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STIPULATING THE LAW

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Gary Lawson

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STIPULATING THE LAW

Gary Lawson*

109 MICH. L. REV. ---- (forthcoming)

Free Enterprise Fund v. Public Company Accounting Oversight Board[1] -- the very last decision announced by the Supreme Court during the October 2009 term -- was one of the most anticipated separation-of-powers cases in modern times. Judge Brett Kavanaugh, dissenting in the lower court, called *Free Enterprise Fund* "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years."[2] Fourteen organizations and groups of individuals filed amicus curiae briefs on the merits in the Supreme Court. Yet perhaps the most important issue presented by the case was not briefed by any of the parties or amici and has nothing to do with the Constitution's rules regarding appointment and removal of federal personnel. The deepest issue lurking in *Free Enterprise Fund* concerns the very nature of adjudication.

The Public Company Accounting Oversight Board ("PCAOB" or "the Board") is a federal agency created by the Sarbanes-Oxley Act of 2002[3] to exercise sweeping regulatory authority over the financial audits of publicly traded companies. Under the terms of the statute, the PCAOB members are appointed by the Securities and Exchange Commission ("SEC" or "the

* Professor, Boston University School of Law. I am grateful to the Abraham and Lillian Benton Fund for financial support and to Larry Alexander, Amanda Frost, and Patty Lawson for invaluable advice.

[1] 561 U.S. – (2010).

[2] Free Enterprise Fund v. Public Company Accounting Oversight Board, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). The 20-year-old case to which Judge Kavanaugh referred was, of course, *Morrison v. Olson*, 487 U.S. 654 (1988).

[3] Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

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Commission")[4] and are removable by the Commission only for narrowly specified causes.[5] Free Enterprise Fund and one of its member companies challenged both the appointment and removal provisions for the Board on constitutional grounds. The Supreme Court unanimously rejected the various Appointments Clause challenges[6] but, in a sharply split decision, held that the removal provisions for PCAOB members unduly limit the President's power to control the administration of the laws. The five-Justice majority maintained that the statute imposed an impermissible restriction on presidential supervision by establishing a "double-for-cause" removal framework, under which the PCAOB members could be removed only for cause by the members of the SEC who themselves are removable only for cause by the President.[7] Four dissenters insisted that the statute was a reasonable congressional accommodation of the twin needs for agency independence and accountability and was consistent with long-established precedent approving for-cause removal provisions for federal agency officials.[8]

In resolving these crucial questions of structural constitutionalism, the majority and dissenting opinions fractured along a number of recognizable, and perhaps predictable, jurisprudential divides: formalism versus functionalism,[9] originalism versus non-originalism,[10]

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[4] *See* 15 U.S.C. § 7211(e)(4) (2000).

[5] *See infra* --.

[6] *See* 561 U.S. at --.

[7] *See id*. at --.

[8] *See id*. at --.

[9] *Cf. id*. at – (beginning the opinion by declaring that the "Constitution divided 'the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial' ") (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983), and concluding that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President") *with id*. at – (Breyer, J., dissenting) (emphasizing "the importance of examining how a particular provision, taken in context, is likely to function" and insisting that "we should decide the constitutional question in light of the provision's practical functioning in context").

[10] Citations to founding-era figures: majority -- 13, dissent -- 1 (not counting three citations to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

Electronic copy available at: http://ssrn.com/abstract=1677014

and precedent-as-a-side-constraint versus precedent-as-law.[11] All of these divides in the context of *Free Enterprise Fund* deserve careful attention, and I am sure that they will all receive that attention elsewhere. But in this Article, I want to focus on a subtler, though in the end even more fundamental, divide that largely flew beneath the radar as the case was litigated and decided.

The majority's holding that a double-for-cause removal provision is unconstitutional is based on the premise that the relevant statutes in fact (or, more precisely, in law) set up a double-for-cause removal provision. Congress unambiguously meant for the PCAOB members to be subject only to for-cause removal under the plain terms of the Sarbanes-Oxley Act, but what about the members of the SEC? As Justice Breyer pointed out both at oral argument[12] and in his dissent,[13] the Securities Exchange Act imposes no express statutory restrictions on the removability of members of the SEC. That is not at all surprising, as it is virtually certain that no such restrictions were meant to exist in 1934 when the Securities Exchange Act was passed. At that time, the governing precedent on removability of federal officers was *Myers v. United States*,[14] which seemed to hold broadly that the President had constitutional power to remove at

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Citations to 20th or 21st century legal scholars: majority -- 0, dissent -- 22.

Citations to *non-originalist* 20th and 21st century legal scholars: majority -- 0, dissent -- 21 (controvertibly classifying Larry Lessig as "non-originalist"; otherwise the score is 0-18).

[11] This is difficult to pin down with specific citations, but: The majority, following the lead of Judge Kavanaugh in the D.C. Circuit, appeared to take its existing precedents upholding removal restrictions as limitations on what might otherwise be a more sweeping presidential removal power derived from original meaning. The majority accepted its precedents but reasoned around them rather than from them. The dissent, by contrast, was willing to draw inferences from the removal precedents to extend them to new situations.

[12] *See* Tr. of Oral Argument at 17-20, *Free Enterprise Fund* (Dec. 7, 2009) (No. 08-861).

[13] *See* 561 U.S. at -- (Breyer, J., dissenting).

[14] 272 U.S. 52 (1926).

will all executive officials.[15] *Humphrey's Executor v. United States*,[16] with its novel constitutional validation of the "independent agency" whose head is removable by the President only for cause, was still a year away. While Congress is under no general obligation to conform its actions to governing Supreme Court precedent, it would make sense that Congress in 1934 would not bother trying to impose removal restrictions of doubtful constitutionality, especially on a President of its own party.[17]

Nonetheless, it has long been universally assumed that Commission members are removable only for cause. All of the parties in *Free Enterprise Fund* proceeded on that assumption,[18] as had all of the judges in the lower court[19] as well as parties and courts in previous cases.[20] The five Justices in the majority in *Free Enterprise Fund* went along with the parties' agreed view of the law regarding removal of Commission members without conducting an independent inquiry into the matter:

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[15] *See* 561 U.S. at – (Breyer, J., dissenting) ("Congress created the SEC at a time when, under this Court's precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause").

[16] 295 U.S. 602 (1935).

