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THE *SINENENG-SMITH* DOCTRINE

*Zachary B. Pohlman**

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* Law Clerk to Judge Steven M. Colloton, United States Court of Appeals for the Eighth Circuit. J.D., Notre Dame Law School, 2021; B.A., Rockhurst University, 2018. Thank you to Bill Kelley for conversations about this project and to Julia for her support. Any errors are mine alone. Copyright © 2022 by Zachary B. Pohlman.

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INTRODUCTION

The Supreme Court’s October 2019 Term was full of noteworthy decisions. Among other significant cases, *Bostock* recognized that Title VII gives gay and transgender individuals a cause of action for workplace discrimination;¹ *June Medical Services* held that a Louisiana statute that restricted access to abortions was unconstitutional;² and *Our Lady of Guadalupe School* recognized the broad scope of the so-called “ministerial exception” that religious institutions enjoy in the employment context.³ Like these cases, *United States v. Sineneng-Smith*⁴ got a fair amount of attention in the popular media before it was decided.⁵ It had the potential to be a headline-worthy case at the intersection of First Amendment and immigration law. Compared to those other decisions, however, *Sineneng-Smith* was a dud. Rather than engage in the complex First Amendment question presented, the “Court ultimately decided *Sineneng-Smith* on procedural grounds.”⁶

¹ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

² *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020) (plurality opinion).

³ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

⁴ 140 S. Ct. 1575 (2020).

⁵ See, e.g., The Editorial Board, *Psst . . . I Want You to Illegally Immigrate*, WALL ST. J. (Feb. 27, 2020, 7:17 PM), <https://www.wsj.com/articles/psst-i-want-you-to-illegally-immigrate-11582849036> [<https://perma.cc/B4Y9-5PMQ>]; Lorelei Laird, *The Supreme Court May Criminalize Immigrant Advocacy*, SLATE (Nov. 18, 2019, 1:13 PM), <https://slate.com/news-and-politics/2019/11/supreme-court-criminalize-immigration-advocacy-sineneng-smith.html> [<https://perma.cc/3F55-GPYX>]; Adam Liptak, *Is It a Crime to Encourage Unauthorized Immigration? The Supreme Court Will Decide*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/us/politics/supreme-court-immigration-speech.html> [<https://perma.cc/T673-XJHD>]; Mark Joseph Stern, *An Anti-Immigrant Law That Goes Too Far, Even for the Supreme Court*, SLATE (Feb. 25, 2020, 5:35 PM), <https://slate.com/news-and-politics/2020/02/the-supreme-court-hears-arguments-in-united-states-v-sineneng-smith.html> [<https://perma.cc/494D-E7TS>].

⁶ Leading Cases, *United States v. Sineneng-Smith*, 134 HARV. L. REV. 480, 480 (2020).

Yet something curious has happened since *Sineneng-Smith* was decided. Despite the Court's "punting on the merits,"⁷ the lower courts are citing it routinely. In fact, in the first year following the *Sineneng-Smith* decision, the state and federal courts cited it in 134 cases.⁸ Despite its prevalence in the lower courts, though, *Sineneng-Smith* has received virtually no scholarly attention.⁹ This short and easily overlooked opinion is deceptively simple. It raises far more questions than it answers—questions that cut to the heart of the powers of the federal courts.

Sineneng-Smith reached the Supreme Court after a Ninth Circuit panel held that a federal statute was unconstitutionally overbroad, in violation of the First Amendment's Free Speech Clause.¹⁰ In the district court and on appeal, neither party advanced an overbreadth argument.¹¹ Rather, the Ninth Circuit appointed three amici, requested additional briefing on the overbreadth question, and ultimately decided the case on that basis.¹² A unanimous Supreme Court vacated the decision, holding "that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion."¹³

The Supreme Court has often extolled the importance of the "principle of party presentation." That principle, so fundamental to our adversarial system, teaches that the parties—not the courts—get to decide which questions a neutral and passive decisionmaker gets to resolve. But never before had the Supreme Court or any federal appeals court vacated a lower court decision for violating that principle. Despite its novelty as a basis for vacatur and remand, the Court said precious little about its power to enforce the party presentation principle. If we now have a *Sineneng-Smith* doctrine—a judicially enforceable party presentation principle—

⁷ *Id.*

⁸ I arrived at this number by conducting a Westlaw search for all cases that had cited *Sineneng-Smith* from May 7, 2020, to May 7, 2021.

⁹ The only piece of scholarship that has addressed *Sineneng-Smith* in any detail thus far is the *Harvard Law Review* case comment cited in note 6 above. That case comment, however, focuses mostly on the underlying First Amendment question that the Court did *not* decide. See generally Leading Cases, *supra* note 6.

¹⁰ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

lower courts and scholars must be the ones to grapple with its origins and implications.

This Article is the first to take up that task. The goal of this Article is to explore the scope and source of the *Sineneng-Smith* doctrine so as to further a more coherent and consistently applied doctrine going forward. Indeed, if the lower courts continue to cite *Sineneng-Smith* at the pace they have since the Court decided the case, they shouldn't hide behind the Supreme Court's silence as to the doctrine's most basic questions. Toward that end, this Article proceeds in four Parts.

I begin in Part I by discussing the adversarial system of adjudication and its relationship to the party presentation principle. Historically, American courts have adhered to the party presentation model of litigation, which relies on the parties to present issues to a court for resolution.¹⁴ In our system, courts thus act as neutral and passive decisionmakers and are limited to deciding questions the parties ask them to resolve. Part I also recounts in some detail the factual and procedural history of *Sineneng-Smith* as well as the Supreme Court's decision in that case, which turned the party presentation principle into an enforceable rule. The following Parts grapple with the open questions left by the Court's stated holding in *Sineneng-Smith*: a court abuses its discretion by deviating too far from the party presentation principle.

Part II addresses one of those open questions: What is the scope of the *Sineneng-Smith* doctrine? I describe four distinct ways in which the *Sineneng-Smith* doctrine could be understood. On one end of the spectrum, a "strong" conception of the *Sineneng-Smith* doctrine would limit courts to deciding legal questions on the basis of only the specific legal theories the parties advance. At the other extreme, the "weakest" conception of the *Sineneng-Smith* doctrine would only prohibit courts from holding that a statute is unconstitutionally overbroad if the parties didn't themselves advance an overbreadth argument. I suggest that the best conception of the *Sineneng-Smith* doctrine—or, at least the one most likely to be applied by courts—is a somewhat "weak" version of the doctrine. A weak conception of *Sineneng-Smith* would

¹⁴ See *infra* Section I.A.

prohibit courts from injecting only constitutional questions or perhaps only overbreadth analyses when the parties themselves don't raise those issues.

Part III takes up another question fundamental to the *Sineneng-Smith* doctrine: Where does it come from? The Court cited no statute for its authority to enforce the party presentation principle, and no statute seems to grant the Court that authority. If, then, the Court did have the authority to announce the *Sineneng-Smith* doctrine, it must have come from the Constitution itself. Some commentators have argued that an enforceable party presentation principle—one that prohibits *sua sponte* judicial decision making—is rooted in the Due Process Clause.¹⁵ If not from due process, an enforceable party presentation principle might also come from Article III itself, either as an exercise of the Court's "judicial power" or pursuant to its "supervisory authority" over the lower federal courts.¹⁶ For reasons I explain, neither the due process nor Article III accounts is persuasive. Rather, if the Supreme Court has the authority to police lower courts for deviations from the party presentation principle—and the Justices' unanimous silence on this point in *Sineneng-Smith* would indicate that it does—then it must be lodged elsewhere.

I propose in Part III two possible constitutional bases for the *Sineneng-Smith* doctrine. First, the Court's enforcement of the party presentation principle might be inextricably intertwined with the First Amendment overbreadth doctrine. Overbreadth is "strong medicine" that the Court discourages the lower courts from using.¹⁷ The *Sineneng-Smith* doctrine therefore might be a further limitation on the use of overbreadth to invalidate speech-restrictive laws: only parties, never a court, can raise an overbreadth argument. Alternatively, the *Sineneng-Smith* doctrine might be constitutional but have no basis in the constitutional text. Under this theory, it could serve as a "constitutional backdrop"—that is, a legal rule that was in force when the Constitution was enacted and, because it has not been abrogated since, remains in effect today.¹⁸

¹⁵ See *infra* Section III.A.

¹⁶ See *infra* Section III.B.

¹⁷ *Sineneng-Smith*, 140 S. Ct. at 1581 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

¹⁸ See *infra* Section III.D.

Lastly, Part IV evaluates the implications of the source of the *Sineneng-Smith* doctrine on three areas of practical significance: the scope of the doctrine, its effect on state courts, and its effect on the Supreme Court itself. Part IV also considers the implications of one final possibility: perhaps *Sineneng-Smith* was wrongly decided. A conclusion follows.

I. THE PARTY PRESENTATION PRINCIPLE

A. *The Adversarial System and Party Presentation*

American courts—federal and state alike—operate according to an adversarial system of adjudication.¹⁹ Two main features characterize adversarial systems: (1) party presentation of the issues and evidence, and (2) a neutral and passive decisionmaker.²⁰ Taken together, American courts are therefore ones in which “the parties, not the judge, have the major responsibility for and control over the definition of the dispute.”²¹ Our adversarial system stands in stark contrast to the judge-dominated inquisitorial models of continental Europe.²² As one commentator described it, the U.S. system “exploits the free-wheeling energies of counsel and places

¹⁹ See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981) (“[O]ur adversary system presupposes[] accurate and just results are most likely to be obtained through the equal contest of opposed interests”); *Friedman v. Dozorc*, 312 N.W.2d 585, 592 (Mich. 1981) (recognizing a “public policy of maintaining a vigorous adversary system”).

²⁰ See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) (“The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard.”).

²¹ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982).

²² See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (“What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”); Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE 109, 109 (1992) (“[I]nquisitorial trials are conducted by the state’s representative, the judge. The role of attorneys is largely confined to suggesting additional questions for the judge to ask witnesses. In the adversary system, the judge is a relatively passive party who essentially referees investigations carried out by attorneys.”). See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (comparing the roles of lawyers and judges in the American and German legal systems).

them in adversary confrontation before a detached judge,” whereas the “German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal.”²³ The adversarial system then, while not uniquely American,²⁴ embodies the specially American qualities of self-determination, evenhanded administration of justice, and the search for truth.²⁵ Not only do those litigating in the United States get their day in court—they get to choose *how* their case is litigated as well.

The so-called “principle of party presentation” is a defining characteristic of the American adversarial system.²⁶ Under that principle, courts “rely on the parties to frame the issues for decision” and act only as “neutral arbiter[s] of matters the parties present.”²⁷ An oft-cited appellate court principle, courts and commentators have described it both as a “general rule”²⁸ and as a “norm.”²⁹ That is, while it lays the foundation for the American adversarial system and distinguishes ours from inquisitorial models,³⁰ American lawyers have always understood the party presentation principle to be just that—a principle, not an absolute rule.³¹

Courts have thus crafted a number of exceptions to the principle of party presentation. Most notably, a court may question

²³ Benjamin Kaplan, *Civil Procedure — Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 431-32 (1960).

²⁴ The adversarial model first developed in English courts with the rise of juries. See Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 720-24 (1983).

²⁵ Cf. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1685-88 (2009) (describing functionalist arguments for anti-inquisitorialism in criminal law proceedings).

²⁶ *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

²⁷ *Id.*

²⁸ *Id.* at 243-44.

²⁹ See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 455 (2009); Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845, 845 (1996).

³⁰ See *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) (“The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”).

³¹ See Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 8 (2014) (“The dominance of party choice, though robust and widespread, is not inviolate.”).

sua sponte, at any stage in litigation, whether it has subject matter jurisdiction.³² As courts of limited jurisdiction, federal courts in particular have an affirmative duty to assure themselves that they have statutory and constitutional authority to hear a case.³³ Because jurisdiction is typically defined as a court's "power," parties cannot waive, consent to, or forfeit subject matter jurisdiction, the party presentation principle notwithstanding.³⁴ Courts have also recognized other exceptions to the party presentation principle that touch upon their capacity or suitability to hear a case. Such exceptions allow courts to raise *sua sponte* questions that implicate standing, political questions, feigned and collusive suits, federalism, and international relations.³⁵ A few courts have stretched the exceptions further, also allowing departures from the principle to avoid a miscarriage of justice, decide a significant question of great public concern, preserve the integrity of the judicial process, and avoid prejudice or inequity to the adverse party, especially when that party is a *pro se* litigant.³⁶

For its part, the Supreme Court purports to be a staunch defender of the adversarial system generally and the principle of party presentation specifically.³⁷ In one of its most explicit discussions of party presentation, the Court stressed its importance in both trial and appellate courts, emphasizing that courts "should not[] sally forth each day looking for wrongs to right" but should rather "wait for cases to come . . . [and] decide only questions presented by the parties."³⁸ In other instances, the Court has warned that "a federal court does not have *carte blanche* to depart

³² See FED. R. CIV. P. 12(h)(3).

³³ See, e.g., *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("[I]t is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.").

³⁴ See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law . . ."); see also *Dodson*, *supra* note 31, at 8 ("Either the court has subject matter jurisdiction or it does not, and, if it does not, party action cannot create it.").

³⁵ See *Frost*, *supra* note 29, at 462.

³⁶ See, e.g., *Starship Enters. of Atlanta, Inc. v. Coweta County*, 708 F.3d 1243, 1254 (11th Cir. 2013); *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012); *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006); *P.R. Tel. Co. v. T-Mobile P.R. LLC*, 678 F.3d 49, 58 n.4 (1st Cir. 2012).

³⁷ See generally *Sklansky*, *supra* note 25.

