary is institutionally responsible for adjudicating cases and controversies,²¹¹ it should not be indifferent to whether it is “doing justice as between the parties”²¹² by resolving their substantive disputes accurately.

Court orders can have dramatic consequences. A judgment might require the payment of substantial amounts of money or extinguish a potentially lucrative cause of action. An injunction carries the possibility of civil²¹³ and criminal contempt,²¹⁴ while a refusal to issue one allows a litigant’s conduct to continue unabated. And a criminal conviction often leads to imprisonment or other substantial restrictions on freedom, while an acquittal allows a potentially dangerous person to remain free. Courts have an important interest in ensuring that their awesome powers are applied under, and only under, legally appropriate circumstances, even if litigants themselves make missteps in the course of judicial proceedings.

Courts also are warranted in focusing on the accuracy of their rulings, rather than acceding to litigants’ deliberate or inadvertent attempts to avoid accurate adversarial adjudication of certain issues, because a court’s ruling often will impact third parties beyond the litigants themselves.²¹⁵ A court ruling can affect third parties both directly and indirectly, as well as through *stare decisis*. Even in purely private disputes, the imposition of substantial liability on a major company can limit the availability of certain goods or services to the public, lead to job losses or stagnant wages for innocent employees, and impact investors’ financial security. A large verdict against a smaller company can lead to bankruptcy, with reverberations felt by employees, creditors, and shareholders. And smaller verdicts can precipitate costly changes in businesses’ policies, internal precautionary measures, or insurance premiums that ultimately result in higher prices for consumers—which may especially impact the poor and middle class. In public law cases, in which courts ensure that government bureaucracies act in accordance with statutory and con-

211. U.S. CONST. art. III, § 1.

212. Oldfather, *supra* note 32, at 131; *see also* Schwarzer, *supra* note 159, at 638 (“[A judge] cannot be indifferent to events which diminish the quality of justice in his court.”).

213. *See, e.g.*, *City of Yonkers v. United States*, 487 U.S. 1251, 1256 (1988) (miscellaneous order) (Marshall, J., concurring in part and dissenting in part) (refusing to stay civil contempt fines of \$1 million daily against a city whose council refused to follow the district court’s order to pass an ordinance allowing the construction of public housing).

214. *United Mine Workers v. Bagwell*, 512 U.S. 821, 826-29 (1994) (explaining that criminal contempt can lead to punitive fines or imprisonment).

215. *Abramowicz & Colby*, *supra* note 159, at 979.

stitutional restrictions, the impact on third parties is likely to be even broader.²¹⁶ Because so many people stand to be directly and indirectly impacted by court rulings, there is a strong public interest in avoiding errors.

Furthermore, having courts focus on the substantive accuracy of their rulings and judgments, rather than simply addressing the particular issues or arguments litigants decide to raise, would bolster their institutional legitimacy.²¹⁷ The public is much more likely to support and abide by the decisions of a judiciary that is committed to resolving disputes accurately and in accordance with the applicable law than one that does not place a premium on issuing substantively correct rulings. People reasonably may question the efficacy or legitimacy of courts if they are perceived as being indifferent to achieving accuracy and substantive justice, and instead are willing to adjudicate cases based on parties' potentially inadvertent waivers of winning claims, issues, or arguments.²¹⁸

An accuracy-centric approach to adjudication also allows courts to minimize the unnecessarily harmful and undesirable adverse consequences of known, recurring, systemic deficiencies in the adversarial system. The adversarial system is not an inherent good, but rather a means to the end of achieving justice.²¹⁹ It is based primarily on the assumption that a clash between relatively equally matched adversaries will lead to the most accurate result, because they each will vigorously promote their client's interests while identifying deficiencies in their opponent's arguments.²²⁰ The quality of lawyering in a case, however, often is "uneven."²²¹ Moreover, litigation has grown to be time-consuming and expensive.²²² One side often will be able to have its attorneys devote a substantially greater amount of time researching legal issues, developing arguments, and perfecting its briefs than the other. In cases such as these, "the court is provided with lopsided information, which often leads to skewed results."²²³