[17] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 283 (2008) ("[J]ust as Congress did not include any restrictions on presidential removals when it created the . . . [Federal Power Commission] in 1927, it also failed to include any such restrictions when it created the Securities and Exchange Commission and the Federal Communications Commission. Apparently, with one minor exception, in the aftermath of the Supreme Court's decision in *Myers*, Congress did not believe that such restrictions were worth the effort.") (footnotes omitted). *See also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 610 (1984) (noting that in the aftermath of *Myers*, Congress "ceas[ed] to provide removal protections in statutes creating new government agencies").

[18] *See infra* --.

[19] *See* 537 F.3d at 680; *id*. at 686-87 (Kavanaugh, J., dissenting).

[20] *See, e.g.*, SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988) ("The [Securities Exchange] Act does not expressly give to the President the power to remove a commissioner. However, for the purposes of this case, we accept appellants' assertions in their brief, that it is commonly understood that the President may remove a commissioner only for 'inefficiency, neglect of duty or malfeasance in office.' ").

> The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," 295 U.S., at 620, 55 S.Ct. 869 (internal quotation marks omitted); *see* Brief for Petitioners 31; Brief for United States 43; Brief for Respondent Public Company Accounting Oversight Board 31 (hereinafter PCAOB Brief); Tr. Of Oral Arg. 47, *and we decide the case with that understanding*.[21]

In his dissenting opinion, Justice Breyer strongly challenged the majority's willingness to accept what amounts to stipulations by the parties about the applicable law governing the removability of SEC commissioners:

> One last question: How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only "for cause?" * * * Unless the Commissioners themselves are *in fact* protected by a "for cause" requirement, the Accounting Board statute, on the Court's own reasoning, is not constitutionally defective. I am not aware of any other instance in which the Court has similarly (on its own or through stipulation) *created* a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional * * * .
>
> It is certainly not obvious that the SEC Commissioners enjoy "for cause" protection. Unlike the statutes establishing * * * [48 other agencies], the statute that established the Commission says nothing about removal. It *is silent* on the question. As far as its text is concerned, the President's authority to remove the Commissioners is no different from his authority to remove the Secretary of State or the Attorney General * * * .
>
> The Court then, by assumption, reads *into* the statute books a "for cause removal" phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite * * * .[22]

Professor Tuah Samohon made a similar point after the oral argument in *Free Enterprise Fund* but before the decision was issued, asking: "Since when can parties stipulate to different

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[21] 561 U.S. at – (emphasis added).

[22] *Id*. at – (Breyer, J., dissenting).

statutory language than that which was duly enacted and the Court go along with it?"[23] Professor Samohon pointed out that "there is a textual option that avoids the need to assume and lays the problem at the feet of the democratic process. The Court could conclude that the SEC commissioners are removable at will because the statute does not say otherwise and conclude that there is only one removal firewall. To be sure, Congress could react to the Court's statutory interpretation and create good cause tenure for such commissioners, but that's the democratically and institutionally appropriate role of Congress."[24]

Justice Breyer and Professor Samohon seem to have a point. Certainly, if the members of the SEC are removable at the will of the President, the majority's problem with the PCAOB would vanish, as there would be only one layer of for-cause removal separating the PCAOB members from the President.[25] Isn't it the height of judicial activism to declare a federal statute unconstitutional based on quite possibly false assumptions about the state of the law? Wouldn't judicial modesty counsel investigation of the actual law concerning the removal of SEC commissioners before announcing broad constitutional rules that depend on that law? Aren't these particularly telling questions given the straight conservative-liberal split on the 5-4 vote, with the conservative Justices forming the seemingly "activist" majority? Perhaps at the end of the day, after an independent inquiry, the Court would decide that SEC commissioners are indeed removable only for cause and proceed with its analysis, but aren't Justice Breyer and Professor Samohon right that such an inquiry is appropriate, if not jurisprudentially mandatory?

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[23] http://www.concurringopinions.com/archives/2010/03/a-whopper-of-an-assumption-in-free-enterprise-fund-v-pcaob.html.

[24] *Id*.

[25] That is not to say that the constitutional problems would objectively vanish. It is quite possible that *no* layers of removal restrictions are permissible under a correct reading of the Constitution. For present purposes, the correct answer is irrelevant.

As it happens, they are probably right from the standpoint of established practice but, I believe, are wrong from the standpoint of sound principles of adjudication. At a minimum, the majority's position rests on a coherent and defensible -- and in crucial respects quite modest and "restrained" -- vision of the role of courts in adjudication, though that vision is not remotely carried to its logical extreme either by the majority or by any other court under current doctrine. Determination of the appropriate adjudicative principles, however, rests on highly controversial foundational assumptions about the nature of law and the nature of courts that, if they truly underlie the majority's opinion, should have been articulated and defended.

By accepting the parties' stipulation about the law, the Court placed itself in the narrow role of an arbitrator of disputes, resolving only those specific questions put to it by the contending parties. Justice Breyer, by contrast, would have the Court act first and foremost as a declarer of objectively correct legal norms, with the disputes brought by the parties serving as vehicles for the performance of that declaratory function. Thus, the seemingly "activist" majority approach, which reaches out to decide an important constitutional question based on quite possibly false assumptions about the meaning of a statute, actually reflects a far more limited conception of the judicial role than does the seemingly "restrained" position championed by Justice Breyer.

This underlying controversy about the proper role of courts is familiar and longstanding.[26] Less familiar is the notion that judicial acceptance of legal stipulations by the parties goes to its heart. Justice Breyer is correct that standard American practice does not generally allow parties to stipulate to legal conclusions. My contention is that it should, and *Free Enterprise Fund* was therefore jurisprudentially right to take the state of the law as the parties jointly offered it.

[26] *See infra* --.