³⁸ *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing en banc)).

from the principle of party presentation”³⁹ and has lauded the principle as “basic to our system of adjudication.”⁴⁰ Moreover, Justice Scalia once observed that “[o]ur adversary system is designed around the premise that the parties know what is best for them,” which leads to the conclusion that the parties “are responsible for advancing the facts and arguments entitling them to relief.”⁴¹ In other words, party presentation is bound up with the adversary system—parties present a case or controversy, and an impartial and passive judiciary resolves it.⁴²

Despite its rhetoric, the Supreme Court had not specified when or how a lower court violates the party presentation principle. It had stated only that “when to deviate from [the party presentation principle is] a matter ‘left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.’”⁴³ In previous cases, the Court had always “stopped short of stating a general principle to contain appellate courts’ discretion.”⁴⁴ Then came *Sineneng-Smith*.

B. United States v. Sineneng-Smith

While the Court disposed of the case before reaching the merits, the facts underlying *Sineneng-Smith* may be inextricably tied to the doctrine itself and are thus worth recounting.⁴⁵ Evelyn Sineneng-Smith “operated an immigration consulting firm” in California.⁴⁶ Sineneng-Smith assisted clients, most of them from

³⁹ *Wood v. Milyard*, 566 U.S. 463, 472 (2012).

⁴⁰ *Arizona v. California*, 530 U.S. 392, 412-13 (2000).

⁴¹ *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment).

⁴² *See Frost*, *supra* note 29, at 449; *cf. United States v. Johnson*, 319 U.S. 302, 305 (1943) (“[T]he ‘honest and actual antagonistic assertion of rights’ . . . [is] a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court.”) (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)); *Ereckman v. United States*, 416 U.S. 909, 913 (1974) (Marshall, J., dissenting from denial of writ of certiorari) (“In our adversary system, it is enough for judges to judge.”) (quoting *Dennis v. United States*, 384 U.S. 855, 874-75 (1966)).

⁴³ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

⁴⁴ *Id.*

⁴⁵ *See infra* Section III.C.

⁴⁶ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1577 (2020).

the Philippines, in obtaining a “labor certification” that formerly allowed certain aliens to become lawful permanent residents permitted to work in the United States.⁴⁷ To qualify for such a certification, “an alien had to be in the United States on December 21, 2000, and apply for certification before April 30, 2001.”⁴⁸ Sineneng-Smith knew her clients did not meet these specifications and that they could not become lawful permanent residents.⁴⁹ She nonetheless charged each client over \$6,000 to file an application.⁵⁰ Sineneng-Smith collected over \$3.3 million from her clients for her services.⁵¹

The United States successfully prosecuted Sineneng-Smith under 8 U.S.C. § 1324.⁵² That statute makes it a federal felony to “encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.”⁵³ In the district court and on appeal to the Ninth Circuit, Sineneng-Smith argued that § 1324 “did not cover her conduct,” and that if it did, it violated the First Amendment’s Petition and Free Speech Clauses as applied to her.⁵⁴ The district court disagreed and upheld Sineneng-Smith’s conviction.⁵⁵

The Ninth Circuit took a different approach. Rather than adjudicate the case the parties framed, the panel appointed three amici to brief and argue issues the parties had not previously litigated.⁵⁶ As is relevant here, the appeals court requested briefing on “[w]hether the statute of conviction is overbroad . . . under the First Amendment.”⁵⁷ Sineneng-Smith herself had not previously made an overbreadth argument; only after the amici filed their

⁴⁷ *Id.* at 1577-78; 8 U.S.C. § 1255(i)(1)(B)(ii).

⁴⁸ *Sineneng-Smith*, 140 S. Ct. at 1578; 8 U.S.C. § 1255(i)(1)(B), (C).

⁴⁹ *Sineneng-Smith*, 140 S. Ct. at 1578.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* Sineneng-Smith was also convicted on additional counts, which included filing false tax returns and mail fraud, but those convictions were not challenged on appeal. *Id.*

⁵³ 8 U.S.C. § 1324(a)(1)(A)(iv). The crime also carries an enhanced penalty if “done for the purpose of commercial advantage or private financial gain.” *Id.* § 1324(a)(1)(B)(i).

⁵⁴ *Sineneng-Smith*, 140 S. Ct. at 1578.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1580-81.

briefs did Sineneng-Smith adopt the overbreadth argument as her own.⁵⁸

The Ninth Circuit ultimately reversed Sineneng-Smith's conviction on that basis—that § 1324 is unconstitutionally overbroad.⁵⁹ In its eventual review of that judgment, the Supreme Court considered two additional facts regarding the panel's handling of the appeal. First, the parties were “permitted, but ‘not required,’ to file supplemental briefs ‘limited to responding to any and all amicus/amici briefs.’”⁶⁰ Second, the Ninth Circuit allotted the amici twenty minutes for oral argument but gave Sineneng-Smith only ten.⁶¹ The government petitioned for Supreme Court review because the appeals court invalidated a federal statute and created a circuit split.⁶² The Court granted certiorari to resolve the important free speech issue.⁶³

The Court never reached the First Amendment question. Following oral arguments—which focused solely on whether § 1324 is unconstitutionally overbroad—it sure looked like it would.⁶⁴ One commentator even observed that a “majority of the justices seemed to be concerned that the statute as written is quite broad.”⁶⁵ Maybe that potential majority was “reluctant to strike down the statute entirely if there [was] a reasonably available alternative interpretation,” or perhaps, the Justices were more splintered than they appeared.⁶⁶ We'll never know. What we do know is that a unanimous Supreme Court ultimately vacated the Ninth Circuit's judgment, holding “that the appeals panel departed so drastically

⁵⁸ *Id.* at 1581 (“True, in the redone appeal, Sineneng-Smith's counsel adopted without elaboration counsel for *amici's* overbreadth arguments. How could she do otherwise? Understandably, she rode with an argument suggested by the panel.”) (citation omitted).

⁵⁹ *Id.*

⁶⁰ *Id.* (emphasis omitted).

⁶¹ *Id.*

⁶² Petition for a Writ of Certiorari at 7-8, 24-25, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67).

⁶³ *United States v. Sineneng-Smith*, 140 S. Ct. 36, 36 (2019).

⁶⁴ See Gabriel Chin, *Argument Analysis: Will a Broad Statute Be Saved by a Narrowing Construction?*, SCOTUSBLOG (Feb. 26, 2020, 11:25 AM), <https://www.scotusblog.com/2020/02/argument-analysis-will-a-broad-statute-be-saved-by-a-narrowing-construction/> [https://perma.cc/2G67-6LQ7].

⁶⁵ *Id.*

⁶⁶ *Id.*

from the principle of party presentation as to constitute an abuse of discretion.”⁶⁷

The Court’s short opinion, authored by Justice Ginsburg, once again touted the importance of party presentation in our adversarial system.⁶⁸ Quoting much of the language discussed above, the Court emphasized that “[c]ourts are essentially passive instruments of government” that do not get to decide questions not posed by the parties before them.⁶⁹ Recognizing the limits of the party presentation principle, the Court noted that the principle is “supple, not ironclad.”⁷⁰ Nonetheless, the Court concluded that the Ninth Circuit’s “takeover of the appeal” went “well beyond the pale” and that no “extraordinary circumstances justified” its independent framing of the litigation.⁷¹ The Court’s legal basis for vacating the appeals court’s decision was that the Ninth Circuit abused its discretion by injecting a new issue, appointing amici, and deciding the case on the basis of that judge-injected issue.⁷² The Court remanded the case to the Ninth Circuit “for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.”⁷³

II. SCOPE OF THE DOCTRINE

The party presentation principle is a well-known, deeply engrained principle of American law.⁷⁴ An enforceable party presentation *doctrine*—call it the “*Sineneng-Smith* doctrine”—is not so well established. While the *Sineneng-Smith* Court’s language did not depart from its normal treatment of party presentation, its judgment certainly did. As a now-enforceable grounds for vacatur on appeal, the legal system—lower courts, practitioners, and theorists—must grapple with the scope of the *Sineneng-Smith* doctrine. Left with little guidance from the Court, this Part

⁶⁷ *Sineneng-Smith*, 140 S. Ct. at 1578.

⁶⁸ *See id.* at 1579 (“In our adversarial system of adjudication, we follow the principle of party presentation.”).

⁶⁹ *Id.* (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing en banc)).

⁷⁰ *Id.*

⁷¹ *Id.* at 1581-82.

⁷² *Id.* at 1578, 1580-82.

⁷³ *Id.* at 1582.

⁷⁴ *See supra* Section I.A.

attempts to flesh out the various ways in which the doctrine could be used to invalidate departures from the party presentation principle in future disputes.

There seem to be four distinct ways in which appellate courts could understand and apply *Sineneng-Smith*. These four possibilities fall along a spectrum and include a “strong,” “medium,” “weak,” and “weakest” conception of the doctrine. Like matryoshka dolls, the stronger, more capacious versions of the doctrine encompass the weaker ones that fall below it on the spectrum. Only time will tell which of these views courts will adopt. For theoretical, doctrinal, and practical reasons, this Part suggests that courts will tend toward the “weak” or “weakest” version of the *Sineneng-Smith* doctrine—limiting its application to instances in which courts inject either a constitutional issue or an overbreadth inquiry. Part IV below returns to the question of scope after considering the source of the *Sineneng-Smith* doctrine.

A. Strong: New Legal Theory

Under a strong conception of the *Sineneng-Smith* doctrine, an appellate court could prohibit a lower court from deciding a question the parties presented but on a legal theory they did not. In its most benign form, courts decide cases on unrepresented legal theories all the time. Often, courts rely on precedent, legislative history, or a dictionary the parties did not cite. In these run-of-the-mill instances, the Supreme Court has not questioned a court’s ability to do so on party presentation grounds.⁷⁵ Indeed, the Court often cites such materials itself.⁷⁶ But there are more questionable scenarios in which a court’s reliance on a seemingly new legal theory to decide a party-presented question may give rise to a

⁷⁵ See Frost, *supra* note 29, at 456 (“[T]he norm does not extend to such minimally proactive judicial conduct, which is viewed as well within judicial power . . .”).

⁷⁶ See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 745 (2d ed. 1954), for the definition of “discriminate”). The parties did not introduce this dictionary’s definition of “discriminate” and instead relied on definitions from WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 648 (1964), and WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 745 (2d ed. 1958). See Brief for the Petitioner at 17, *Bostock*, 140 S. Ct. 1731 (No. 18-107), 2019 WL 3958416, at *17; Brief for the Federal Respondent Supporting Reversal at 31, *Bostock*, 140 S. Ct. 1731 (No. 18-107), 2019 WL 3942898, at *31.

Sineneng-Smith–based challenge on appeal. An example helps to illustrate how a strong form of the doctrine could be used to invalidate court actions of this variety.

Consider a typical statutory interpretation case in which a court could give an ambiguous statutory word or phrase one of two reasonable interpretations. The parties may make interpretive arguments on the basis of text, structure, purpose, canons of construction, and the like. The issue is one of statutory interpretation; the theory is that normal modes of interpretation resolve the ambiguity a certain way. But may a court introduce *sua sponte* a corpus linguistics analysis to decide which interpretation to adopt?⁷⁷ “Corpus linguistics is an empirical approach to the study of language that involves large, electronic databases of text known as a corpora,” from which judges “draw inferences about language from data gleaned from ‘real-world’ language in its natural habitat—in books, magazines, newspapers, and even transcripts of spoken language.”⁷⁸ An emerging and hotly contested tool of statutory and constitutional interpretation,⁷⁹ the use of corpus linguistics in both federal and state courts is on the rise.⁸⁰ Yet the parties don’t always initiate its use. The Sixth Circuit recently requested that the parties submit additional briefing on the original meaning of Article III’s case or controversy requirement using

⁷⁷ See, e.g., *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 438-45 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment); *State v. Rasabout*, 2015 UT 72, ¶¶ 40-134, 356 P.3d 1258, 1271-90 (Lee, A.C.J., concurring in part and concurring in the judgment); cf. *Frost*, *supra* note 29, at 457 (“[I]f a party asserts that a statute’s plain language is in its favor, but fails to cite or make any arguments regarding legislative history, can a court *sua sponte* take notice of the legislative history and craft an argument about statutory meaning on that basis, or has the party forfeited any such argument by failing to discuss it?”).

⁷⁸ Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828 (2018) (footnote omitted).

⁷⁹ For critiques of the use of corpus linguistics in statutory interpretation, see *Wilson*, 930 F.3d at 445-48 (Stranch, J., concurring); Donald L. Drakeman, *Is Corpus Linguistics Better than Flipping a Coin?*, 109 GEO. L.J. ONLINE 81 (2020); Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401 (2019); Ethan J. Herenstein, Essay, *The Faulty Frequency Hypothesis: Difficulties in Operationalizing Ordinary Meaning Through Corpus Linguistics*, 70 STAN. L. REV. ONLINE 112 (2017).

⁸⁰ See, e.g., *Nycal Offshore Dev. Corp. v. United States*, 148 Fed. Cl. 1, 13 n.6 (Fed. Cl. 2020); *Caesars Ent. Corp. v. Int’l Union of Operating Eng’rs Loc. 68 Pension Fund*, 932 F.3d 91, 95 (3d Cir. 2019); *State v. Lantis*, 447 P.3d 875, 880 (Idaho 2019); *People v. Harris*, 885 N.W.2d 832, 838-39, 838 n.29 (Mich. 2016).

corpus linguistics, a theory neither party had previously advanced.⁸¹ Under a strong form of the *Sineneng-Smith* doctrine, a reviewing court might vacate a judgment that relies on such a court-injected corpus linguistics analysis.⁸²

While possible, this strong conception of the *Sineneng-Smith* doctrine is unlikely to take hold for three reasons—one doctrinal, two practical. Doctrinally, the Supreme Court has stated time and time again that it is not bound by the specific legal theories the parties advance “but rather retains the independent power to identify and apply the proper construction of governing law.”⁸³ The lower federal courts largely conceive of themselves as partaking in this same law-declaration power.⁸⁴ Since the federal courts regularly decide cases on legal theories the parties did not advance, it seems unlikely that *Sineneng-Smith* calls into question this consistent practice as a doctrinal matter.⁸⁵

Practically, the strong form of the doctrine is unlikely to win the day for two independent reasons. First, despite the Supreme Court’s assertions to the contrary, many courts (including the Supreme Court itself on some occasions) will not address *sua sponte*

⁸¹ *Wright v. Spaulding*, 939 F.3d 695, 700 n.1 (6th Cir. 2019).