Even when litigants are evenly matched in terms of counsel and resources, attorneys sometimes overlook issues and arguments.²²⁴ And institutional litigants often have strategic reasons for avoiding

216. See Chayes, *supra* note 205, at 1294; Fiss, *Forms of Justice*, *supra* note 145, at 43.

217. See Abramowicz & Colby, *supra* note 159, at 982-84; Cole, *supra* note 208, at 1225-26.

218. Cole, *supra* note 206, at 1225-26 (arguing that the courts' institutional integrity is harmed if their adjudicatory process "mak[es] it appear that courts exist to serve the whims of litigants and make decisions without regard to legal precedent").

219. See Schwarzer, *supra* note 159, at 638.

220. Milani & Smith, *supra* note 5, at 273; Schwarzer, *supra* note 159, at 637.

221. Abramowicz & Colby, *supra* note 159, at 986-87.

222. Schwarzer, *supra* note 159, at 635.

223. Abramowicz & Colby, *supra* note 159, at 986.

224. See Cravens, *supra* note 2, at 252-53.

certain issues or refusing to make certain arguments that may benefit them in a particular case but be against their long-term or broader interests.²²⁵ Thus, while there may be compelling reasons to rely on litigants to bring cases to a court's attention and shape their general contours,²²⁶ a purely adversarial process consistently can be expected to generate results that deviate from those otherwise required by the applicable law. When the adversarial system does not work as designed to present a court with the full range of pertinent issues and arguments in a case, and the court identifies potential issues or concerns on its own about the matter, the fundamental underlying goals that the adversarial system is intended to achieve would be furthered by allowing the court to invite the litigants to address them.

This Article's recommended approach to adjudication also would further the policy goals underlying most statutes and common-law causes of action. Parties who implicitly or explicitly attempt to litigate a case or issues within a case based on incorrect or incomplete legal premises effectively are attempting to have the court resolve the matter based on their own law (or their subjective understanding or interpretation of the law), rather than through accurate application of the laws that purportedly govern the matter.²²⁷ When statutes or the common law create rights, whether against the Government or a private party, the policies underlying those rights often will be frustrated when people satisfying the legally established criteria are prevented from engaging in the ostensibly permitted conduct or receiving the contemplated entitlement. Likewise, when a law allows a person to seek injunctive relief to stop certain conduct from occurring, the harms that the statute was intended to prevent by prohibiting that conduct will occur if a plaintiff who satisfies the statutory criteria is nevertheless unable to obtain an injunction.

Courts already have broad discretion to direct litigants to address legal issues, including non-jurisdictional ones, and to resolve motions and cases based on arguments the parties themselves did not raise.²²⁸ They also have the institutional capacity to identify and give litigants

225. See Frost, *supra* note 49, at 479; see also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-99 (1974) (explaining that large institutions which litigate frequently can look beyond the outcome of a particular case and develop their litigation strategies with an eye toward obtaining favorable rulings and precedents that will benefit them over the long term).

226. See Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 960 (1978) ("Appointment as a federal judge does not, to use the classic phrase, confer 'a roving commission to do good.'").

227. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971) (providing that a court may not abide by litigants' decision to apply the law of a particular jurisdiction if doing so would frustrate a "substantial policy" of some other jurisdiction that has a greater connection to the dispute).