Part I of this Article reviews the background of and decision in *Free Enterprise Fund* to illustrate how the case was consistently framed by the parties and the various judges involved to assume, without need for inquiry, that SEC commissioners are subject only to for-cause removal. The parties, in essence, successfully stipulated to a crucial element of the law governing their case. Part II surveys the American legal system's ordinary practices regarding stipulations, showing that in many respects, including most prominently stipulations about governing law, those practices do not give parties anything close to complete control over the contours of the disputes that they bring before courts. Based on current doctrine, Justice Breyer's position was at least prima facie correct, and if the majority wished to depart from it, the majority probably should have provided some explanation for its actions. Part III identifies the jurisprudential assumptions behind the current doctrine and practices and suggests an alternative set of assumptions that argues in favor of more party control of litigation. A detailed analysis and defense of those assumptions would require a lengthy book on jurisprudence. In particular, any theory about the extent of appropriate party control over the law applicable to their disputes must articulate an account of precedent that conforms to that theory, as the relationship between precedent and party control of legal norms proves to be complex and inescapable. I do not have the desire (nor the ability) to spell out here a comprehensive account of precedent, so my discussion is necessarily incomplete. Accordingly, my aim in this Article is only to highlight the key points that lie behind party-centered and court-centered views of adjudication of legal propositions in order to stimulate debate rather than to provide rigorous answers. I am more interested for the moment in pointing out the implications of various positions than in advancing those positions. Part IV contains concluding remarks about some possible consequences of adopting a party-centered view of adjudication of legal propositions, including some

consequences that might be of considerable interest to legal academics who participate as amicus curiae in litigation.

Free Enterprise Fund was widely seen as a major case about the structure of the Constitution. Perhaps it should have been viewed instead as a major case about the structure of litigation.

I

A. *The Pre-Game Show*

The Sarbanes-Oxley Act of 2002 was passed in the wake of a series of accounting scandals that rocked the financial world in the 1990s. Title I of the Act created the PCAOB and vested it with broad authority to regulate and oversee the audit practices of accounting firms, including the authority to register, inspect, investigate, and sanction such firms.[27] "To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and 'such other requirements as the Board may prescribe.' "[28]

The members of the PCAOB are appointed by the Securities and Exchange Commission to five-year terms[29] and "may be removed by the Commission, in accordance with section . . .

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[27] *See* 15 U.S.C. § 7211(c), (f).

[28] 561 U.S. at – (quoting 15 U.S.C. § 7213(a)(2)(B)).

[29] *See* 15 U.S.C. § 7211(e)(4).

7217(d)(3), for good cause shown."[30] Section 7217(d)(3), in turn, provides that the SEC may censure or remove PCAOB officials upon a finding by the Commission, after a formal hearing, that a member of the PCAOB "(**A**) has willfully violated any provision of this Act, the rules of the Board, or the securities laws; (**B**) has willfully abused the authority of that member; or (**C**) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof."[31] This provision provides *fewer* occasions for removing a Board member than is typical for federal officers subject to for-cause removals.[32]

In addition to removal authority, the SEC maintains considerable power over the operations of the PCAOB. As the D.C. Circuit put it,

> [T]he Commission approves all Board rules, 15 U.S.C. §§ 7211(g), 7217(b)(2), and may abrogate, delete, or add to them, *id*. § 7217(b)(5). All Board sanctions are subject to plenary review by the Commission, *id*. § 7217(c)(2); and the Commission "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board," *id*. § 7217(c)(3) . . . . It also may impose limitations upon Board activities, *id*. § 7217(d)(2), and relieve the Board of its enforcement authority altogether, *id*. § 7217(d)(1).[33]

Nonetheless, there are important features of the Board's work over which the SEC does not have direct authority. Specifically, the SEC has review power over the Board's rules and sanctions, but it has no statutory power to direct, supervise, or review the Board's investigative and

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[30] *Id*. § 7211(e)(6).

[31] *Id*. § 7217(d)(3).

[32] The standard removal restriction tracks the language governing removals of members of the Federal Trade Commission, which permits removal for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41 (2000). As the majority in *Free Enterprise Fund* pointed out, there are various forms of "malfeasance" that do not appear to be grounds for removal of PCAOB members: "The Act does not even give the Commission power to fire Board members for violations of other laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under §7217(d)(3)." 561 U.S. at —.

[33] 537 F.3d at 672.

enforcement decisions. Given this authority and the strict conditions under which Board members can be removed, it appears as though the PCAOB was structured as a so-called "independent agency"[34] nestled within the SEC.

Beckstead and Watts is an accounting firm "[s]pecializing in audits of small publicly-traded companies."[35] On September 28, 2005, the Board issued a report critical of the firm[36] and commenced a formal investigation. On February 7, 2006, the firm and the Free Enterprise Fund, of which the firm is a member, filed a complaint challenging the authority of the PCAOB to undertake investigations on the ground that the PCAOB was illegally constituted and therefore could perform no executive functions. The claimed constitutional defects involved both the appointment and removal of Board members.

The Constitution's Appointments Clause provides that all officers of the United States shall be appointed by the President with the advice and consent of the Senate but allows Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[37] The Free Enterprise Fund's challenge to the Board under this provision was multifaceted, and the details are ancillary to this discussion and will not be addressed further here.[38] The petitioners also objected to the statute's double-for-cause

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[34] There is no universally accepted definition of an independent agency. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 7 (5th ed. 2009). I use the term in a formal sense to describe an agency whose head is not removable at the will of the President, without regard for empirical facts about the congruence of agency decisions with presidential wishes. *Cf.* 561 U.S. at – (Breyer, J., dissenting) (defining independent agency status as turning on multiple legal and practical factors).

[35] http://www.becksteadwatts.com/.

[36] For the report, including Beckstead and Watts's response to it, see . http://pcaobus.org/Inspections/Reports/Documents/2005_Beckstead_and_Watts.pdf.

[37] U.S. CONST. art. II, § 2, cl. 2.

[38] There were three parts to the Appointments Clause challenge: that because of the PCAOB's degree of independence from the SEC, the PCAOB's members are principal officers who can be appointed only by the President with Senate confirmation; that even if they are inferior officers, Congress can only vest their appointment in the President, the

removal arrangement, under which the President can only remove SEC commissioners for cause and SEC commissioners can only remove PCAOB members for cause, on the ground that it unconstitutionally insulates PCAOB members from presidential control. Obviously, a crucial predicate of this latter argument is the proposition that SEC commissioners can only be removed for cause. The complaint treated that proposition as settled law needing no argument or explanation. The government sought summary judgment on all claims without contesting the assertion that SEC commissioners were removable only for cause. On March 21, 2007, District Judge James Robertson granted the Board's motion for summary judgment in a very brief opinion that took as given, without discussion, that "SEC commissioners can be removed by the President for cause."[39]

B. *Shaping the Playing Field*

A year and half later, in a not-nearly-so-brief split decision, the D.C. Circuit affirmed, rejecting all of the constitutional challenges to the Board's composition and operation. The court upheld the double-for-cause removal arrangement as consistent with governing Supreme Court precedent, especially given the availability of practical methods of presidential influence over the SEC and the Board other than removal or the threat of removal.[40] Importantly, the court, as had

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courts, or the "Heads of Departments," and the SEC is not a constitutional "Department[]"; and that even if the SEC is a "Department[]," the collective body of SEC commissioners, as opposed to an individual person such as the Commission's chairperson, cannot be a constitutional "Head[]" of a department. For more discussion of the Appointments Clause issues in the case, including an issue not addressed by the Court but which I think was dispositive, see Gary Lawson, *The "Principal" Reason Why the PCAOB Is Unconstitutional*, 62 VAND. L. REV. EN BANC 73 (2009).