⁸² The Sixth Circuit eventually concluded that “corpus linguistics turned out not to be the most helpful tool in the toolkit” to resolve the legal question and did not rest its decision on that basis. *Id.*

⁸³ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see also* U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (quoting *Kamen*, 500 U.S. at 99).

⁸⁴ *See, e.g.*, *United States v. Castillo*, 896 F.3d 141, 149 (2d Cir. 2018) (“[A] court ‘retains the independent power to identify and apply the proper construction of governing law.’”) (quoting *Kamen*, 500 U.S. at 99); *Hernandez v. City of San Jose*, 623 F. App’x 512, 513 n.2 (9th Cir. 2015) (“[W]e ‘retain[] the independent power to identify and apply the proper construction of governing law,’ especially when it is important for proper consideration of the case on remand.”) (omission in original) (quoting *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013)); *United States v. Harris*, 72 F. Supp. 3d 1332, 1340 n.7 (M.D. Ga. 2014) (“[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”) (quoting *Indep. Ins. Agents*, 508 U.S. at 446).

⁸⁵ Even the Supreme Court “does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). Query, though, whether the Supreme Court has different powers of appellate review than the lower federal courts. *See infra* Section III.B.

legal arguments the parties did not make.⁸⁶ When courts decide cases on the basis of theories the parties advanced, they negate the possibility for appellate review for compliance with the party presentation principle in the first place. Second, if the Court *did* usher in the strong form of the doctrine, appeals courts would likely see a dramatic increase in the number of appeals claiming party presentation violations. If judges really do cite materials not proffered by the parties as often as I have suggested, parties may latch onto a judge's smallest departure from their arguments as grounds for an appeal, and appellate courts would be charged with entertaining such claims. A strong conception of the *Sineneng-Smith* doctrine could therefore cabin judicial discretion more than is workable. While the adversarial system limits judges to deciding cases the parties present, *how* judges resolve the issues presented is often a matter of discretion—hence “abuse of discretion” review. I doubt the Supreme Court meant to limit judicial discretion as much as the strong form of *Sineneng-Smith* would imply or perhaps require.

B. Medium: New Legal Issue

The medium conception of the *Sineneng-Smith* doctrine has slightly less bite than the strong version. Under the medium conception, a court would violate the party presentation principle only when it injects a new legal *issue* into the dispute, not merely a new legal *theory*. Just as they often decide cases on legal theories not presented by the parties, courts inject new legal issues into litigation regularly, though their reasons for doing so are not always apparent.⁸⁷ As Professor Amanda Frost has observed, “judges have not articulated a clear set of conditions that lead them to deviate from their typical practice of letting the parties frame the

⁸⁶ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (“We do not inquire here whether the DOJ regulation was authorized by § 602 The petition for writ of certiorari raised, and we agreed to review, only the question . . . whether there is a private cause of action to enforce the regulation.”); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497-98 (D.C. Cir. 2004) (refusing to address a legal argument not raised by the parties); *Warner v. Aetna Health Inc.*, 333 F. Supp. 2d 1149, 1154 n.7 (W.D. Okla. 2004) (same).

⁸⁷ See Frost, *supra* note 29, at 461-62.

dispute.”⁸⁸ What is clear is that judicial issue creation happens at all levels of the federal judiciary and in a number of different ways.

One way the Supreme Court injects new issues into existing disputes is by amending the questions the parties present.⁸⁹ Supreme Court Rule 14(1)(a) provides that “[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.”⁹⁰ Yet the Court often rewrites or adds to “those questions to clarify, narrow, or simplify the issues” as presented by the parties.⁹¹ Indeed, the Court has stated that the rule “does not limit [its] power to decide important questions not raised by the parties”⁹² and will disregard the rule when “reasons of urgency or of economy” justify doing so.⁹³ The Supreme Court thus leaves itself wide latitude to inject new issues into a case via an amendment to the question presented. Could this amorphous Supreme Court practice be jeopardized by a medium conception of *Sineneng-Smith*? Perhaps. Then again, perhaps the Supreme Court plays by different rules altogether, such that this longstanding practice, one that might be suspect under a medium conception of the *Sineneng-Smith* doctrine, would be ultimately unaffected.⁹⁴

In the lower federal courts, judicial issue creation is not uncommon, though it is brought about by other means. One of the most effective ways a lower court can reshape litigation and inject

⁸⁸ *Id.* at 463; see also ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 346 (7th ed. 1993) (“Analysis of other cases in which the Court considered a question not presented in a petition suggests that the exception from the normal rule is not circumscribed by any particular formula, and that it reflects the Court’s discretionary authority to dispose of cases in what it determines to be the most sensible and reasonable way.”).

⁸⁹ Frost, *supra* note 29, at 464.

⁹⁰ SUP. CT. R. 14(1)(a).

⁹¹ Frost, *supra* note 29, at 464; see, e.g., U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993) (“[A] court may consider an issue ‘antecedent to . . . and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief.”) (omission in original) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (recognizing the Court has “on occasion rephrased the question presented by a petitioner or requested the parties to address an important question of law not raised in the petition for certiorari”) (citation omitted); *Payne v. Tennessee*, 498 U.S. 1080, 1080 (1991) (granting the certiorari petition and “request[ing]” that the parties “brief and argue whether *Booth v. Maryland* and *South Carolina v. Gathers* should be overruled”) (citations omitted).

⁹² *Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971).

⁹³ *Yee*, 503 U.S. at 535.

⁹⁴ See *infra* Section IV.C.

a new issue is to request additional briefing on an issue not previously litigated, either through amici, as in *Sineneng-Smith*, or by the parties themselves. Indeed, the federal courts of appeals have raised a number of new issues through requests for additional briefing that extend well beyond jurisdictional questions.⁹⁵ Of course, a court doesn't have to request supplemental briefing to inject a new issue into a case. It could raise and decide the issue for the first time in its judgment and opinion. Allowing the parties to litigate the court-created issue might comport with notions of due process⁹⁶ and reduce judicial errors,⁹⁷ but the upshot is the same: the court, not the parties, introduced the issue for judicial resolution.

Despite the Supreme Court's stated opposition to judicial issue creation,⁹⁸ its seemingly tough rhetoric has not always mirrored its actions, making widespread adoption of the medium conception of the *Sineneng-Smith* doctrine unlikely. In one instance, the D.C. Circuit blatantly injected a legal question that the parties had not addressed, but the Supreme Court did not question its doing so.⁹⁹ The Supreme Court held, among other things, that because the D.C. Circuit requested additional briefing and gave the parties "ample opportunity to address the issue, . . . the court's decision to consider the issue was certainly no abuse of its discretion."¹⁰⁰ Yet the Court has gone even further, clarifying that "[w]e do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often . . . that somewhat longer

⁹⁵ See Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1297-99 (2002) (collecting cases in which courts of appeals have requested additional briefing on, among other things, "whether to overrule prior precedent," "whether to consider an issue not raised below," and whether "to address an intervening statute").

⁹⁶ See Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 262-65 (2002).

⁹⁷ See *id.* at 259-62.

⁹⁸ See *supra* notes 37-44 and accompanying text.

⁹⁹ See *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-48 (1993).

¹⁰⁰ *Id.*; see also Ruth Bader Ginsburg, Lecture, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 214 (1985) ("The parties' contentions ordinarily determine the issues to be addressed. If the panel or the opinion writer spots a potentially dispositive question not raised by the parties, the judges generally invite supplemental briefs, thereby affording the litigants a chance to have their say.") (footnote omitted).

(and often fairer) way ‘round is the shortest way home.’¹⁰¹ Shortest way home? Perhaps. Required? Certainly not.

Therefore, under a medium conception of the *Sineneng-Smith* doctrine, one that prohibits a court from injecting a new legal issue into an existing case, it would seem to matter little whether a court gives the parties a chance to brief and argue said issue. If the party presentation principle truly requires judges to “rely on the parties to frame the issues for decision,”¹⁰² then a medium version of the *Sineneng-Smith* doctrine would prohibit judicial issue creation on the merits, regardless of whether a court requests supplemental briefing. Yet federal courts of all levels routinely inject new issues into existing disputes, a practice that has received the Supreme Court’s imprimatur multiple times.¹⁰³ Consequently, it seems improbable that appellate courts, the Supreme Court included, will tend toward the medium conception of the *Sineneng-Smith* doctrine.

To be sure, the flexible “abuse of discretion” standard of review the Court adopted may open the door to a widely applied medium conception of the *Sineneng-Smith* doctrine, albeit in a slightly watered-down form. In *Sineneng-Smith* itself, the Court acknowledged that the party presentation principle is “supple, not ironclad” and is subject to exceptions in “extraordinary circumstances.”¹⁰⁴ Taken together, the *Sineneng-Smith* doctrine could be broadly conceived under its medium form, with appellate courts looking to the reasons *why* a lower court injected a new issue in deciding whether the lower court abused its discretion. That is, the general rule would remain opposed to judicial issue creation, but courts might be willing to relax that rule in many more circumstances than the medium conception of the doctrine might suggest on its face.

¹⁰¹ *Trest v. Cain*, 522 U.S. 87, 92 (1997); *see also* *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (considering whether 18 U.S.C. § 3501 superseded *Miranda*, even though the Fourth Circuit initially invoked the statute *sua sponte*). *See generally* Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287, 290 (2000).

¹⁰² *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

¹⁰³ *See supra* notes 87-97 and accompanying text.

¹⁰⁴ *Sineneng-Smith*, 140 S. Ct. at 1579, 1581.

The Ninth Circuit adopted this approach in the only case since *Sineneng-Smith* to apply the doctrine to vacate a lower court ruling.¹⁰⁵ Observing that the case “involv[ed] a specialized area of civil law and competent, highly experienced counsel on both sides,” the Ninth Circuit ruled that in deciding an issue not raised by either party, the district court abused its discretion.¹⁰⁶ If the case involved not administrative review but a slip and fall, or if both parties were represented by recent law school graduates, maybe the Ninth Circuit would have ruled differently.¹⁰⁷ If the medium conception of the *Sineneng-Smith* doctrine takes hold, appellate litigation is likely to revolve not around whether a court injected a legal issue the parties did not present, but whether a court abused its discretion in discerning that an extraordinary circumstance justified the judicial issue creation. Such circumstances are currently not well defined.¹⁰⁸ Should courts continue to apply this medium conception of the *Sineneng-Smith* doctrine, courts must, to enhance doctrinal certainty, explain the circumstances that justify a departure from the ban on judicial issue creation. Failure to do so could result in varying applications of the doctrine, even among circuits that purportedly adhere to the same medium conception of the *Sineneng-Smith* doctrine.

¹⁰⁵ See *Todd R. v. Premera Blue Cross Blue Shield of Alaska*, 825 F. App’x 440, 441-42 (9th Cir. 2020).

¹⁰⁶ *Id.*

¹⁰⁷ I do not mean to suggest that the Ninth Circuit should have omitted these factors from its decision. The medium conception of the *Sineneng-Smith* doctrine, as I have framed it here, requires only that judges provide a justification when injecting a new legal issue. The district court did not do so here. Thus, the Ninth Circuit would have been justified in vacating the decision under the medium conception of the doctrine, regardless of whether the issue was complex or the parties were represented by competent counsel.

¹⁰⁸ See *United States v. Boyd*, 208 F.3d 638, 651 (7th Cir. 2000) (Ripple, J., dissenting) (“There is . . . no rigid and undeviating judicially declared practice under which courts of review invariably and under all circumstances decline to consider all questions which have not previously been specifically urged. . . . Exceptional cases or particular circumstances may prompt a reviewing court, where injustice might otherwise result or where public policy requires, to consider questions neither pressed nor passed upon below.”) (first alteration in original) (quoting *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961)), *vacated and remanded*, 531 U.S. 1135 (2001); Frost, *supra* note 29, at 463-64 (“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.”).

C. Weak: Limited to Constitutional Questions

A court applying the weak form of the *Sineneng-Smith* doctrine would vacate a lower court's injection of a new issue only when that issue presents a constitutional question. In the recent Ninth Circuit case applying the *Sineneng-Smith* doctrine, the district court decided an issue of contract interpretation that neither party had argued.¹⁰⁹ But a narrower conception of the doctrine, one focused solely on judicially created constitutional questions, is consistent with *Sineneng-Smith* itself. Recall that there, the Ninth Circuit injected a constitutional question and decided that 8 U.S.C. § 1324 was constitutionally overbroad without the parties presenting that issue.¹¹⁰ As one subset of issues to be injected by courts *sua sponte*, constitutional questions present unique, high stakes situations that may warrant closer appellate supervision. Doctrinal and theoretical reasons point to this weak conception of the *Sineneng-Smith* doctrine as a more likely candidate for widespread adoption by the federal courts.

Famously, *Marbury v. Madison* observed that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹¹¹ And since then, the judiciary has preferred the fundamental law of the Constitution to ordinary law when the two conflict, exercising the power to declare that “an act of the legislature, repugnant to the constitution, is void.”¹¹² Of course, *Marbury* gives rise to the “counter-majoritarian difficulty,” wherein a court “thwarts the will of representatives of the actual people of the here and now” when it decides that a statute is unconstitutional.¹¹³ The source of innumerable debates over the years, this Article steps lightly into the well-trodden territory of scholarship exploring the many contours of the counter-majoritarian difficulty and of the federal courts’ power to hold

¹⁰⁹ See *Todd R.*, 825 F. App’x at 441.

¹¹⁰ See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020).