228. See *supra* Part II.C-D.

the opportunity to address such issues fairly easily. Whereas courts generally lack access to the witnesses and evidence necessary to determine the underlying facts of a case, they can readily access the case law, statutes, regulations, legislative history, and other authorities they need to identify potential legal issues or arguments and resolve questions of law accurately. Adopting an accuracy-centric approach to adjudication would legitimize and systemize a practice that currently occurs sporadically, unpredictably, and typically without explanation.²²⁹

Many scholars have argued that judges have a responsibility to go beyond the parties' arguments to ensure the accuracy of their rulings only in certain types of cases. Professors Owen Fiss,²³⁰ Abram Chayes,²³¹ and Melvin Aron Eisenberg,²³² for example, have argued that courts must play an active role in public law cases to ensure the accuracy of their rulings. Professor Robert J. Pushaw makes a related argument, emphasizing the difference between "cases" and "controversies" within Article III's enumeration of the types of disputes over which federal courts may exercise jurisdiction.²³³ In a dispute that qualifies as a "case," the court's primary role is "to answer the legal question presented through 'exposition'—the process of ascertaining, applying, and interpreting the law," regardless of the parties' specific arguments.²³⁴ In a "controversy," by contrast, the judge "serve[s] principally as a neutral umpire whose decision bound only the immediate parties."²³⁵ Under Professor Pushaw's approach, a court's obligation and ability to ensure the accuracy of its rulings depends on the jurisdictional font under which the matter was brought. Professor Amanda Frost, offering a slightly different perspective, argues that courts should raise new issues when necessary to prevent "erroneous statements of precedent-setting law," "maintain control over interpretive methods," or "give voice to legislative enactments disfavored or ignored by the parties."²³⁶

While all of these scholars make persuasive points, their views of the importance of accuracy in judicial decisionmaking may be too narrow and rooted too deeply in the importance of the judiciary's

229. See *supra* note 49.

230. Fiss, *Forms of Justice*, *supra* note 145, at 24.

231. Chayes, *supra* note 205, at 1302.

232. Eisenberg, *supra* note 202, at 426-28 (supporting an exception to the norm of "strong responsiveness" to litigants' arguments for public law cases).

233. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448 (1994).

234. *Id.* at 449; see also *id.* at 473-74.

235. *Id.* at 450.

236. Frost, *supra* note 49, at 509.

role in interpreting the Constitution and federal laws.²³⁷ As this Section demonstrates, there are numerous other justifications for allowing courts to go beyond the precise issues and arguments that litigants raise in order to ensure that legal questions are answered properly and cases adjudicated in accordance with the underlying substantive law. Even when courts are playing a primarily dispute-resolution function, litigants, the public, and the judiciary itself all have strong interests in maximizing the accuracy of courts' rulings and cases' outcomes.

C. Accuracy on Appeal

The preceding discussion focused primarily on trial courts, but most of the justifications for adopting an accuracy-centric approach to adjudication apply equally (if not more so) to appellate courts. Appellate courts are subject to different institutional constraints than trial courts, however, that warrant modifications to the way in which this Article's recommendations should be applied.

An accuracy-centric approach is more likely to lead to potentially wasteful duplication of judicial effort in an appellate court than at the trial level. A trial court often will identify a claim, issue, or argument that the parties have overlooked before adjudicating a particular motion, resolving an issue, or fully trying the case. Bringing the matter to the litigants' attention and giving them the opportunity to address it under such circumstances generally does not result in wasted judicial effort. By the time a case is on appeal, however, the parties typically have been through lengthy proceedings at the trial level, except for certain interlocutory appeals such as those concerning class certification²³⁸ and preliminary injunctions.²³⁹ Raising a new issue or argument for the first time on appeal could lead to a reversal on grounds that the parties did not bring to the trial court's attention and require the trial court to duplicate its efforts.²⁴⁰ Conversely, when a new issue or argument leads an appellate court to reject a plaintiff's claims, the trial-level proceedings might have been brought to a speedier conclusion if the issue or argument had been raised there.