[39] 2007 WL 891675 (D.D.C. 2007), at 5.

[40] *See* 537 F.3d at 679-85.

the district court, simply took for granted that the SEC was an independent agency whose members could only be removed for cause.[41] No one contested that point.

Judge Kavanaugh dissented because "neither the President nor a Presidential alter ego can remove the members of the PCAOB * * *. Rather, the Board is removable only by the Securities and Exchange Commission, and only for cause. Put another way, the PCAOB is an independent agency appointed by and removable for cause by another independent agency."[42] Judge Kavanaugh, as did the majority, effectively accepted as stipulated that SEC commissioners are removable only for cause.

The Supreme Court granted certiorari on May 18, 2009,[43] and the case was extensively briefed by three parties (the petitioners, the Solicitor General, and the PCAOB) and fourteen amici. All of the parties and amici agreed that, under existing law, the SEC commissioners could be removed by the President only for cause. The petitioners' brief noted that in the case of the PCAOB, "unlike with every other independent agency or entity executing federal law, the President is precluded – either directly or through an 'alter ego' removable at will – from appointing or removing Board members,"[44] and it argued that the President could enforce an order to the SEC to fire a Board member "only if the Commissioner has a 'duty' to fire the Board member, such that the failure to do so is a 'neglect of duty' justifying Presidential removal of the Commissioner."[45] The assumption that SEC commissioners are removable only for cause was a

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[41] *See id*. at 679-80.

[42] *Id*. at 697.

[43] *See* 129 S.Ct. 2378 (2009).

[44] Brief for Pet. at 25, *Free Enterprise Fund* (No. 08-861).

[45] *Id.* at 31.

linchpin of the petitioners' separation-of-powers argument against the for-cause limitation on removal of PCAOB members.

Neither the Solicitor General nor the PCAOB challenged that assumption about the removability of SEC commissioners. To the contrary, the Solicitor General's brief noted "the common understanding that 'the President may remove [an SEC] commissioner only for 'inefficiency, neglect of duty or malfeasance in office,' "[46] though the brief did observe in a footnote that "[t]his understanding exists even though the provision of the Exchange Act establishing the Commission * * * does not expressly limit the President's power of removal."[47] The PCAOB's brief similarly observed that SEC commissioners "are customarily understood to be removable only for 'inefficiency, neglect of duty or malfeasance in office * * * ."[48] All of the parties briefed the case as though a statutory for-cause limitation on removal of SEC commissioners was a given. No amicus brief challenged that assumption, though several amici challenged the constitutionality of those presumed for-cause removal limitations.[49]

On December 7, 2009, the Court heard oral argument in the case. Relatively early in his argument, petitioners' counsel Mike Carvin asserted that the SEC commissioners were not subject to plenary control by the President.[50] When Justice Breyer asked, "so why aren't they subject to the President's plenary control?,"[51] Mr. Carvin answered, "because of the removal provisions,

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[46] Brief for Resp. U.S. at 43 (quoting SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988)).

[47] *Id*. at 43 n.15.

[48] Brief for Resp. PCAOB at 31.

[49] *See* Brief of Law Professors as Amici Curiae in Support of Petitioners, 2009 WL 2372919; Amicus Curiae Brief on the Merits of Mountain States Legal Foundation in Support of Petitioners, Free Enterprise Fund and Beckstead and Watts, 2009 WL 2406377.

[50] Tr. of Oral Arg. at 15.-16

[51] *Id*. at 17.

which pose very serious removal restrictions on the President's ability to control the SEC."[52] Justice Breyer pointed out that there was in fact no statute expressly limiting the President's authority to remove SEC commissioners,[53] and Justice Scalia interjected, "I don't think the government will think it has achieved a great victory if it comes out of this with the proposition that the SEC is not an independent regulatory agency. And I don't think the government is arguing that position."[54] Mr. Carvin agreed that "[t]hey have not taken that position."[55] Justice Ginsburg thought that "everybody agrees"[56] that SEC commissioners are removable for cause even though the statute is silent, and after a bit more colloquy regarding the possibility of holding SEC commissioners to be removable at will, Justice Scalia noted, "This is not an argument that you have made anyway. Can we go on to the arguments that you've made?"[57]

The Justices pursued this line of questioning further during Solicitor General Elena Kagan's argument. Chief Justice Roberts asked point-blank, "Can the President pick up the phone and fire the SEC commissioners?",[58] to which Solicitor General Kagan responded, "The President can pick up the phone and fire the SEC commissioners for cause, however 'cause' has

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[52] *Id*.

[53] *Id.*

[54] *Id*. It is an interesting commentary on the times that no one would think it a victory for the government to have the SEC placed under presidential control. It would not be a victory for the SEC or Congress, but it would be quite a victory for the President – if in fact the President was committed to a formalist view of separation of powers.

[55] *Id*. When pressed further by Justice Breyer about the source of limitations on presidential removal of commissioners, Mr. Carvin invoked the five-year term of office granted to commissioners and the Supreme Court's 1958 decision in *United States v. Weiner*, 357 U.S. 349 (1958), in which the Court inferred a limitation on removal for members of the War Claims Commission even though the statute was silent on the point. Tr. of Oral Arg. at 18.

[56] *Id*. at 19.

[57] *Id*. at 22.