¹¹¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹¹² *Id.*; see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (treating the federal courts as “supreme in the exposition of the law of the Constitution” and tracing that premise back to *Marbury*).

¹¹³ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962).

government action unconstitutional generally.¹¹⁴ For purposes of exploring the potential scope of the *Sineneng-Smith* doctrine, it suffices to highlight just one aspect of the federal courts' exercise of judicial review.

Historically, the federal courts, for the most part, have been aware of the gravity of their constitutional decisions and have been reluctant to exercise the power of judicial review too broadly.¹¹⁵ Or

¹¹⁴ As one scholar put it, "constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review." Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578 (1993). For a small sampling of the vast literature on the counter-majoritarian difficulty, see generally BICKEL, *supra* note 113; James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997). See also Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984) ("Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble."); Erwin Chemerinsky, Foreword, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 46 (1989) (noting that "scholarly literature about judicial review has been dominated by" the counter-majoritarian difficulty for several decades).

¹¹⁵ See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72 (7th ed. 2015) ("[W]hen viewed in proper historical context, Marbury represented the application of an earlier, modest understanding of judicial review rather than a bold articulation of the idea of judicial supremacy.") (citing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 93-127 (2004)); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 543, 547 (1985) (highlighting instances in which a court will "often acknowledge that it has jurisdiction over the subject matter of a dispute yet, despite Marshall's dictum [in *Cohens v. Virginia* that 'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given'], will refrain from exercising it") (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)); cf. BICKEL, *supra* note 113, at 16-17 ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."). But see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363 (2004) ("By conventional wisdom, the Warren Court's criminal procedure rulings were 'plainly, even aggressively countermajoritarian'—the one doctrinal area where the Court knew it lacked public support but took a stand anyway. Indeed, even constitutional historians who generally deny the Supreme Court's capacity for countermajoritarian decision making cite the Warren Court's criminal procedure decisions as exceptions to the rule, and for good reason.") (footnotes omitted) (quoting William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997)).

at least they say so.¹¹⁶ In no other context is the desire to avoid constitutional rulings more on display than in the aptly named constitutional avoidance doctrine. That doctrine has three facets.¹¹⁷ First, courts should not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”¹¹⁸ Second, federal courts “will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”¹¹⁹ Third, and specific to the statutory interpretation context, when “the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [federal courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”¹²⁰ This last, so-called canon of constitutional avoidance has been “repeatedly affirmed,”¹²¹ and its application by the federal courts is “beyond debate.”¹²²

The federal courts’ proclivity to decide cases on non-constitutional grounds likely informs the reach of the *Sineneng-Smith* doctrine. That is, even if appellate courts continue to give lower courts much discretion in crafting novel legal theories and answering questions not presented by the parties, a court’s injection of a constitutional issue is different in kind and not merely degree.

¹¹⁶ See, e.g., *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”) (omission in original) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

¹¹⁷ See FALLON ET AL., *supra* note 115, at 77-81.

¹¹⁸ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

¹²¹ *Jones v. United States*, 526 U.S. 227, 239 (1999).

¹²² *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The constitutional avoidance canon is not, however, without its critics. See, e.g., William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001) (arguing that the canon is in tension with legislative supremacy because it often results in questionable statutory interpretations and additionally intrudes upon executive power by overruling certain agency interpretations); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 98 (arguing that the canon permits judges to use disingenuous interpretations of statutes to “substitute their judgment for that of Congress”).

The result is a weak conception of the *Sineneng-Smith* doctrine that espouses a seemingly *per se* rule: a court abuses its discretion when it injects *sua sponte* a constitutional question.¹²³ Such a conception is certainly compatible with *Sineneng-Smith* itself, as the Ninth Circuit there asked and decided a First Amendment question that neither party had posed.¹²⁴ And given that federal courts normally adhere to the “cardinal principle” of avoiding constitutional questions and interpretations when possible, it’s unsurprising that the Supreme Court had not previously vacated a lower court decision for injecting a constitutional issue.¹²⁵ Courts simply don’t do so that often. The weak conception of the *Sineneng-Smith* doctrine would therefore have limited applicability. But given that an enforceable party presentation principle was not established until recently, perhaps a narrowly drawn rule is the intended one.

D. Weakest: Limited to Overbreadth

The weakest version of the *Sineneng-Smith* doctrine cabins its applicability even further. While the weak conception discussed above would limit appellate review to instances in which a lower court injects a constitutional issue, the weakest conception of the doctrine would further narrow its scope to the judicial creation of one kind of constitutional question—namely, overbreadth. The uniqueness of the overbreadth doctrine may call for its unique treatment when a court, not the parties, introduces it into litigation.

Under the overbreadth doctrine, a party can challenge a statute as facially unconstitutional, even if the government could constitutionally prohibit the party’s own speech.¹²⁶ That is, if the

¹²³ Query whether “exceptional circumstances” could justify a departure from the party presentation principle to inject a constitutional question.

¹²⁴ See *supra* Section I.B.

¹²⁵ *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (quoting *Crowell*, 285 U.S. at 62). To be clear, it is not my position that the *Sineneng-Smith* doctrine constitutionalizes the constitutional avoidance doctrine in any of its forms. Rather, the doctrine would apply only when a court injects a constitutional *issue* not presented by the parties. In other words, “if the parties fail to raise a constitutional challenge to a statute, the [party presentation principle] generally bars courts from doing so *sua sponte*.” Frost, *supra* note 29, at 456-57.

¹²⁶ Note, *Overbreadth and Listeners’ Rights*, 123 HARV. L. REV. 1749, 1750 (2010). Commentators normally trace the origins of the overbreadth doctrine to *Thornhill v.*

statute would violate the First Amendment rights of some hypothetical third party, a court can decide that the entire statute is unconstitutional.¹²⁷ While normally someone cannot “challenge a statute on the ground that it would be unconstitutional as applied to someone else,” courts have relaxed this requirement and allowed third-party standing for overbreadth challenges under the First Amendment.¹²⁸ For this reason, the severity of facially invalidating a statute, and in accordance with constitutional avoidance principles, the Court has warned against overuse of the overbreadth doctrine, calling it “‘strong medicine’ that is not to be ‘casually employed.’”¹²⁹

At a minimum, then, the scope of the *Sineneng-Smith* doctrine must extend at least to invalidate lower court decisions based on a judicially interposed overbreadth question. The combination of the court-created issue, the Supreme Court’s hesitation to engage in overbreadth analysis, and the factual background of *Sineneng-Smith* itself all support this weakest conception of the *Sineneng-Smith* doctrine. As the Ninth Circuit learned in *Sineneng-Smith*, when a lower court invalidates a statute on overbreadth grounds unprompted by the parties, the ruling from the reviewing court will likewise be strong medicine—a vacated judgment for abuse of discretion.

III. SOURCE OF THE DOCTRINE

The scope of the *Sineneng-Smith* doctrine is unclear on its face, though the four scenarios outlined above present the most likely options. Even more unclear from the decision is the source of the Supreme Court’s authority to promulgate and enforce the *Sineneng-Smith* doctrine. The Court did not ground either the party

Alabama, 310 U.S. 88 (1940). See, e.g., Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 11 (describing *Thornhill* as the “fountainhead” of the doctrine).

¹²⁷ See Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 424 (1974); see also *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (applying the overbreadth doctrine to invalidate a civil statute); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (applying the overbreadth doctrine to invalidate a criminal statute).

¹²⁸ Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991).

¹²⁹ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

presentation principle or its ability to review the Ninth Circuit's issue injection in any source of positive federal law. Nonetheless, the Justices' unanimous silence on the source of the *Sineneng-Smith* doctrine means that the Supreme Court at least thinks it has the power to police the lower courts for departures from the party presentation principle. Even if the Court ultimately does, it did not tell us where that power comes from. This Part explores possible answers to that open question.

A. Due Process

The Fifth and Fourteenth Amendments prohibit the federal and state governments from depriving any person of “life, liberty, or property, without due process of law.”¹³⁰ The Supreme Court has ruled that, in the context of litigation, the “core of due process” encompasses “the right to notice and a meaningful opportunity to be heard.”¹³¹ Various commentators have argued that the party presentation principle—effectuated by an enforceable prohibition on *sua sponte* judicial decision making—flows from this understanding of constitutional due process.¹³² Some lower federal courts and state courts appear to agree with this conception, at least in certain instances,¹³³ though the Supreme Court itself has never adopted that view.¹³⁴

¹³⁰ U.S. CONST. amends. V, XIV, § 1.

¹³¹ *Lachance v. Erickson*, 522 U.S. 262, 266 (1998).

¹³² See, e.g., Milani & Smith, *supra* note 96, at 262-71; Miller, *supra* note 95, at 1294-95; Luke Ryan, Essay, *How the Party Presentation Rule Limits Judicial Discretion*, 4 ST. THOMAS J. COMPLEX LITIG. 31, 38-39 (2017).

¹³³ See, e.g., *Nolen v. Gober*, 222 F.3d 1356, 1360-61 (Fed. Cir. 2000) (“[T]he decision of the Court of Appeals for Veterans Claims to address the well grounded claim issue, which neither party raised and about which neither party had prior warning, implicates fundamental principles of fairness.”); *Stoyanov v. Immigr. & Naturalization Serv.*, 172 F.3d 731, 735 (9th Cir. 1999) (holding that Board of Immigration Appeals’ ruling on asylum seeker’s credibility without briefing on that issue violated due process); *Kerrigan, Estess, Rankin & McLeod v. State*, 711 So. 2d 1246, 1249 (Fla. Dist. Ct. App. 1998) (holding “that the trial court denied [the law firm] due process when it sua sponte ruled unenforceable the contingent fee contract on which those liens were based, without notice and an opportunity for the parties and counsel to be heard”); *Maikotter v. Univ. of W. Va. Bd. of Trs.*, 527 S.E.2d 802, 808-10 (W. Va. 1999) (Davis, J., concurring in part and dissenting in part) (arguing that the sua sponte granting of attorney’s fees violated due process).

¹³⁴ And with good reason: it decides questions not raised by the parties all the time. See *supra* notes 89-94 and accompanying text.

Whether due process actually supplies a constitutional check on *sua sponte* judicial decision making is contestable. The consistent contrary practice of federal and state courts of all levels suggests otherwise.¹³⁵ But grounding the *Sineneng-Smith* doctrine in due process faces an even bigger hurdle. In *Sineneng-Smith*, the Ninth Circuit *did* give the parties adequate notice and an opportunity to be heard on the overbreadth question it injected; it requested supplemental briefing and heard additional arguments specifically on overbreadth.¹³⁶ Even if we assume the Due Process Clause prohibits *sua sponte* judicial decision making, a court would cure any constitutional defect associated with injecting a new issue by allowing the parties an opportunity to address that issue. Indeed, each of the scholars who finds a constitutional hook for the party presentation principle in due process acknowledges as much.¹³⁷ *Sineneng-Smith*, therefore, cannot find a positive law home in the Due Process Clause.¹³⁸

B. Article III

1. “Judicial Power”

Some might look for a more viable constitutional basis for the *Sineneng-Smith* doctrine in Article III’s grant of the “judicial Power.”¹³⁹ The argument is that inherent in the judicial power is the power to craft certain rules of procedure, at least where Congress has failed to do so.¹⁴⁰ This inherent authority has been

¹³⁵ See *supra* Section II.B.

¹³⁶ See *supra* notes 56-58 and accompanying text.

¹³⁷ See Milani & Smith, *supra* note 96, at 294 (“Courts can avoid the problems discussed above by establishing a rule that they will request briefs and argument from the parties on issues which are identified *sua sponte*.”); Miller, *supra* note 95, at 1297 (“An appellate court should always ask for the parties’ submissions before ruling.”); Ryan, *supra* note 132, at 33 (“[T]he parties should be given a chance for rehearing (if at the appellate court level) or remand with supplemental briefing (if at the district court level).”).

¹³⁸ It is theoretically possible, though highly unlikely, that litigants have a substantive due process right to party presentation. An assertion of such a right would almost certainly fail the demanding test the Court applies in recognizing such fundamental liberty interests. See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹³⁹ U.S. CONST. art. III, § 1.

¹⁴⁰ See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 817-18 (2008).

understood to include, *inter alia*, a federal court's ability to promulgate rules to manage its docket¹⁴¹ and sanction parties for misconduct.¹⁴² Does inherent authority also explain the Supreme Court's power to create a rule requiring party presentation? While the Supreme Court is mostly silent on the exact source of the federal courts' inherent authority over procedure,¹⁴³ scholars have assumed that Article III provides a firm historical foundation for the practice.¹⁴⁴

Whatever inherent powers over procedure the federal courts have, those powers are entirely local.¹⁴⁵ So, while a federal appellate court has the power to prescribe procedures for its court, it cannot impose procedures for courts beneath it; that's a matter left to the discretion of each federal court. As Justice Barrett has explained, a "reviewing court can set aside a rule on the ground that the inferior court abused its discretion in adopting it but not on the ground that it thought a different rule a better one."¹⁴⁶ The reason

¹⁴¹ See, e.g., *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (emphasizing "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *Ex parte Peterson*, 253 U.S. 300, 312-13 (1920) ("Courts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint . . . special masters, auditors, examiners and commissioners.") (citation omitted).

¹⁴² See, e.g., *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828, 831 (1994) (recognizing that federal courts "have embraced an inherent contempt authority" that includes imprisonment until the contemnor complies with a specific judicial order).

¹⁴³ *But see Degen v. United States*, 517 U.S. 820, 823 (1996) ("Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.").

¹⁴⁴ See, e.g., Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1464 (1984); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 335 (2006); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 742 (2001). *But see* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1687 (2004) ("It is thus difficult, in light of history and doctrine, to justify federal local court rulemaking in civil cases as an exercise of inherent power even in the weak sense, both because court rulemaking ill fits within the category of judicial power to resolve cases or controversies under Article III, and because there have always been statutory authorizations when the federal courts have exercised such power.").

¹⁴⁵ Barrett, *supra* note 140, at 882.