Furthermore, when additional evidence is necessary to satisfy the applicable legal standard or would help to elucidate an issue, litigants easily can introduce it before a trial court. Appellate courts

237. See *supra* notes 208-10 and accompanying text.

238. See FED. R. CIV. P. 23(f).

239. See 28 U.S.C. § 1292(a)(1) (2012).

240. See 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, 1565-66 (2012); Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 986-87 (1989).

generally are not equipped to accept new evidence, particularly for adjudicative, as opposed to legislative, facts. Remanding a case for a new hearing or trial to allow the litigants to expand the record to include the pertinent evidence would result in duplicative, time-consuming proceedings.

Many of these concerns can be avoided by requiring courts to adopt an accuracy-centric approach to adjudication that is consistent with the institutional constraints that apply to their position within the judicial hierarchy. Concerns about wasted judicial effort and appellate courts' inability to consider new evidence appear to be at their nadir regarding pure questions of law, particularly questions that would not require further proceedings in the lower court. Examples include arguments that the plaintiff has failed to state a claim, a party's evidence is legally insufficient to support its claims, a legal provision is unconstitutional, a certain statute does not give rise to a cause of action, or a particular cause of action does not allow for the award of certain kinds of relief (such as punitive damages, injunction, restitution, or specific performance). Allowing appellate courts generally to consider such issues in the first instance, or new arguments relating to such issues, would yield the benefits of an accuracy-centric approach to adjudication discussed above²⁴¹ without requiring the introduction of new evidence or leading to duplicative trial-court proceedings, regardless of how the appellate court resolves the issue.

Professor Richard Campbell cautions that encouraging appellate courts to address new issues or arguments would encourage appeals and give attorneys "an incentive to conceal errors during the trial in order that they might use them as grounds for a reversal on review, in case a decision below was adverse."²⁴² Although such gamesmanship occasionally might happen, it seems that litigants most often seek to raise new issues or arguments on appeal because their trial counsel inadvertently overlooked them.²⁴³ Most attorneys would be reluctant to surrender knowingly a "free bite at the apple" by foregoing the chance to raise an issue before the trial court, especially where the ruling might shape the course of the rest of the case or impact settlement negotiations.

Finally, to obtain a reversal on appeal, an attorney would have to show not only that an error occurred, but that it was prejudicial. Because many appellate courts are quick to dismiss errors as "harmless," it would be very risky for an attorney to game the system by attempting to sandbag opponents on appeal. In any event, if a court

241. See *supra* Part IV.B.

242. Campbell, *supra* note 209, at 92-93.

243. Dennerline, *supra* note 240, at 989 ("[A]n attorney who does not know of an issue at trial cannot be encouraged by any rule to raise it.").

determines that it would be inequitable to consider a new issue or argument, it would retain discretion to refuse to do so. The main function of an accuracy-centric approach would be to switch the strong presumption against consideration of new issues and claims in the first instance to a presumption in favor of it, at least where they would not require new evidence to resolve or the unnecessary duplication of trial-court proceedings.

V. OBJECTIONS TO AN ACCURACY-CENTRIC MODEL

At least four major objections may be raised against this Article's conclusion that courts should ensure that their rulings and judgments are substantively accurate, despite litigants' deliberate or inadvertent attempts to avoid adversarial adjudication of particular issues or arguments. Section A explains that courts should not be reluctant to ensure the substantive accuracy of their rulings based on concerns about evolving into an inquisitorial justice system. Section B shows that courts are institutionally equipped to reach accurate conclusions concerning claims, issues, and arguments, even if a litigant is not the one initially to raise them. Section C demonstrates that this Article's recommendations would not require courts to sacrifice their impartiality, while Section D shows that an accuracy-centric approach would not unduly delay judicial proceedings.