[58] *Id*. at 47.

been defined."[59] The government's position on the removability of SEC commissioners was made unmistakably clear in an extended exchange in which Solicitor General Kagan noted that "for many, many decades, everybody has assumed that the SEC commissioners are subject to the same for-cause removal provision [as FTC commissioners], and the government has not contested that in this case, nor has Mr. Carvin." [60]

Thus, all of the parties at oral argument agreed that SEC commissioners were removable only for cause, and all of the parties structured their legal arguments around that assumption.

C. *The Supreme Court Speaks*

June 28, 2010, the Supreme Court reversed the Court of Appeals. The majority held that the removal provisions for PCAOB members in the Sarbanes-Oxley Act were unconstitutional (and were severable from the rest of the statute). As noted earlier, the Court declared that "[t]he parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' *and we decide the case with that understanding*."[61] Nor was that the only legal assumption made by the parties and accepted by the Court. While several amici urged the Court broadly to reconsider its past precedents upholding various congressional restrictions on presidential removal power,[62] the parties did not so urge, and the Court accordingly took the validity of those precedents as stipulated:

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[59] *Id*.

[60] *Id*. at 51-52.

[61] 561 U.S. at – (emphasis added) (citations omitted).

[62] *See supra* note 54.

> In *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States v. Perkins*, 116 U.S. 483, 21 Ct. Cl. 499, 6 S.Ct. 449, 29 L.Ed. 700 (1886), and *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), the Court sustained similar restrictions on the power of principal executive officers -- themselves responsible to the President -- to remove their own inferiors. *The parties do not ask us to reexamine any of these precedents, and we do not do so*.[63]

With those assumptions about the applicable law in hand, the essence of the majority's reasoning is encapsulated in two critical paragraphs:

> * * * [W]e have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President -- or a subordinate he could remove at will -- who decided whether the officer's conduct merited removal under the good-cause standard.
>
> The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers -- the Commissioners -- none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

What makes this case "quite different" from previous cases in which restrictions on presidential removal were upheld is clearly the Court's view that it is here dealing with two levels of removal restrictions rather than one. The Court's ultimate holding is based on the fundamental assumption that the one permissible layer of removal restrictions established by precedent is used up at the Commission level, leaving no room for removal restrictions at the Board level. Accordingly, the statutorily-specified removal restrictions on Board members were found

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[63] 561 U.S. at – (emphasis added). The parties also agreed that the members of the PCAOB were constitutional "Officers of the United States," U.S. CONST. art. II, § 2, cl. 2, notwithstanding a statutory declaration that the PCAOB is not a government agency and its members are not government officers. *See* 15 U.S.C. § 7211(b). The Court accepted that stipulation as well. *See* 561 U.S. at --.

unconstitutional, leaving in place the non-statutorily-specified (and therefore perhaps non-existent) removal restrictions on the SEC commissioners.

The Court did not undertake its own independent inquiry about the removability of SEC commissioners. Nor did the Court re-determine, as an original matter, the permissibility of single-layer removal restrictions, which its precedents had upheld but which an originalist analysis would seriously question. Rather, the Court took both the validity of its prior precedents and the status of SEC commissioners as given, based on the agreement among all the parties (though not the amici with respect to the Court's precedents) on those basic legal propositions.

As has already been detailed at length,[64] Justice Breyer, joined by three other Justices, raised strong objections to the Court's willingness to assume legal conclusions about the removability of SEC commissioners – though, as far as I can tell, the dissenters had no objection to the Court's willingness to accept its prior precedents as authoritative without independently determining whether they warranted reconsideration. The majority did not see fit to respond to those objections.

Courts, of course, often accept, and indeed welcome, agreements among parties about propositions relevant to litigation. Such agreements are called *stipulations*. In order to gauge whether the majority or the dissent in *Free Enterprise Fund* had the right approach, and to discern the premises underlying, and the implications of, their competing approaches, it is necessary briefly to survey the practices of the American legal system regarding stipulations.

II

[64] *See supra* --.

A. *Stipulating Facts*

One would think that agreement among parties to litigation is generally a good thing. If they agree enough not to litigate at all, it is win-win-win for the parties and the heavily burdened legal system. If the parties choose to litigate, but instead of contesting every detail of the case tooth-and-nail agree to narrow the dispute down to the most essential contested points, it again seems difficult to see why that is not cause for celebration all around.

Much of the time, the legal system does indeed celebrate party agreement. Once litigation commences, if the parties can agree on as many of the key facts as possible by stipulation, it saves the parties the time and expense of contesting the points and it saves the court (or jury) the trouble of resolving them. Parties sometimes may have reasons to introduce evidence regarding facts even when the other party is willing to concede them,[65] but assuming that the parties are willing to agree on a stipulation, courts generally welcome the event.

The legal system's receptivity to stipulations of fact, however, cannot be based wholly on a cost-saving premise, because stipulations are not always cost-savers – at least not for the courts. It is quite possible that by declining to contest certain facts, the parties push the court to decide other matters that may be more difficult for the court to analyze. Consequently, it is not always the case that party stipulations make the court's job easier. Whether stipulations reduce decision costs for courts is something to be determined case by case. Nonetheless, courts typically do not engage in that kind of case-specific cost-benefit analysis before accepting party stipulations. Instead, it is hornbook law (or perhaps more literally encyclopedia law) that "courts ordinarily look with favor on stipulations designed to simplify, shorten, or settle litigation and

[65] *See* Old Chief v. United States, 519 U.S. 172 (1997).

save costs to the parties, and such stipulations should be encouraged by the courts rather than discouraged."[66] When factual stipulations are involved, the legal system generally lets the parties call the shots, which reflects a very strong ideological commitment to party control over the course of litigation.

To be sure, this commitment to party control is not absolute. Courts will occasionally disregard stipulations that are manifestly contrary to evidence in the record. One obvious circumstance is where the parties attempt to stipulate facts to establish jurisdiction that does not exist. If another private litigant and I wanted to invoke the Supreme Court's original jurisdiction under the State Party clause,[67] we could not validly stipulate that I am the State of Arizona when it is manifestly not true. Nor can one stipulate to a live case or controversy if one does not actually exist.[68] In *People of the State of California v. San Pablo & T. R. Co.*,[69] the parties sought the Supreme Court's ruling on the validity of a California tax that treated real property owned by railroads differently than real property owned by other entities. The case was decided on stipulated facts, which one presumes included the stipulation that the tax for which the State of California was suing had not been paid. By 1893 when the case reached the Supreme Court, however, the railroad had tendered full payment, and the State had deposited the money in a bank, which under applicable California law extinguished the obligation.[70] The railroad at that

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[66] 83 C.J.S. 2d, *Stipulations* § 3, at 6.