¹⁴⁶ *Id.* at 883; see, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42-58 (1991) (recognizing the inherent power of lower federal courts to impose sanctions even though

is that the “judicial power” is vested in *each* federal court.¹⁴⁷ If the Supreme Court or other federal appellate courts have supervisory authority over lower courts, authority that empowers them to promulgate prospective rules for inferior courts, that power must come from somewhere beyond Article III’s grant of the “judicial power” common to all federal courts.¹⁴⁸

Therefore, as with due process, grounding the *Sineneng-Smith* doctrine in the “judicial power” faces problems when viewed in light of the facts of the case. True, the Supreme Court held that the Ninth Circuit abused its discretion in deciding the overbreadth question the parties did not raise.¹⁴⁹ But the Ninth Circuit abused its discretion not in the exercise of its inherent rulemaking authority. The Ninth Circuit made no rule. Rather, it abused its discretion by “depart[ing] so drastically” from the party presentation principle.¹⁵⁰ Under the guise of its inherent authority, the Supreme Court could have bound *itself* to a strict conception of party presentation. But it would exceed the Court’s inherent authority, at least in exercising its “judicial power,” to require that the Ninth Circuit adopt such a strict conception of the principle.

2. Supervisory Authority

Alternatively, *Sineneng-Smith* might be explained as an exercise of the Supreme Court’s “supervisory authority,” which though contested, also finds a purported home in Article III. Commentators typically trace the Court’s supervisory authority to a 1943 case called *McNabb v. United States*.¹⁵¹ In *McNabb*, the “Supreme Court held that a district court must exclude from

no rule or statute was on point); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (recognizing the inherent power of lower federal courts to assess attorney’s fees against counsel); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (recognizing the inherent power of lower federal courts to dismiss cases *sua sponte* for lack of prosecution). For more examples, see Barrett, *supra* note 144, at 339 & n.63.

¹⁴⁷ U.S. CONST. art. III, § 1.

¹⁴⁸ Barrett, *supra* note 144, at 328. See *infra* Section III.B.2.

¹⁴⁹ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020).

¹⁵⁰ *Id.* (“[T]he appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion.”).

¹⁵¹ 318 U.S. 332 (1943); see Beale, *supra* note 144, at 1435; see also Barrett, *supra* note 144, at 329 n.9 (explaining that *Weeks v. United States*, 232 U.S. 383 (1914), “the first exclusionary rule case,” was not classified as a supervisory power decision until long after it was decided).

evidence a voluntary confession” obtained during “a prolonged detention.”¹⁵² While the Supreme Court had previously prescribed mandatory rules of procedure for the lower courts—for example, the Federal Equity Rules, the Federal Admiralty Rules, and the Federal Rules of Civil Procedure—the Court promulgated those rules pursuant to an express congressional authorization.¹⁵³ The rule the Court announced in *McNabb* was different in that the Court didn’t promulgate it pursuant to any statutory or constitutional grant of authority but in the context of an adjudication.¹⁵⁴ Without a statute or constitutional provision to point to, the Court justified the *McNabb* rule as an exercise of its “supervisory authority.”¹⁵⁵ It asserted plainly that “[j]udicial supervision of . . . criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.”¹⁵⁶ Like the procedural rules the Court promulgates via express statutory authorization, the *McNabb* rule was mandatory and prospective.¹⁵⁷

Though the *McNabb* Court was “not entirely clear about who or what it was supervising,” Justice Barrett has identified three important characteristics common to subsequent cases in which the Supreme Court has exercised its supervisory power.¹⁵⁸ First, the rules announced in these “cases are a kind of procedural common law”; they aren’t a form of constitutional or statutory

¹⁵² Barrett, *supra* note 144, at 329; *see also McNabb*, 318 U.S. at 341-42.

¹⁵³ Barrett, *supra* note 144, at 329.

¹⁵⁴ *See McNabb*, 318 U.S. at 341, 343-45; Barrett, *supra* note 144, at 329 (“*McNabb* is a striking case insofar as it is a self-conscious exercise of supervisory rulemaking in the context of adjudication rather than in the process of promulgating court rules.”).

¹⁵⁵ *McNabb*, 318 U.S. at 341. Lest there be any doubt about the origin of the *McNabb* rule, the Court made it clear that the exclusionary rule announced was “[q]uite apart from the Constitution.” *Id.*

¹⁵⁶ *Id.* at 340.

¹⁵⁷ *See Anderson v. United States*, 318 U.S. 350, 355-57 (1943) (applying the *McNabb* rule to exclude a confession in a case decided on the same day as *McNabb*).

¹⁵⁸ Barrett, *supra* note 144, at 329, 332-33. For other examples of the Supreme Court exercising its supervisory power, see *Castro v. United States*, 540 U.S. 375, 382-83 (2003); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808-09 (1987); *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92 (1981) (plurality opinion); *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 260-68 (1953); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 225 (1946).

interpretation.¹⁵⁹ Second, the rules are generally applicable rather than case-specific and thus “resemble [prospective] rules of constitutional procedure” or those “promulgated under the Rules Enabling Act.”¹⁶⁰ Third, the rules do not govern the Supreme Court’s own procedures—rather, they govern the procedures in the lower federal courts.¹⁶¹ Hence, the Supreme Court’s supervisory authority cases, and the rules announced under that authority, differ in important ways from its inherent authority cases. In the former, the Supreme Court truly *supervises* the lower courts; it mandates procedures the lower courts must follow and enforces compliance with those procedures. In the latter, any court—the Supreme Court included—can engage in local rulemaking, subject only to abuse-of-discretion review by an appellate court on a rule-by-rule basis.¹⁶²

While a closer call than inherent authority, the *Sineneng-Smith* doctrine likely does not find a constitutional basis in the Supreme Court’s exercise of supervisory authority for three independent reasons. First, *Sineneng-Smith* differs in kind from what has typically been categorized as a supervisory authority rule because it did not announce a generally applicable rule. Second, the Supreme Court has historically invoked its supervisory authority to protect against violations of rights; *Sineneng-Smith* is not such a case. And third, supervisory authority itself rests on shaky constitutional grounds, and recent scholarly criticisms of the doctrine, as well as the Court’s steady decline in issuing supervisory authority decisions, suggest that supervisory authority has grown

¹⁵⁹ Barrett, *supra* note 144, at 332. *See generally* Barrett, *supra* note 140 (identifying areas of procedure in which the federal courts exercise common lawmaking authority and grounding that power in Article III’s grant of the judicial power).

¹⁶⁰ Barrett, *supra* note 144, at 332-33.

¹⁶¹ *Id.* at 333.

¹⁶² Of course, once the Supreme Court decides that a lower court acted within its inherent authority in prescribing a rule of local procedure, that court may continue to adhere to that rule in the future. This does not, however, convert a retroactive review for abuse of discretion into a prospective rule. *Cf.* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46 (1991) (reviewing a district court’s authority to sanction a party for abuse of discretion); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947) (holding that a district court possessed inherent authority to dismiss a suit for *forum non conveniens*), *partially superseded by statute*, Act of June 25, 1948, ch. 646, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404).

out of favor with the current Supreme Court.¹⁶³ I address each in turn.

a. Sineneng-Smith Isn't Generally Applicable

One important feature of supervisory authority cases is that they establish prospective and generally applicable rules.¹⁶⁴ In this way, the holdings of supervisory authority cases read like a federal rule of evidence or civil procedure. A few examples illustrate the point. The *McNabb* rule is easy enough to state: district courts “must exclude from evidence a voluntary confession” resulting from “a prolonged detention.”¹⁶⁵ Likewise, in *Thiel v. Southern Pacific Co.*, another frequently cited supervisory authority case, the Supreme Court banned the “systematic and intentional exclusion” of daily wage earners from juries.¹⁶⁶ And in *Castro v. United States*, the Court held that district courts must warn litigants of the consequences for “second or successive” habeas petitions if the court recharacterizes a motion for a new trial as a habeas petition under 28 U.S.C. § 2255.¹⁶⁷ In each case, as in many others,¹⁶⁸ the Supreme Court announced a prospective rule of procedure that applies in all lower federal courts.

The holding of *Sineneng-Smith* is not reducible to a rule-like formulation in the way that the holdings of these and other supervisory authority cases are. Rather, because the Supreme Court vacated the Ninth Circuit’s judgment because the court abused its discretion,¹⁶⁹ the Court’s disposition of the case was necessarily fact-bound. Indeed, the Court discussed the case’s procedural history in detail, suggesting that the totality of the Ninth Circuit’s actions—ordering additional briefing on

¹⁶³ See, e.g., *United States v. Tsarnaev*, 142 S. Ct. 1024, 1041-42 (2022) (Barrett, J., concurring).

¹⁶⁴ Barrett, *supra* note 144, at 332-33.

¹⁶⁵ *Id.* at 329; see also *McNabb v. United States*, 318 U.S. 332, 341-42 (1943). The reason for the rule is less clear. The Court cited various federal statutes as well as its own understanding that “in formulating such rules of evidence for federal criminal trials[,] the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.” *Id.*

¹⁶⁶ 328 U.S. 217, 220 (1946).

¹⁶⁷ 540 U.S. 375, 383 (2003).

¹⁶⁸ See generally Barrett, *supra* note 144, at 332 & n.36.

¹⁶⁹ See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020).

overbreadth, appointing amici to press the overbreadth argument, giving the amici more argument time than the parties, and ultimately disposing of the case on overbreadth grounds—resulted in its abuse of discretion.¹⁷⁰ Moreover, nothing in the decision purports to have prospective force, save the general notion that departing too drastically from the party presentation principle is one way in which a lower court can abuse its discretion. This is hardly the manner in which generally applicable procedural rules are typically promulgated. Normally, rules announced pursuant to the Court’s supervisory authority have had bright lines: confessions obtained during a prolonged detention must be excluded from evidence; daily wage earners as a class cannot be barred from jury service; litigants must be warned when certain motions are recharacterized as habeas petitions. *Sineneng-Smith* doesn’t seem to fit the mold of these supervisory authority decisions.

b. Supervisory Authority Protects Individual Rights

In addition to the previously identified three characteristics of supervisory authority cases,¹⁷¹ a fourth feature is common to all supervisory authority cases: they protect individual rights, not the government. The Supreme Court has previously recognized that the “purposes underlying use of the supervisory powers” include “implement[ing] a remedy for violation of recognized rights” and, in the criminal context, “preserv[ing] judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury.”¹⁷² In light of these purposes, consider the three examples discussed above. In *McNabb* and *Castro*, the Court crafted rules to protect criminal defendants; in *Thiel*, it protected daily wage earners’ right to full participation in civic activities.¹⁷³

In *Sineneng-Smith*, though, the criminal defendant *won* in the Ninth Circuit, albeit on an argument that *Sineneng-Smith* herself did not pursue.¹⁷⁴ If anything, the Ninth Circuit was overly protective of *Sineneng-Smith*’s interests as a criminal defendant by

¹⁷⁰ *See id.* at 1580-81.

¹⁷¹ *See supra* text accompanying notes 158-161.

¹⁷² *United States v. Hasting*, 461 U.S. 499, 505 (1983).

¹⁷³ *See supra* notes 165-167 and accompanying text.

¹⁷⁴ *United States v. Sineneng-Smith*, 910 F.3d 461, 485 (9th Cir. 2018), *vacated and remanded*, 140 S. Ct. 1575 (2020).

injecting an issue that ultimately provided the grounds to reverse her conviction. By vacating the Ninth Circuit's judgment, the Supreme Court advanced neither of the two purposes for its supervisory authority it had previously described. The lower courts did not violate Sineneng-Smith's substantive rights (in fact, the Ninth Circuit vindicated her First Amendment rights by holding that § 1324 was overbroad), and Sineneng-Smith pressed no evidentiary argument.¹⁷⁵ While the Supreme Court normally invokes its supervisory authority to protect individual rights, its decision in *Sineneng-Smith* had the opposite effect: the government got another bite at the apple to defend Sineneng-Smith's conviction on remand. And on remand, the government won.¹⁷⁶

c. Supervisory Authority Rests on Shaky Constitutional Grounds

Sineneng-Smith does not fit neatly into the supervisory authority rubric because it is not generally applicable and does not protect individual rights. But even if it could be pigeonholed as a supervisory authority case, there's a more fundamental reason the *Sineneng-Smith* doctrine likely fails to find a home in Article III: the Supreme Court's exercise of supervisory authority is constitutionally suspect. As I mentioned above, because each federal court is vested with the "judicial power," if the Court's supervisory authority is justified on constitutional grounds, it must come from elsewhere in Article III.¹⁷⁷ While some scholars have

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. Sineneng-Smith*, 982 F.3d 766, 777 (9th Cir. 2020).