A. *Avoiding Inquisitorial Adjudication*

One major objection to allowing or requiring courts to consider non-jurisdictional issues *sua sponte* is that it would turn the adversarial system into an inquisitorial one.²⁴⁴ Professor David Alan Sklansky's observations about criminal procedure are true for all litigation—"A lengthy tradition in American law looks to the Continental, inquisitorial system of . . . adjudication for negative guidance about our own ideals. Avoiding inquisitorialism is taken to be a core commitment of our legal heritage."²⁴⁵

244. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); see also *United States v. Burke*, 504 U.S. 229, 246 (1992) (Souter, J., concurring) ("The rule that points not argued will not be considered . . . distinguishes our adversary system of justice from the inquisitorial one."); Jeffrey C. Metzcar, Note, *Raising the Defense of Procedural Default Sua Sponte: Who Will Enforce the Great Writ of Liberty?*, 50 CASE W. RES. L. REV. 869, 907 (2000). Of course, what constitutes an "inquisitorial" system varies from country to country and from time period to time period. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1681 (2009).

245. Sklansky, *supra* note 244, at 1636; see also *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (noting that an inquisitorial approach is "wholly foreign" to American practice); *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) ("[O]urs is an accusatorial and not an inquisitorial system . . ."); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report*

“The central characteristic of the inquisitorial model is the active role of the judge, who is given the principal responsibility for searching out the relevant facts. . . . [T]he evidence is developed in a predominantly unilateral fashion by the judge, and the lawyers’ role is minimal.”²⁴⁶ Justice Scalia contends, “What makes a system adversarial rather than inquisitorial” is that the judge “decides on the basis of facts and arguments pro and con adduced by the parties.”²⁴⁷ An inquisitorial system “allows the fact-finder free rein to follow all trails.”²⁴⁸ The American legal tradition regards inquisitorial systems as less accurate than an adversarial system, and many commentators contend that inquisitorial systems show less regard for litigants’ autonomy and dignitary interests.²⁴⁹

Simply dismissing a certain practice as “inquisitorial” does not seem a sufficient basis for rejecting it. Courts already are required to engage in purportedly inquisitorial analysis under certain circumstances, such as when they confirm *sua sponte* their subject-matter jurisdiction²⁵⁰ or assess the propriety of granting a default or unopposed motion for summary judgment.²⁵¹ Requiring courts to go further and apply an accuracy-centric approach to adjudication would leave the justice system fundamentally party-driven. Courts still would wait for parties to initiate proceedings and rely on the litigants to identify the contours of the case (i.e., the nucleus of operative facts that defines the dispute²⁵²). Under an accuracy-centric approach, when a court identifies potential new claims, issues, or arguments, it would give the parties an opportunity to address them, rather than unilaterally attempting to determine the proper resolution for itself. The fundamental structure of the adversary system would remain largely undisturbed. The desirability of having courts confirm for

of the Joint Conference, 44 A.B.A. J. 1159, 1160 (1958) [hereinafter *Joint Conference Report*].

246. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 74 (1998); see also *Hartmann v. Prudential Ins. Co.*, 9 F.3d 1207, 1214 (7th Cir. 1993) (explaining that the American legal system, unlike a European inquisitorial system, “is not geared to having judges take over the function of lawyers, even when the result would be to rescue clients from their lawyers’ mistakes”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 381-82 (1982) (pointing out that our system is adversarial rather than inquisitorial because “[p]arties, rather than officers of the state, control[] case preparation” and “its basic principle is that the parties, not the judge, have the major responsibility for and control over the definition of the dispute”).

247. *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

248. Peter Brett, *Legal Decisionmaking and Bias: A Critique of an “Experiment,”* 45 U. COLO. L. REV. 1, 22 (1973).

249. Frost, *supra* note 49, at 459; Milani & Smith, *supra* note 5, at 282.

250. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012).

251. See *supra* Part II.A–B.

252. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

themselves the accuracy of parties' legal assertions therefore should turn on considerations other than generic fears of inquisition.