[67] U.S. CONST. art. III, § 2, cl. 2 (providing for original Supreme Court jurisdiction in cases "in which a State shall be a Party").

[68] I am assuming for the moment that all litigation, including federal question "cases," requires a live dispute among parties. As an original matter, that is actually an interesting question, *see* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L.REV. 447 (1994), but to explore the point would take us far afield.

[69] 149 U.S. 308 (1893).

[70] *Id*. at 310.

point owed nothing. That fact, conceded in open court by the State's attorney general, required dismissal, notwithstanding the desire of the parties to have the case heard:

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it . . . . [T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.[71]

In a legal world in which federal courts have constitutionally-limited jurisdiction, this principle makes a great deal of sense even in the face of a general commitment to party control. The case-deciding power of federal courts comes from the Constitution, not from the consent of litigating parties.[72] "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[73] If the court has no power to speak other than to dismiss the case for lack of jurisdiction, then it cannot speak in any other way, regardless of the wishes or stipulations of the litigants.

Subsequent cases, however, have extended the jurisdictional reasoning of *San Pablo* much further in finding grounds to disregard factual stipulations. The seminal case is *Swift & Co. v. Hocking Valley Ry. Co*,[74] decided in 1917. The railroad had filed, and the Interstate Commerce Commission had approved, a tariff providing for a $1 per day charge for rail cars held for loading and unloading by shippers for longer than two days. The tariff specifically

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[71] *Id*. at 314.

[72] *See* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1202 (2000).

[73] Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

[74] 243 U.S. 281 (1917).

included cars owned by the shippers and kept by the shippers on their own tracks. The railroad sued to collect such charges from Swift & Co., which challenged the application of the tariff to private cars on private tracks as arbitrary and as a deprivation of property without due process. Two days after the case was heard in the state trial court, the parties stipulated: " 'For the purpose only of reviewing the judgment of the common pleas court on defendant's demurrer to the amended petition, it is stipulated by the parties hereto that the track on which the cars in question were placed was the private track of Swift and Company.' "[75] The trial court held in favor of the railroads, and the Ohio state appeals court and state supreme court both affirmed. The Ohio Supreme Court expressly accepted the parties' stipulation regarding ownership of the track.

On writ of error, the United States Supreme Court concluded that it did not need to pass on the validity of the tariff as applied to private cars on private tracks, as had the state courts, because "the record discloses, contrary to the statement in the stipulation, that the track in question was *not* a 'private track.' "[76] And indeed, a license agreement in the record makes it very clear that the track was owned by the railroad and leased to Swift & Co.[77] Because the case was heard in the trial court on demurrer, those actual facts regarding ownership of the track were part of the decision of the court of common pleas; the stipulation made by the parties was solely for purposes of appeal. The Supreme Court refused to accept the stipulation, declaring that "[i]f the stipulation is to be treated as an attempt to agree . . . that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented [citing *San Pablo*] . . . . The fact that effect

[75] *Id*. at 285.

[76] *Id*. at 286

[77] *See id.* at 286 n.1.

was given to the stipulation by the appellate courts of Ohio does not conclude this court."[78] Taking the facts as they really were, the Court had no trouble affirming the validity of the tariff to private cars on railroad-owned track.

Unlike in *San Pablo*, the parties' stipulation in *Swift & Co.* did not create jurisdiction that otherwise would not exist. On the assumption that the relevant track was in fact owned by the railroad, as the record indicates, Swift & Co. could still have had its case heard by a federal court. It just would be a much weaker case than Swift & Co. preferred. Given the principle of limited federal court jurisdiction, there is a big difference between a case that is "moot," and thus is not an Article III "Case[]" at all, and one that is "fictitious" in the sense of presenting a live case or controversy, with real money on the line, but which is framed by the parties in a manner that does not precisely conform to objective reality. And if one is dealing with state courts of unlimited jurisdiction, the rationale of *San Pablo* would not necessarily counsel against accepting bogus stipulations in any circumstances, while the result in *Swift & Co*. might do so.

Indeed, if the Court's objection was to deciding fictitious cases in the broadest sense of "fictitious," then stipulations should *never* be accepted uncritically. Parties often stipulate to facts that neither side knows for sure simply for reasons of convenience or economy. Indeed, avoiding the trouble and expense of learning the truth is one of the primary reasons for stipulations. Or parties could stipulate to facts that each side genuinely believes are correct but which turn out, in reality, to be wrong. If the goal is always and everywhere to avoid deciding "fictitious" cases, courts would *always* need to determine for themselves *every* fact in the case. That is obviously not what the Court meant in *Swift & Co.* – the normal welcoming rule for

[78] *Id*. at 290. The Court also cited *Mills v. Green*, 159 U.S. 651 (1895), but that case had nothing to do with stipulations; it merely affirmed the requirement of a live case or controversy for which effective relief can be given.

stipulations of fact remains in effect notwithstanding that decision. The problem in *Swift & Co.* was that the parties' stipulation was transparently and knowingly false. The parties clearly wanted a legal ruling on facts different from those actually presented, and the Court was unwilling to indulge that desire. *Swift & Co.* thus extends the range of circumstances in which courts will not accept stipulations from the jurisdictional foundation of *San Pablo* to include circumstances in which it is plain on the record that the parties are wrong and where it is equally plain that the parties *know* that they are wrong. Framed narrowly, *Swift & Co.* is a rule against stipulating to obvious lies.[79]

The Court in *Swift & Co.* did not explain *why* accepting a knowingly false stipulation on a non-jurisdictional fact is problematic. If the duty of the court is to decide cases within its constitutional power, there is no doubt that the "fictitious" dispute between Swift & Co. and the Hocking Valley Railway Company met that standard: Hocking was asking for money purportedly due and Swift did not want to pay it on federal constitutional and statutory grounds. The federal claims were near-certain losers if the track was owned by the railroad rather than by Swift, but they were claims nonetheless. The stipulation of private ownership of the track did not create a federal claim where none otherwise existed, though it did strengthen considerably that claim's viability. If Hocking was willing to strengthen the claim of its adversary through stipulation, why should the federal courts care? Hocking could achieve essentially the same result by simply failing to raise certain legal or factual issues – or even by hiring an inferior lawyer.