¹⁷⁷ It is possible that the Court has adjudicative supervisory authority pursuant to some statutory authorization. But the Court has never suggested that its exercise of supervisory power is statutory, and none of the commentators to consider the question have found any plausible basis in federal statutory law to support the Court's exercise of supervisory authority. See Beale, *supra* note 144, at 1477-78; Barrett, *supra* note 144, at 333-34; cf. David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 500 (1991) ("The [First] Judiciary Act authorized each of the federal courts respectively 'to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States'; and it gave the Supreme Court no supervisory role in this regard.") (footnote omitted); Murray M. Schwartz, *The Exercise of Supervisory Power by the Third Circuit Court of Appeals*, 27 VILL. L. REV. 506, 514-25 (1982) (largely rejecting both constitutional and statutory bases for the federal courts of appeals to exercise supervisory authority).

suggested that Article III's delineation between one "supreme" court and other "inferior" courts might provide a textual basis to justify the Supreme Court's exercise of supervisory authority over the lower courts, none (to my knowledge) have found this argument convincing.¹⁷⁸

The Supreme Court has never attempted to ground its exercise of the supervisory power in Article III or elsewhere. And toward the end of the twentieth century, it all but abandoned supervisory authority as an actual basis for decision, though it continued to pay lip service to the theoretical possibility of exercising such authority. Indeed, despite the Court's confident assertion in *Dickerson v. United States* that the "law in this area is clear," and that the Supreme Court "has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence and

¹⁷⁸ In a searching study of the original meaning of Article III, Justice Barrett concluded that:

[T]he Constitution's structure cuts against, and history rules out, the proposition that the Supreme Court possesses inherent supervisory power over inferior court procedure. If such authority exists, it derives from the Constitution's distinction between supreme and inferior courts. . . . [I]t is more consistent with the Constitution's structure to interpret the Court's "supremacy" vis-à-vis inferior federal courts as a limit on the way Congress can structure the judicial branch than to interpret it as a source of inherent authority for the Supreme Court. Even assuming, however, that the Court's "supremacy" functions as a grant of power to the Supreme Court, the conclusion that the Supreme Court possesses supervisory power over procedure depends upon the conclusion that this particular power is part of that grant. . . . [H]istory fails to support that conclusion. It was not until the twentieth century, when the Court rejected the notion of federal general common law, that it claimed the right to prescribe procedure for inferior federal courts. Given the recent vintage of this claim, history does not support the notion that the power to prescribe inferior court procedure is inherent in any court designated "supreme."

Barrett, *supra* note 144, at 387. Justice Barrett is not alone in concluding that the supreme/inferior distinction does not support rulemaking as an exercise of supervisory power. See, e.g., Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 984-85 (2000); cf. William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013, 1020-21 (1991) (stating that the words "[s]upreme" and "inferior" seem to indicate relative importance"); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 84-85 (1989) ("While lower courts may be 'inferior' in the hierarchy[,] . . . they are not constitutionally subordinate in terms of either their duties under the Constitution or their relationship to higher courts.") (emphasis omitted).

procedure that are binding in those tribunals,” the *Dickerson* Court itself did not rely on supervisory authority.¹⁷⁹ Rather, the Court in *Dickerson* famously held that *Miranda* announced a constitutional rule that could not be superseded by statute.¹⁸⁰ One commentator described the “rise and fall” of supervisory power as “resembl[ing] a parabolic arc, beginning with *McNabb*, reaching its crest during the tenure of Chief Justice Warren, and then descending precipitously during the Burger and Rehnquist Courts.”¹⁸¹ The Roberts Court has continued that downward trend.¹⁸²

C. First Amendment

The due process and Article III arguments that might justify the *Sineneng-Smith* doctrine assume that the case stands for a procedural rule about how courts ought to oversee litigation.¹⁸³ A distinct possibility remains, however. Perhaps the *Sineneng-Smith* doctrine is best justified not as a procedural rule but as a substantive one—one that is rooted in the First Amendment.¹⁸⁴

The First Amendment provided the rule of decision in the Ninth Circuit. Recall that *Sineneng-Smith* was convicted under

¹⁷⁹ 530 U.S. 428, 437 (2000).

¹⁸⁰ *Id.* at 444.

¹⁸¹ Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 47 (1994).

¹⁸² See, e.g., *Gray v. Kelly*, 564 U.S. 1301, 1303 (2011) (Roberts, C.J., in chambers) (expressly refusing to apply the Supreme Court’s “supervisory authority” over a district court in a habeas proceeding). Some may argue that the Court in *Hollingsworth v. Perry* (*Hollingsworth I*), 558 U.S. 183, 196 (2010), *did* invoke its supervisory authority. But there, the Court noted that it “may use its supervisory authority to invalidate local rules that were promulgated in violation of an Act of Congress.” *Id.* Thus, the “supervisory authority” invoked in *Hollingsworth I* is what this Article calls “inherent authority.” The Court did not prescribe a uniform rule for district courts regarding the broadcasting of a trial. Rather, it held that the district court’s amendment of its local rules to allow broadcasting did not comply with federal law. *Id.* The Court—and many commentators—often conflate the distinction between inherent and supervisory authority under the general term “supervisory authority.” Barrett, *supra* note 144, at 339 (“[T]he Supreme Court has used the term ‘supervisory authority’ to describe a broad range of rulemaking activity, some of it supervisory and some of it local. Scholarly discussion of the Supreme Court’s supervisory power has not distinguished the two.”) (footnote omitted).

¹⁸³ Cf. Leading Cases, *supra* note 6, at 480 (“The Court ultimately decided *Sineneng-Smith* on procedural grounds, holding that the Ninth Circuit abused its discretion in appointing three amici to brief and argue legal issues not raised by the parties.”).

¹⁸⁴ See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

8 U.S.C. § 1324(a)(1)(A)(iv) for encouraging aliens to reside in the country illegally by knowingly giving inaccurate immigration consulting advice.¹⁸⁵ On appeal, *Sineneng-Smith* argued (1) that her conduct fell outside the scope of § 1324, (2) that § 1324 was impermissibly vague under the Fifth Amendment, and (3) that § 1324 violated the First Amendment as a content-based restriction on speech.¹⁸⁶ Rather than decide the case on any of those bases, the Ninth Circuit invited arguments on First Amendment overbreadth and ultimately held that § 1324(a)(1)(A)(iv) was unconstitutionally overbroad, vacating *Sineneng-Smith*'s conviction.¹⁸⁷ We know that the Supreme Court vacated that judgment due to the Ninth Circuit's drastic departure from the party presentation principle.¹⁸⁸ But what if the party presentation principle itself is inextricably intertwined with First Amendment overbreadth?

Overbreadth is the narrowest way to categorize the scope of the *Sineneng-Smith* doctrine;¹⁸⁹ it also provides a possible constitutional hook that might justify the Supreme Court's decision in *Sineneng-Smith*. As I previously discussed, the overbreadth doctrine allows a litigant to challenge a statute as facially unconstitutional, even if the litigant's speech could be lawfully prohibited.¹⁹⁰ Due to this procedural curiosity, the Court has often described overbreadth as an exception to the rule against third-party standing.¹⁹¹ Because a successful overbreadth challenge facially invalidates a law, and because those who might not satisfy traditional standing requirements can bring an overbreadth challenge, the Court has called overbreadth "strong medicine" that courts should invoke sparingly.¹⁹²

Reinforcing the high bar that overbreadth challenges must overcome is the Supreme Court-created substantiality

¹⁸⁵ *United States v. Sineneng-Smith*, 910 F.3d 461, 468 (9th Cir. 2018), *vacated and remanded*, 140 S. Ct. 1575 (2020).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 482-85.

¹⁸⁸ *Sineneng-Smith*, 140 S. Ct. at 1582.

¹⁸⁹ *See supra* Section II.D.

¹⁹⁰ *See supra* notes 126-129 and accompanying text.

¹⁹¹ *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-12 (1973).

¹⁹² *Sineneng-Smith*, 140 S. Ct. at 1581 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

requirement.¹⁹³ In *New York v. Ferber*, the Supreme Court recognized that a New York statute that prohibited the distribution of materials depicting children in sexual performances could prohibit some constitutionally protected speech, including pictures in medical textbooks and National Geographic.¹⁹⁴ The Court, however, doubted that “these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute’s reach.”¹⁹⁵ The Court also assumed that the New York courts would give the statutory term “lewd exhibition[s] of the genitals” a narrow construction.¹⁹⁶ Whatever permissible speech the law may have banned was insignificant. The Court therefore refused to decide that the law was unconstitutionally overbroad, holding that “we believe that the overbreadth of a statute must not only be real, but substantial as well.”¹⁹⁷ Litigants challenging a speech restriction on overbreadth grounds must satisfy the court that this substantiality requirement is met.

Separately, outside the overbreadth context, the Supreme Court has continued to narrow the scope of Article III standing in recent years in two distinct ways. First, *Spokeo, Inc. v. Robins*¹⁹⁸ and *Thole v. U.S. Bank N.A.*¹⁹⁹ both build on *Lujan’s*²⁰⁰ framework and stand for the proposition that even where Congress has purportedly conferred a putative plaintiff standing, Article III’s case or controversy language imposes additional, more stringent requirements.²⁰¹ These cases have narrowed Article III standing by requiring that plaintiffs allege injuries that are both “particularized” and “concrete,” meaning “‘real,’ and not ‘abstract.’”²⁰² In other words, to get into federal court, a plaintiff’s

¹⁹³ See generally FALLON ET AL., *supra* note 115, at 179-80.

¹⁹⁴ 458 U.S. 747, 773-74 (1982).

¹⁹⁵ *Id.* at 773.

¹⁹⁶ *Id.* (alteration in original).

¹⁹⁷ *Id.* at 770 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

¹⁹⁸ 578 U.S. 330 (2016).

¹⁹⁹ 140 S. Ct. 1615 (2020).

²⁰⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

²⁰¹ See *Spokeo*, 578 U.S. at 337-43; *Thole*, 140 S. Ct. at 1619-22; see also U.S. CONST. art. III, § 2.

²⁰² *Spokeo*, 578 U.S. at 340; see also *Thole*, 140 S. Ct. at 1620-21 (“Article III standing requires a concrete injury even in the context of a statutory violation.”) (quoting *Spokeo*, 578 U.S. at 341).

injury “must actually exist.”²⁰³ *Spokeo* and *Thole* thus make it harder for putative plaintiffs to prove that they have the requisite Article III standing.

Second, the Court has also heightened standing requirements by recharacterizing certain prudential standing principles as constitutional ones. In *Allen v. Wright*, for example, the Court characterized the general prohibitions on third-party standing and generalized grievances as prudential, “judicially self-imposed limits” on standing.²⁰⁴ But in *Lujan*,²⁰⁵ and most notably in *Hollingsworth v. Perry (Hollingsworth II)*, the Court explained that the ban on generalized grievances is a *constitutional* prohibition.²⁰⁶ In *Hollingsworth II*, the Court confronted the question whether California residents who sought to enforce Proposition 8, which limited marriage to opposite-sex couples, had standing to do so when the California Attorney General refused to defend the state constitutional amendment.²⁰⁷ Denying standing to the proponents of the ballot initiative, the Court held that the “Article III requirement” of standing means “[r]efusing to entertain generalized grievances” so that courts are limited to exercising “power that is judicial in nature.”²⁰⁸ And while the Court has sometimes assumed that the rule disallowing third-party standing is a prudential limitation on standing,²⁰⁹ it has suggested in dicta on a number of occasions that the ban on third-party standing might also have roots in Article III.²¹⁰ As the Court continues to

²⁰³ *Spokeo*, 578 U.S. at 340.

²⁰⁴ 468 U.S. 737, 751 (1984); see also S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 95 (2014).

²⁰⁵ *Lujan*, 504 U.S. at 573-74 (“We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.”).

²⁰⁶ 570 U.S. 693, 715 (2013).

²⁰⁷ *Id.* at 697-702.

²⁰⁸ *Id.* at 715 (quoting *Lance v. Coffman*, 549 U.S. 437, 441 (2007)).

²⁰⁹ See *Craig v. Boren*, 429 U.S. 190, 193 (1976); cf. *United States v. Windsor*, 570 U.S. 744, 756-63 (2013) (holding that the Court had Article III jurisdiction and that exercising jurisdiction was prudent where an amicus defended the constitutionality of DOMA when the executive branch would not, negating any adversarial dispute between the named parties).

²¹⁰ See, e.g., *New York v. Ferber*, 458 U.S. 747, 767 n.20 (1982) (prohibition on third-party standing is “grounded in Art[icle] III limits on the jurisdiction of federal courts to actual cases and controversies”); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (prohibition on third-party standing is “closely related to Art[icle] III concerns”); *Barrows v. Jackson*,

tighten standing requirements, it would not be surprising if it affirmatively casts the prohibition on third-party standing as a constitutional requirement rather than a prudential consideration.

These two distinct doctrinal developments—the substantiality requirement in the overbreadth context and a stringent approach to standing more broadly—both point toward a First Amendment-based party presentation principle. In his *Sineneng-Smith* concurrence, Justice Thomas noted that the overbreadth doctrine is “the handiwork of judges.”²¹¹ Though likely meant as a pejorative, his observation is true in that the text and original meaning of the First Amendment do not contemplate overbreadth.²¹² Rather, a speech-protective Supreme Court developed the overbreadth doctrine in the mid-twentieth century pursuant to the “substantive values underlying the First Amendment.”²¹³ First came “aggressive” application of the doctrine followed by later judicially crafted limitations like the substantiality requirement.²¹⁴ And with regard to standing, if third-party harm is or becomes a constitutional rather than prudential bar to standing, overbreadth as an exception to the rule against third-party standing would be “especially problematic.”²¹⁵

Taken together, the *Sineneng-Smith* doctrine might be constitutionally defensible as one more limitation on a court’s use of the “strong medicine” that is overbreadth.²¹⁶ If the Court is interested in (1) limiting the use of overbreadth, and (2) cutting back on third-party standing, then the *Sineneng-Smith* doctrine

346 U.S. 249, 255 (1953) (“[The limitation on third-party standing is] not always clearly distinguished from the constitutional limitation . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others.”).

²¹¹ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1588 (2020) (Thomas, J., concurring).

²¹² *Id.* at 1583 (“This Court’s overbreadth jurisprudence is untethered from the text and history of the First Amendment.”). *See generally* Fallon, *supra* note 128, at 863-67 (tracing the development of the overbreadth doctrine and its First Amendment roots).

²¹³ Fallon, *supra* note 128, at 864.

²¹⁴ Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970); *see* FALLON ET AL., *supra* note 115, at 179-80.

²¹⁵ *Sineneng-Smith*, 140 S. Ct. at 1586-87 (Thomas, J., concurring) (“Although the modern Court has characterized the rule as a prudential rather than jurisdictional matter, it has never provided a substantive justification for that assertion.”) (citation omitted).