B. Accuracy in the Absence of Adverseness

A closely related objection is that the absence of adversarial adjudication will hinder courts' attempts to resolve legal issues correctly.²⁵³ Many argue that the adversary process is a necessary safeguard to ensure courts achieve accurate results. "Through vigorous advocacy each party helps the court to perceive and to respond properly to weaknesses in the presentations made by the other parties. In addition, vigorous advocacy can illuminate facets of a case that are not immediately apparent and might not otherwise be considered by the court."²⁵⁴ The adversary system takes advantage of "the incentive of the contesting parties to search out relevant facts, policies, and authorities."²⁵⁵

Of course, it has long been recognized that adversarial adjudication "provides no guarantee that all pertinent arguments or theories will be presented to the court. One or more of the omitted theories may be in some way better for the resolution of the case than those the parties have put forward."²⁵⁶ As Owen Fiss points out, disparities in resources and incentives can greatly affect a party's ability to present its case persuasively.²⁵⁷ Thus, while adversarial presentation should remain a crucial cornerstone of the justice system, preventing courts from adjusting for its shortcomings seems unnecessarily harsh and dogmatic.²⁵⁸ A court may promote the adversarial system's purported goal of achieving accurate outcomes by ensuring that a case and the issues within it are decided in accordance with applicable

253. See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error . . ."); Milani & Smith, *supra* note 5, at 259-62 (discussing *Poyner v. Loftus*, 694 A.2d 69 (D.C. 1997), in which the court adjudicated an issue *sua sponte* and arrived at an outcome that was directly contrary to a squarely applicable statute); Freedman, *supra* note 246, at 73 ("[T]he adversary system is the method of dispute resolution that is most effective in determining truth . . .").

254. Spann, *supra* note 159, at 650.

255. Freedman, *supra* note 246, at 85. It also has been argued that the adversarial model shows greater respect for litigants, Milani & Smith, *supra* note 5, at 282 & n.205 (citing STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 35 (1988)), and makes it more likely they will accept the outcome of a case, see, e.g., JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 113-15 (1975); see also Milani & Smith, *supra* note 5, at 284-85.

256. Cravens, *supra* note 2, at 253; see also Sklansky, *supra* note 244, at 1687 (noting that there are "notorious gaps between an idealized version of the American adversary system and the system's actual, day-to-day operation").

257. Fiss, *Against Settlement*, *supra* note 144, at 1076-77; see also Fiss, *Forms of Justice*, *supra* note 145, at 24.

258. See *supra* notes 221-26 and accompanying text.

law, even when a litigant overlooks an applicable legal provision, argument, precedent, or claim.

C. *Preserving Impartiality*

One of Lon Fuller's main reasons for arguing that adverseness is critical to adjudication is that allowing judges to conduct their own legal inquiries, independent of the parties' arguments, encourages them to jump to conclusions and biases them in favor of one side.²⁵⁹ A joint report of the American Bar Association and Association of American Law Schools on the adversarial process, echoing this sentiment, states that identifying possible issues and arguments requires an arbiter to "put aside his neutrality."²⁶⁰ When it comes time to adjudicate such issues, the arbiter often is unable "to look with skepticism on the fruits of his efforts" and cannot "return[] to his neutral position."²⁶¹ The report elaborates that "what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention."²⁶²

Professor Freedman, also concurring with this critique, warns that when a judge engages in her own legal inquiries, it allows her "to ignore all trails but the one that initially appears to be the most promising . . . without the corrective benefit of investigation and presentation of evidence by active adversaries."²⁶³ Judith Resnik raised many of these same concerns about the increasing managerial role that the rules of procedure require judges to play in civil litigation.²⁶⁴ She contends, "Having supervised case preparation and pressed for settlement, judges can hardly be considered untainted if they are ultimately asked to find the facts and adjudicate the merits of a dispute."²⁶⁵

Such concerns seem overblown. As an initial matter, they arise from psychological assumptions rather than any empirical evidence.

259. Fuller, *supra* note 203, at 385-86; *see also* Freedman, *supra* note 246, at 85 ("[T]he adversary system is superior, because it mitigates the decisionmaker's tendency to judge prematurely . . .").

260. *Joint Conference Report*, *supra* note 245, at 1160.