The rationale behind *Swift & Co.*, and the possible unraveling of a party-centered focus on stipulations, was perhaps revealed thirty-four years later in *Universal Camera Corp. v.*

[79] One could frame it even more narrowly to encompass only circumstances in which the parties stipulate to an obvious lie *on appeal*, after the true facts were part of the decision below.

NLRB.[80] The case did not involve stipulations, but rather concerned, *inter alia*, the weight to be given the factual findings of hearing examiners (who today are called administrative law judges) when courts review agency decisions. In the course of declaring that those findings deserve whatever weight their probative value warrants, the Court observed:

> The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.' Thayer, A Preliminary Treatise on Evidence, 530. This Court has refused to accept assumptions of fact which are demonstrably false, even when agreed to by the parties [citing, *inter alia*, *Swift & Co.*].[81]

Certainly, if truth is the ultimate goal of adjudication, stipulations are not infallible. If the object of litigation is to find the truth, the fact that parties have stipulated to certain propositions is evidence of their truth, but it is hardly conclusive. But no one has ever believed that courts should be single-minded truth-finders without regard to the agreements of the parties. Otherwise, courts could never accept stipulations by the parties without independent judicial inquiry into at least their plausibility, if not their objective correctness. Because courts routinely accept stipulations, even objectively false stipulations, unless their falseness appears on the face of the record, party control must, at least ordinarily, predominate over truth-finding as the driving goal of adjudication.

Even a relatively modest conceptual focus on truth-finding, however, may provide for more occasions for disregarding stipulations than would a narrow reading of *Swift & Co.* limited only to obvious lies (or obvious lies concocted by the parties exclusively for appeal). And indeed, modern cases, both federal and state, suggest broadly that "the parties may not create a

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[80] 340 U.S. 474 (1951).

[81] 340 U.S. at 497 (citations omitted).

case by stipulating to facts which do not really exist"[82] and that "an appellate court should not pronounce a rule that has importance beyond the particular litigants when the record shows the undisputed facts to be contrary to the stipulation."[83] Courts have even extended *Swift & Co.* to circumstances in which stipulations are clearly false but there is no reason to think that the parties deliberately constructed them to be false. In *Dillon, Read & Co., Inc. v. United States*,[84] the court rejected stipulated figures in a tax calculation where "[t]he numbers to be plugged into the formulas are agreed to, and the final figures resulting from the formulas are agreed to, but application of the formulas to the stipulated figures does not produce the stipulated results,"[85] because the IRS had misapplied the formula by failing properly to account for certain indebtedness of the taxpayer.[86] The parties, said the court, "are free to stipulate to whatever facts they wish, except they may not stipulate to facts known to be fictitious"[87] – presumably meaning known to the *court* to be fictitious even if not known to the *parties* to be fictitious. This gives the court a potentially active role in policing the parties' stipulations.

In general, however, if parties stipulate facts that are not blatantly false, the very strong presumption is that courts will accept those stipulations and treat them as non-discretionarily binding on the legal process. If it is not plain on the face of the record that a stipulation is false,

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[82] PPX Enterprises, Inc. v. Audiofidelity, Inc., 746 F.2d 120, 123 (2d Cir. 1984) (finding the stipulations in the case to be reasonable).

[83] State Accident Insurance Fund Corp. v. Casteel, 301 Ore. 151, 154, 719 P.2d 853, 854 (1986) (rejecting a stipulation that workers' compensation payments had been made on a single claim when the record clearly showed two separate claims).

[84] 875 F.2d 293 (Fed. Cir. 1989).

[85] *Id*. at 300.

[86] *See* Dillon, Read & Co., Inc. v. United States, 15 Cl. Ct. Rep. 246, 265 n.7 (1988).

[87] *Id*.

courts will not actively search for reasons to reject that stipulation. By and large, the law leaves it to the parties to determine which facts are worth arguing about, even if a predictable consequence of that practice is to have cases sometimes decided on the basis of factual assumptions that are objectively (though not obviously or knowingly) false. Put simply, courts routinely decide "fictitious" cases simply because those are the cases that the parties want them to decide.

B. *Stipulating Law*

The legal world's view of party control looks very different when we move from propositions of fact to propositions of law. With propositions of fact, the baseline norm (subject to the exceptions noted above) is that party stipulations are conclusive. With propositions of law, the baseline norm is that party stipulations are ineffectual. Declarations to that effect are legion:

> "It is the general rule that stipulations as to what the law is are of no validity."[88]
>
> "Generally, it is not competent for the litigants to stipulate as to what the law is so as to bind the court, and such stipulations will be disregarded. Decisions of questions of law must rest on the judgment of the court, uninfluenced by stipulations of the parties or counsel."[89]
>
> "Parties to an action may not stipulate to legal conclusions to be reached by the court, It has generally been stated that the resolution of questions of law rests upon the court, uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective."[90]

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[88] *Stipulations of Parties As to the Law,* 92 A.L.R. 663, 664 (1934).

[89] 83 C.J.S., *Stipulations* § 30 , at -- (footnote omitted).

[90] 73 Am. Jur. 2d, *Stipulations* § 4 , at -- (footnotes omitted).

> "We are required to interpret federal statutes as they are written . . . and we are not bound by parties' stipulations of law. We are not in the business of deciding cases according to hypothetical legal schemes . . . ."[91]

As the Supreme Court has repeatedly said: "We are not bound to accept, as controlling, stipulations as to questions of law."[92] Nor will courts accept as binding stipulations regarding legal methodology – that is, how courts will determine applicable law. Instead, "[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."[93]

This sharp difference in the treatment of stipulations of fact and law is hard to justify jurisprudentially. As I have argued at length elsewhere, under almost any plausible legal theory, propositions of law are epistemologically equivalent to propositions of fact, in that each kind of proposition is subject to proof and such proof always requires principles of evidentiary admissibility, principles of evidentiary significance, and a standard of proof.[94] The precise principles and standards may vary considerably between factual and legal propositions, as they can vary among different kinds of propositions within each category, but the formal structure for proof does not depend on the label "law" or "fact." The distinction between fact and law drawn by our legal system is purely conventional. Since, however, it is a convention grounded

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[91] Hankins v. Lyght, 441 F.3d 96, 104 (2d Cir. 2006).