²¹⁶ *Id.* at 1581 (majority opinion) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

qua First Amendment doctrine accomplishes those goals. Judges created the overbreadth doctrine and have since limited its reach with certain limitations like the substantiality requirement. What's one more judicially created limitation in the form of a ban on judges injecting overbreadth analyses *sua sponte*? By conducting an overbreadth analysis only when the parties present overbreadth arguments, courts would limit their use of overbreadth and thus limit the use of third-party standing.

Justice Thomas's concurrence points to a complicating factor in this analysis, though: overbreadth itself might be unconstitutional. Because any overbreadth inquiry raises questions about its congruence with established Article III standing requirements, Justice Thomas concluded his concurrence by stating that "[i]n an appropriate case, we should consider revisiting [the overbreadth] doctrine."²¹⁷ If the Supreme Court does reconsider the overbreadth doctrine—and if the Court ultimately does away with it—this would also destroy the First Amendment hook for the *Sineneng-Smith* doctrine. If overbreadth is overruled, courts would not even have the option of injecting an overbreadth analysis *sua sponte*. If court-injected overbreadth analyses are not a live option, a First Amendment-based party presentation principle would be obsolete. Thus, if the Court eliminates the overbreadth doctrine, it could potentially eradicate a constitutionally justifiable *Sineneng-Smith* doctrine as well.

D. Constitutional "Backdrop"

If the *Sineneng-Smith* doctrine is rooted in a specific provision of the Constitution, the First Amendment's Free Speech Clause—through the judicially created doctrine of overbreadth—is likely the strongest candidate. And thus far, this Article has assumed that a constitutionally sound *Sineneng-Smith* doctrine needs a textual basis in a specific constitutional provision. But if that assumption were cast aside, it might be possible that the party presentation principle is a legally valid doctrine without a textual hook in the written Constitution itself. That is, the *Sineneng-Smith* doctrine could be constitutional without any single constitutional provision to support it. At first blush, this idea confounds. Doesn't an

²¹⁷ *Id.* at 1588 (Thomas, J., concurring).

unwritten constitutional rule contradict the idea of a written Constitution in the first place? Further inspection reveals, however, that such unwritten constitutional doctrines are commonplace even within the American constitutional design. To take just a few examples, consider the President's removal power, the anti-commandeering doctrine, and the federal courts' application of *stare decisis* in constitutional cases. Each "seem[s] like [a] constitutional question[]," yet "none of these issues is easily resolved by any specific provision of the Constitution's text."²¹⁸

Professor Stephen Sachs has labeled these doctrines "constitutional backdrops": "rules or principles that aren't recorded in the text, but that nonetheless have continuing legal effect."²¹⁹ In constructing these and other "backdrop" doctrines, the Court relies on Founding-era history—but not a specific constitutional provision—when deciding what the Constitution permits, prohibits, or requires.²²⁰ The idea is that where the constitutional text is silent on a given question, and where a legal rule or principle was widely understood and accepted when the Constitution was enacted, such rules and principles "are left unaltered by the text."²²¹ That is, they continue to have the force of law even under the written Constitution "until they're properly changed."²²² And "[w]hen something *else* in the text prevents us from changing the background law, that ordinary law becomes a constitutional backdrop."²²³

To see how it works, consider Justice Scalia's opinion for the Court in *Printz v. United States*, which held that the federal government cannot commandeer state executive officials "to administer or enforce a federal regulatory program."²²⁴ The opinion is not originalist in the strict sense; it does not seek to understand the original meaning of any particular constitutional provision.²²⁵

²¹⁸ Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1815-16 (2012).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 1816.

²²² *Id.*

²²³ *Id.*

²²⁴ 521 U.S. 898, 935 (1997).

²²⁵ Cf. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6-7 (2015) (explaining the "core ideas" of

Indeed, it cannot be: “Because there is no constitutional text speaking to th[e] precise question, the answer to the [state officials’] challenge must be sought in *historical understanding and practice*, in the structure of the Constitution, and in the jurisprudence of this Court.”²²⁶ Examining the historical record in detail, the Court found that from the time of the Founding until recent times, Congress had never compelled state executive officials to implement federal law.²²⁷ The Court interpreted Congress’s failure to commandeer state executives for most of the country’s history as proof that the Constitution itself prohibits that practice.²²⁸ It concluded that “the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.”²²⁹ To reiterate, the Court reached this conclusion without interpreting the text of a specific constitutional provision.

For another example, take *stare decisis* in constitutional cases. No constitutional text or statutory provision requires that courts adhere to judicial precedent in constitutional cases, yet the judiciary flouts *stare decisis* as a “foundation stone of the rule of law.”²³⁰ Some commentators contend “that the Constitution requires *stare decisis*” as part of the linguistic meaning of the “judicial Power” Article III vests in the federal courts.²³¹ But as Professor Sachs and others have shown, this is an “aggressive claim” that doesn’t explain why district courts (which are vested with the “judicial power”) don’t follow horizontal *stare decisis*.²³² If

originalism as the “Fixation Thesis” and the “Constraint Principle,” the former of which holds that “the original meaning (‘communicative content’) of the *constitutional text* is fixed at the time each provision is framed and ratified”) (emphasis added). I use the term “originalist” here as a “decision procedure”—i.e., a method for deciding a case—rather than as a “standard”—i.e., a criterion by which to gauge whether an interpretation is correct. *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

²²⁶ *Printz*, 521 U.S. at 905 (emphasis added).

²²⁷ *Id.* at 905-18.

²²⁸ *Id.* at 905 (“[S]uch ‘contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.’”) (omission in original) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

²²⁹ *Id.* at 907-08.

²³⁰ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014).

²³¹ Sachs, *supra* note 218, at 1864.

²³² *Id.*

stare decisis were part of the “judicial power,” it also would have required Founding-era lawyers to understand judges in civil law countries as “exercising something other than judicial power.”²³³ Rather than pinning stare decisis to a linguistic understanding of the “judicial power,” Professor Sachs proposes analyzing stare decisis as a constitutional backdrop.²³⁴ Stare decisis likely was a “well-understood background assumption[] of the common law” against which the Framers drafted the Constitution.²³⁵ Indeed, stare decisis “went unspoken because all assumed it to be true.”²³⁶ Importantly, no express constitutional text gives Congress the power to override constitutional stare decisis,²³⁷ and neither Congress nor the Court has abrogated the doctrine since the federal courts first applied it in the Founding era.²³⁸ On the basis of this historical record, Professor Sachs argues that the constitutional backdrop theory—rather than the linguistic meaning of the “judicial power”—better describes why stare decisis “continues to be in effect today.”²³⁹

Constitutional backdrops explain how doctrines like the executive anti-commandeering principle and stare decisis are considered constitutional law despite the absence of a constitutional provision directly on point. They existed at and after the Founding, and no constitutional provision or later legal enactment has altered their legal force. The *Sineneng-Smith* doctrine might be justified in the same way. To qualify as a constitutional backdrop, the historical evidence would need to show that (1) the party presentation principle existed in federal courts at

²³³ John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 522 (2000).

²³⁴ See Sachs, *supra* note 218, at 1863-66.

²³⁵ Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1577 (2000).

²³⁶ *Id.*

²³⁷ Professor Sachs ultimately leaves open the question whether constitutional stare decisis could be abrogated by statute but notes that even if it is a common-law rather than constitutional backdrop, it remains in effect because it has not yet been changed. Sachs, *supra* note 218, at 1865-66.

²³⁸ Of course, sometimes, the Court does overrule its prior cases. But that is because the doctrine of stare decisis itself “is not an inexorable command” and allows for overruling precedent where certain factors are met. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

²³⁹ Sachs, *supra* note 218, at 1864-65.

the Founding, (2) it has not been altered since, and (3) it cannot be altered.

A full study of the history of the party presentation principle is beyond the scope of this Article, but the well-documented history of the related adversariness requirement sheds initial light on the question. A cursory analysis suggests that party presentation might qualify as a backdrop.²⁴⁰ The Process Acts of 1789 and 1792 required the federal courts to follow, respectively, the “modes of process”²⁴¹ and the “modes of proceeding”²⁴² used in the supreme court of the state in which the federal court sat. Thus, if the party presentation principle were followed in state courts at the Founding, it would have been followed in federal courts as well. Additionally, as Professors Anthony J. Bellia Jr. and Bradford R. Clark have documented, the effect of the Process Acts was not only to regulate procedure but also to “define[] the causes of action that were available in federal court.”²⁴³ And in the Founding era, this meant that federal courts adopted “state forms of action as causes of action at law in federal courts, and traditional remedies in equity and admiralty as causes of action for cases within those respective jurisdictions.”²⁴⁴

Litigating cases pursuant to the forms of action, at least for actions at law, likely all but required party presentation. The federal courts’ equity and admiralty jurisdiction probably allowed for some “quasi-inquisitorial” practices that included the gathering of evidence.²⁴⁵ But legal actions, which needed to conform to “strict pleading devices,” relied on the parties to shape the single issue in dispute and present to the jury the evidence that supported their case.²⁴⁶ “Litigants at law thus had great freedom to control the

²⁴⁰ Admittedly, the history and scholarship I have drawn on here applies in the civil context only. Further study would need to account for any differences between the civil and criminal contexts.

²⁴¹ Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94.

²⁴² Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

²⁴³ Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 646-47 (2015).

²⁴⁴ *Id.* at 647.

²⁴⁵ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184 n.16 (2005).

²⁴⁶ *Id.* at 1252.

evidence presented and the sequence and nature of the proceedings, but could only exercise this freedom within a very circumscribed sphere.”²⁴⁷ Because the jury had but one issue to decide—a narrow factual question winnowed down by form-pleading rules—courts had no discretion to inject evidence or new legal issues into cases at law.²⁴⁸ It is at least plausible, therefore, that the party presentation principle was built into the legal system at the Founding.

But this brief historical dive leaves many questions unanswered. Deeper study is needed to determine whether party presentation qualifies as a constitutional backdrop or whether it’s a lesser form of unwritten law. Query, for example, whether the 1938 Federal Rules of Civil Procedure, which introduced “one form of action—the civil action,” significantly changes the analysis.²⁴⁹ In its regulation of pleading and discovery practices, the Rules assume that the parties will collect and present evidence to the court. But the Rules themselves say little about the role that courts play in adjudicating disputes. Additionally, the Process Acts and forms of action applied only to civil actions. Perhaps the history of criminal law adjudication with respect to party presentation differs in important respects; perhaps it doesn’t. And lastly, as Part I outlined, the Supreme Court has long lauded the importance of the party presentation principle—but a more searching study of not only how the federal courts talk about party presentation but also how they actually adjudicate cases would shed additional light on the party presentation principle’s status as a constitutional backdrop. The point for now is that the idea of constitutional backdrops provides one more possibility for a constitutionally legitimate and enforceable party presentation principle—that is, for the *Sineneng-Smith* doctrine.

IV. IMPLICATIONS

Defining with precision where the Supreme Court gets its power to promulgate and enforce the *Sineneng-Smith* doctrine is not just an academic nicety. The source of the doctrine has real-world implications for at least three reasons I discuss in this Part:

²⁴⁷ *Id.*

²⁴⁸ *See id.*

²⁴⁹ FED. R. CIV. P. 2.

the scope of the doctrine, its effect on state courts, and its effect on the Supreme Court itself. If the *Sineneng-Smith* doctrine has no basis in the Constitution, then of course it would be unlawful to extend the doctrine any further. If, however, the *Sineneng-Smith* doctrine is constitutionally legitimate, it is likely lawful on the basis of First Amendment overbreadth or as a constitutional backdrop. As this Part shows, which justification explains the doctrine's lawfulness has wide-ranging implications for how robust the doctrine is or could become.

A. Scope of the Doctrine

Part II suggested that courts would likely understand *Sineneng-Smith* to stand for the “weak” or “weakest” version of the doctrine. Such conceptions would limit the doctrine's scope to constitutional questions or overbreadth, respectively. Viewing the *Sineneng-Smith* doctrine in light of the Court's power to promulgate it at all brings the question of the doctrine's scope into clearer focus. If the *Sineneng-Smith* doctrine is justifiable only on the basis that it limits a court's ability to review *sua sponte* a statute on overbreadth grounds, then the doctrine is necessarily limited to the overbreadth context. That is, while the *Sineneng-Smith* doctrine may be understood in any of the four ways I propose above when unmoored from its constitutional justification, only the “weakest” conception of the doctrine would stand on firm constitutional footing if rooted in the First Amendment. Under this First Amendment overbreadth justification, a court enforcing the *Sineneng-Smith* doctrine on appeal could vacate a lower court's judgment on the basis of a departure from the party presentation principle only when a lower court introduces an overbreadth analysis *sua sponte*. Any broader applications of the *Sineneng-Smith* doctrine—say, to reject a court's insertion of a new legal issue or theory—would be unconstitutional.

Conversely, a *Sineneng-Smith* doctrine justified as a constitutional backdrop would have a much broader scope. Since constitutional backdrops are unwritten legal rules and principles in effect at the Founding that the Constitution left intact, the scope of the party presentation principle today would need to mimic the one in effect in 1787. Determining the scope of the party presentation principle would thus require further historical inquiry. What's clear

enough, though, is that any party presentation principle in effect at the Founding would not be tied to overbreadth; overbreadth did not become part of First Amendment law until 1940.²⁵⁰ If the party presentation principle is a constitutional backdrop, courts would thus need to decide whether the “weak” or “medium” version of the *Sineneng-Smith* doctrine controls.²⁵¹ The question would again be a historical one: Did the party presentation principle prohibit judges from inserting constitutional questions only (“weak”), or did it prohibit judges from inserting any new legal issue (“medium”)? If the Supreme Court or lower courts expand enforcement of the *Sineneng-Smith* doctrine beyond the overbreadth context, presumably on the basis of the constitutional backdrop theory, then they must do the requisite historical work to delineate the exact parameters of the doctrine. No matter where they land as a matter of historical practice, justifying the party presentation principle as a constitutional backdrop would widen the scope of the *Sineneng-Smith* doctrine beyond the scope it would have as a First Amendment principle.