261. Milani & Smith, *supra* note 5, at 274 (citing *Joint Conference Report*, *supra* note 245).

262. *Joint Conference Report*, *supra* note 245, at 1160.

263. Freedman, *supra* note 246, at 75.

264. Resnik, *supra* note 246, at 380 (arguing that "[m]anagement is a new form of 'judicial activism'"); *see also id.* at 414 (arguing that active judicial management of pretrial proceedings "breaks sharply from American norms of adjudication" in large part because it is "judge initiated").

265. *Id.* at 430 (footnote omitted).

Moreover, attorneys are trained to engage in “objective,” self-directed research in order to find the “correct” legal answers, or at least determine how a court of competent jurisdiction (or the pertinent appellate court) would resolve a particular issue.²⁶⁶ Indeed, such objective and predictive writing is among the first things that law students learn and constitutes a major part of an attorney’s client-counseling function.

It is unclear why a court is more likely to be biased by its own research into a potential issue or concern than if a litigant brings the issue to the court’s attention. Moreover, even if a litigant raises an issue, in many cases a court still will read the underlying cases for itself and perhaps perform supplemental research to identify further pertinent authorities that the litigants may have overlooked. The flexibility that the system already gives judges in adjudicating issues that the parties raise, as well as their broad discretion to consider issues beyond those that the parties contest,²⁶⁷ belies any real concerns about judicial partiality.

D. Preventing Delay

The most persuasive concern about encouraging judges to identify *sua sponte* and adjudicate new legal issues and arguments is not rooted in fears about undermining the adversarial process, reducing accuracy, or promoting judicial bias, but rather the sheer burden of such duties. Requiring judges to consider only legal issues and arguments that the parties expressly identify and adequately brief—as well as those narrow classes of issues properly classified as jurisdictional or plain error—allows already overburdened courts to process cases more quickly. To a certain extent, the desirability of making further tradeoffs between speed and ultimate accuracy is a policy matter. Courts, however, can shift back onto litigants the burden of establishing their substantive entitlement to the relief they seek—such as the granting of a motion, acceptance of a stipulation of law, or issuance of a consent decree—based on the underlying applicable law. The marginal time commitment for a court of adopting an accuracy-centric approach to adjudication therefore may not be as substantial as it might initially appear.

Moreover, even in an era of substantial judicial delays and backlogs, imposing on judges the duty to make sure that their substantive orders, rulings, and judgments are legally correct seems reasonable. If parties find the delay intolerable and would rather resolve their dispute on terms that may be, or are, legally incorrect, they generally remain free to do so through private settlements or

266. Cf. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457-58 (1897).

267. See *supra* Part II.C-D.

arbitration.²⁶⁸ There is little need to place a court's imprimatur on such *alegal* outcomes.

VI. CONCLUSION

There are many procedural vehicles through which parties expressly or implicitly may seek to have a court enter a substantive ruling, order, or judgment without fully considering the merits of the underlying case or particular issues within the case. Because all of these procedural vehicles ultimately implicate the same underlying issue—the extent to which a court may be indifferent about the legal accuracy of its rulings—a single, uniform standard should apply to all of them. Although Article III's prohibition on hypothetical lawsuits imposes outer limits on a court's ability to base a judgment on patently incorrect legal premises, courts should go well beyond that absolute minimum by adopting an accuracy-centric approach to adjudication.

A court should not issue a ruling, grant a motion, or award a judgment if it harbors doubts about the validity of the requesting party's legal premises or otherwise believes that such relief would be inconsistent with the applicable underlying law. If the litigants have failed to address a potentially valid claim, issue, or argument, the court should direct them to do so. If litigants wish to resolve their differences based on incorrect or unexamined legal standards, they remain free to do so through private arbitration or settlement agreements, rather than putting courts in the position of placing a judicial imprimatur on rulings or judgments that are not based on their best understanding of the law.

268. See *supra* Part III.