B. Are State Courts Bound?

The question of scope is not only a question for the federal courts but also one that has federalism implications as well. Here again, the source of the *Sineneng-Smith* doctrine affects whether a state court decision is susceptible to vacatur by the Supreme Court for departing from the party presentation principle. The Supreme Court has long understood that its supervisory authority does not extend to state courts.²⁵² So, contrary to the analysis above, if the Court announced the *Sineneng-Smith* doctrine pursuant to its supervisory authority, the decision would not bind state courts. Consider how that plays out on the ground. If a state high court were to invalidate a state statute as unconstitutionally overbroad under the (federal) First Amendment on its own initiative, the Supreme Court could review the decision for the soundness of its

²⁵⁰ See *Thornhill v. Alabama*, 310 U.S. 88 (1940).

²⁵¹ See *supra* Sections II.B, C.

²⁵² See, e.g., *Early v. Packer*, 537 U.S. 3, 10 (2002) (explaining that a rule announced pursuant to the Supreme Court’s supervisory power is inapplicable to state courts); *Dickerson v. United States*, 530 U.S. 428, 438-39 (2000) (“It is beyond dispute that we do not hold a supervisory power over the courts of the several States.”).

First Amendment analysis but not for the state court's departure from the party presentation principle. Conversely, while "[f]ederal courts hold no supervisory authority over state judicial proceedings," they may intervene "to correct wrongs of constitutional dimension."²⁵³ Therefore, if the *Sineneng-Smith* doctrine is inextricably bound up with the First Amendment, the calculus changes. In that scenario, the Supreme Court *would* have the power to vacate the state court's judgment if the state court departed from the party presentation principle by injecting the overbreadth issue.²⁵⁴

But the calculus changes again if the Court justifies the *Sineneng-Smith* doctrine as a constitutional backdrop. This time, however, the scope of the *Sineneng-Smith* doctrine is narrower under the backdrop conception than it is under the First Amendment conception. If the party presentation principle is a constitutional backdrop, it would apply to state courts only if Congress were to extend it to state courts specifically. But it's far from clear Congress has the power to require that state courts follow federal procedural rules, at least in most instances.²⁵⁵ Now, it may very well be the case that the state courts adhere to something like the *Sineneng-Smith* doctrine as a matter of traditional practice or state procedural law. Indeed, state courts would have to have followed some form of the party presentation principle at the Founding for the *Sineneng-Smith* doctrine to be justified as a constitutional backdrop in the first place. But even if state courts *choose* to abide by the party presentation principle, that does not make it constitutionally *required*. To put it bluntly, if the California Supreme Court, rather than the Ninth Circuit, were to inject an overbreadth inquiry to invalidate a federal law, the

²⁵³ *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

²⁵⁴ If, contrary to what I argued above, the party presentation principle is justified on the basis that it is required by due process, then the Supreme Court could review a state court judgment for departure from a party presentation principle that is not tied to First Amendment overbreadth.

²⁵⁵ See generally Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (arguing that Congress cannot impose procedural rules on state courts adjudicating state law claims). Congress does have limited authority to prescribe procedural rules for state courts adjudicating federal claims. But these are limited to instances in which the federal procedural rules "form part of the substance of an asserted federal right." *Id.* at 959-63.

Supreme Court could not enforce the *Sineneng-Smith* doctrine, a procedural rule, against the California Supreme Court. Instead, the Supreme Court would have to decide the overbreadth question on the merits.²⁵⁶

C. *Is the Supreme Court Different?*

In *Sineneng-Smith*, the Supreme Court tried to justify its common practice of ordering additional briefing and appointing *amicus curiae* to argue questions the parties did not raise. Justice Ginsburg's opinion for the Court included an addendum of cases from 2015 to 2020 in which the Court "called for supplemental briefing or appointed *amicus curiae*."²⁵⁷ The cases discussed in the addendum allegedly do not "bear any resemblance to the redirection ordered by the Ninth Circuit panel in this case."²⁵⁸ And on a very narrow view of the Ninth Circuit's actions, perhaps they don't. But the claim that the Supreme Court always abides by the party presentation principle, at least as understood at a higher level of generality, is not hard to refute. In fact, the Court routinely decides issues not raised by the parties (and sometimes without briefing)—a practice it has relied upon in some of its most significant cases that include *Erie Railroad Co. v. Tompkins*,²⁵⁹ *Mapp v. Ohio*,²⁶⁰ *Washington v. Davis*,²⁶¹ and *Dickerson v. United States*.²⁶²

But does the Supreme Court have to abide by the party presentation principle at all? In *Sineneng-Smith*, the Court went out of its way to explain that it does follow the principle.²⁶³ The Court's actions tell another story: following the party presentation principle is optional, at least for the Supreme Court itself.²⁶⁴ Nonetheless, this conclusion is mostly consistent with the preceding

²⁵⁶ Of course, if the California Supreme Court were to inject an overbreadth issue *sua sponte*, the Supreme Court could (and probably would) refuse to grant certiorari in the first place.

²⁵⁷ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582-83 (2020).

²⁵⁸ *Id.* at 1579 n.4.

²⁵⁹ 304 U.S. 64 (1938).

²⁶⁰ 367 U.S. 643 (1961).

²⁶¹ 426 U.S. 229 (1976).

²⁶² 530 U.S. 428 (2000); see Frost, *supra* note 29, at 467-69; Milani & Smith, *supra* note 96, at 253-59.

²⁶³ See *Sineneng-Smith*, 140 S. Ct. at 1582.

²⁶⁴ See Frost, *supra* note 29, at 461-69.

analysis. If due process required courts to follow the party presentation principle, then the Supreme Court would be constitutionally bound to refrain from issue creation, just as the lower courts would be. So too if the principle came from Article III's grant of the "judicial power," which vests the judicial power in each federal court. The Court's regular practice of deciding issues not presented by the parties thus provides an additional piece of evidence that neither the due process nor "judicial power" explanation is correct.

The two remaining possibilities that pin the *Sineneng-Smith* doctrine to the constitutional text both comport with the Supreme Court's practice. If, despite what I've argued above, supervisory authority provides a legitimate basis for the Court to enforce the party presentation principle in the lower courts, the Supreme Court itself would not be bound by the principle. When it comes to supervisory authority, "the Supreme Court is [not] regulating its own procedure" but is rather "directly regulating the proceedings of inferior courts."²⁶⁵ That is, under its supervisory authority, the Supreme Court has the prerogative to play by a different set of rules if it wants to. But the First Amendment overbreadth justification for the party presentation principle has just as much, if not more, explanatory force. While the Supreme Court may choose to decide issues not raised by the parties in other contexts, like the lower courts, it would be bound to avoid deciding cases on overbreadth grounds unless the parties present that issue. And, of course, this view is consistent with the Supreme Court's well-worn refrains (1) that "overbreadth is 'strong medicine' that is not to be 'casually employed,'"²⁶⁶ and (2) that "the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."²⁶⁷

It is a bit harder to explain, however, how the Supreme Court could exempt itself from the party presentation principle if the *Sineneng-Smith* doctrine is justified as a constitutional backdrop. Constitutional backdrops are constitutionally required because

²⁶⁵ Barrett, *supra* note 144, at 325.

²⁶⁶ *Sineneng-Smith*, 140 S. Ct. at 1581 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

²⁶⁷ *Bond v. United States*, 572 U.S. 844, 855 (2014) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

they are legally enforceable background norms that predated the Constitution, continued to have the force of law after its enactment, and have not been abrogated.²⁶⁸ Without historical evidence to distinguish between the lower courts, which presumably would have been bound by the principle, and the Supreme Court, which presumably would not have been, the Court's practice of departing from the party presentation principle rests on shaky ground. Fortunately for the Supreme Court, such historical evidence likely exists. Its most famous case serves as the case in point. In *Marbury v. Madison*,²⁶⁹ Madison did not argue that section 13 of the Judiciary Act was unconstitutional.²⁷⁰ Indeed, he couldn't have. Madison didn't bother to argue the case *at all*.²⁷¹ The Court's decision in *Marbury v. Madison*, therefore, *must* have violated the party presentation principle. It held section 13 of the Judiciary Act unconstitutional without being asked to.

If the Court can evade the party presentation principle in the very case that established judicial review, the Court needs to better explain its claim in *Sineneng-Smith* that it is bound by the principle. It is not hard to think of additional cases where the Court decided an issue the parties did not present.²⁷² From *Marbury* to the Court's modern-day practice of adding to and amending the questions presented,²⁷³ the Court seems to violate the party presentation principle fairly regularly, no matter how one understands its scope. Indeed, neither party in *Sineneng-Smith* itself advanced a party presentation argument! Did the Court's decision in *Sineneng-Smith* itself violate the *Sineneng-Smith* doctrine?

Alternatively, the Supreme Court could simply embrace that it plays by a different set of rules. But should the Court admit that it is not bound by the party presentation principle in the same way as the lower federal courts, it runs into a slippery slope, at least if the principle is justified as a constitutional backdrop. The logic goes like this: If the Court has always been exempt from the party

²⁶⁸ See *supra* Section III.D.

²⁶⁹ 5 U.S. (1 Cranch) 137 (1803).

²⁷⁰ See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 30-33.

²⁷¹ *Id.* at 5.

²⁷² See Miller, *supra* note 95, at 1279-88 (discussing various cases).

²⁷³ See *supra* notes 91-93 and accompanying text.

presentation principle, then the principle might not have been in effect at the Founding. If the principle was not in effect at the Founding, then it might not be a constitutional backdrop. If the principle is not a constitutional backdrop, then on what lawful basis could the Court have decided *Sineneng-Smith* on party presentation grounds? Where in the Constitution does it get the authority to enforce the party presentation principle? Possibly to escape this Catch-22 so as to justify party presentation as a constitutional backdrop, the Supreme Court tried—strained even—to explain that, despite the fact that it frequently injects new questions and orders additional briefing, it too is bound by the party presentation principle. Query whether it succeeded.

D. Was Sineneng-Smith Wrongly Decided?

Of course, one final possibility remains: maybe the Supreme Court simply got *Sineneng-Smith* wrong. Maybe there is no such thing as a constitutionally sound *Sineneng-Smith* doctrine. But even if *Sineneng-Smith* was wrong, it remains the case that the party presentation principle is a defining feature of the American adversarial system. It just might not be a judicially enforceable rule.

Not everything the Supreme Court says is binding law. In fact, much of what the Supreme Court says is decisively not the law but is instead mere dicta or general principles. To return to *Marbury*, there Chief Justice Marshall invoked Blackstone for the basic proposition that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy.”²⁷⁴ But of course, in *Marbury* itself, the Court held that it lacked the power to grant Marbury’s petition for a writ of mandamus, denying him a remedy even though he was entitled to one as a matter of law.²⁷⁵ Nonetheless, it continues to be a staple of American law that a violation of legal rights entitles an aggrieved person to a legal

²⁷⁴ *Marbury*, 5 U.S. (1 Cranch) at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768)).

²⁷⁵ See *id.* at 162 (“To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right. . . . If he has a right, and that right has been violated, do the laws of his country afford him a remedy?”).

remedy. This rights-remedy principle is not self-enforcing,²⁷⁶ but it does undergird some of the Court's doctrines, specifically when it comes to implied constitutional remedies.²⁷⁷

The party presentation principle might work the same way. Even if no statutory or constitutional provision gives the federal courts the power to enforce it, the party presentation principle could still be a general principle of American law. Indeed, by all accounts it is. Central to the adversarial system is the idea that the parties “know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”²⁷⁸ In our system, the federal courts serve only as “arbiter[s] of matters the parties present.”²⁷⁹ The *Sineneng-Smith* Court's description of the American adjudicative process is therefore accurate as a descriptive matter and even aspirational as a normative matter. For this reason, even if *Sineneng-Smith* was incorrectly decided, the lower courts are not wrong to cite it for general principles about how the party presentation principle works, what its goals are, and how it fits into the American adjudicative system.²⁸⁰ They could not, however, *enforce* the *Sineneng-Smith* doctrine. This limitation mirrors that of the rights-remedy principle: the Court might identify that a right has been violated, but it can't always supply a remedy.²⁸¹ Similarly, a lower court might depart from the party

²⁷⁶ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.”).

²⁷⁷ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (“[T]he Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But ‘it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.’”) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

²⁷⁸ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

²⁷⁹ *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

²⁸⁰ Of course, even if the Supreme Court decided *Sineneng-Smith* incorrectly, only the Supreme Court itself can overturn erroneous precedent. See generally *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-86 (1989).

²⁸¹ See *Alexander*, 532 U.S. at 286-87 (“Without [congressional intent to create a remedy], a cause of action does not exist and courts may not create [a remedy], no matter how desirable that might be as a policy matter, or how compatible with the statute.”); cf. *Sossamon v. Texas*, 563 U.S. 277, 289 (2011) (“The question here is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, but whether Congress has given clear direction that it intends to *include* a damages remedy.”) (citation omitted).

presentation principle, but that does not mean that a federal court has the constitutional authority to vacate a lower court decision on that basis.

CONCLUSION

The Court's decision in *United States v. Sineneng-Smith* surprised just about everyone who had followed the case. After briefing and oral argument, the Court seemed poised to issue a landmark First Amendment ruling. It passed on that opportunity, but its seemingly narrow holding should not evade doctrinal scrutiny. For the first time in its history, the Supreme Court turned the familiar party presentation principle into an enforceable rule—a rule this Article has called the “*Sineneng-Smith* doctrine.” If the lower courts continue to cite *Sineneng-Smith* at the pace they have thus far, the Supreme Court ought to address two open questions about the doctrine that *Sineneng-Smith* did not and that this Article has raised: What is the scope of the *Sineneng-Smith* doctrine? And on what authority can the courts enforce it? This Article has proposed some possible answers to each question. It leaves it to the reader, however, to decide whether these possible applications and justifications in fact warranted the Court's decision in *Sineneng-Smith*. The Court would do well to provide some clarification in the years to come.