[92] Sanford's Estate v. Commissioner of Internal Revenue, 308 U.S. 39, 51 (1939).

[93] Kamen v. Kemper Financial Svcs., Inc., 500 U.S. 90, 99 (1991).

[94] *See* Gary Lawson, *Proving the Law*, 86 NW. U.L. REV. 859, 862-77 (1992).

repeatedly in the United States Constitution,[95] this Article is not the place to launch (or repeat) a broad-based attack on the distinction. At least for the moment, let us accept as given that the American legal system distinguishes factual from legal propositions, treats them differently for many purposes, and specifically treats factual stipulations (presumptively valid) differently from legal stipulations (presumptively invalid).

While American law does not let parties conclusively determine which law is applicable to their case, what that law means, and how courts will go about determining the answers to those first two questions, parties do have some measure of control over the legal landscape in their litigation. Most obviously, parties can choose to waive legal claims, including constitutional claims, and courts will generally not address waived claims.[96] A bi-lateral (or multi-lateral) waiver of an issue by the parties is the functional equivalent of a stipulation regarding the law pertaining to that issue, and no one doubts that such waivers are generally valid. In particular, it is always a legal question in a case whether courts should reconsider applicable precedents, but if the parties do not ask courts to re-examine settled precedent, courts will normally leave well enough (or bad enough, depending on one's view of the precedent) alone. The Court's choice in *Free Enterprise Fund* to treat *Perkins* and *Morrison* as settled law based on the agreement of the parties, without independent consideration of the appropriateness of re-thinking those precedents, is a prime example.[97]

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[95] *See* U.S. CONST. art. III, 2, cl. 2 (providing for Supreme Court appellate jurisdiction "both as to Law and Fact"); *id*. amend. VII ("no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law").

[96] *See* 16AA CHARLES ALAN WRIGHT, ARTHUR N. MILLER, ET AL, FEDERAL PRACTICE & PROCEDURE § 3974.1 (4th ed. ---).

[97] This is not to say that courts never choose to re-examine precedents that the parties are willing to accept, *see, e.g.,* Pearson v. Callahan, 552 U.S. 1279 (2008) (directing the parties to brief the question whether to overrule a precedent), but only that such events are relatively rare.

Parties are also able, within some limits, to specify which jurisdiction's law will govern transactions potentially subject to conflicting legal regimes; contractual choice-of-law provisions are upheld as long as the parties have picked a jurisdiction whose law plausibly might govern under an independent choice-of-law analysis.[98] The effect of honoring these provisions is to allow the parties to choose the applicable law even when courts might have determined that some other law applies in the absence of the contractual stipulation.

There are occasional decisions suggesting an even broader role for parties in stipulating law. A New York state court case in 1906 broadly proclaimed: "That parties may stipulate what the law is that governs their dispute, as well as what the facts are from which it arises, cannot be doubted. And the courts should and will give as complete effect to the former as to the latter class of stipulations."[99] Pursuant to this principle, the court gave effect to a stipulation that defendant's liquor sales prior to 1905 were lawful. Combined with an independent holding that no relevant change in the law occurred in 1905, the stipulation established the then-present lawfulness of the defendant's activities. While the case continues to be cited for its broad language,[100] it is doubtful whether that language can be taken at face value. Because the legal claim in that case was based entirely on the effect of a 1905 enactment, there was no reason to think that the defendant's pre-1905 conduct was remotely at issue, so the "stipulation" was inconsequential -- tantamount to a "stipulation" today that Microsoft is validly incorporated in the State of Washington. Prior New York cases had expressed a much narrower rule regarding legal stipulations, limited essentially to enforcing waivers and procedures agreed upon by

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[98] *See ,e.g.,* Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3 543, 546-47 (7th Cir. 2009) (reversing a district court for conducting an independent choice-of-law analysis when the parties had already agreed on the applicable forum).

[99] In Re Cullinan, 113 A.D. 485, 486, 99 N.Y.S. 374 (A.D. 2 Dept., 1906).

[100] *See* 2 CARMODY-WAIT, 2D, CYCLOPEDIA OF NEW YORK PRACTICE WITH FORMS, *Stipulations* § 7.19, at – n12.

parties,[101] and subsequent cases also tend to involve waivers[102] or choice-of-law elections,[103] though the broader view continues to surface.[104]

On the whole, however, it is fair to say that parties in the United States generally cannot control courts on legal questions by agreement. Of course, once a legal claim is raised, parties can effectively try to stipulate to the law applicable to resolution of that claim by virtue of the materials that they choose to bring before the court. Courts, however, are free under current practice to supplement the parties' presentations with their own research, to raise issues that the parties have (through inadvertence or choice) avoided, and even to appoint amici to argue positions that the parties do not want considered. Indeed, as Amanda Frost reminds us in an important study of the scope and limits of party control over litigation, "some of the Supreme Court's landmark cases were decided on grounds that were never raised by the parties."[105]

The best illustration of the limits of party control over the legal materials employed by courts under current practice – an illustration that explicitly brings to the forefront the key jurisprudential assumptions behind that practice and its possible alternatives -- is the truly remarkable saga of Section 92 of the federal banking code. This provision, enacted in 1916, provides (or provided?) that national banks "located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and

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[101] *See* In Re New York, Lackawanna & Western R.R. Co., 98 N.Y. 447, 453 (1885).

[102] *See* Levy v. Delaware, Lackawanna & Western R.R. Co., 211 A.D. 503, 505-06, 207 N.Y.S. 592 (A.D. 4 Dept., 1925).

[103] *See* Bank of New York v. Amoco Oil. Co., 35 F.3d 643, 650 (2d Cir. 1994) ("Under the law of New York, the parties may stipulate that the law of a state bearing a reasonable relation to the transaction governs their rights and duties under the transaction. N.Y.U.C.C. § 1-105(1).").

[104] *See*, e.g., Koren-DiResta Const. Co., Inc. v. New York City School Const. Authority, 293 A.D.2d 189, 195, 740 N.Y.S. 56, 61 (1st Dept., 2002) (accepting a stipulation on the time when a contractor's claim accrued).

[105] Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 450 (2009).

regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company . . . ."[106] The text of the law contains no language specifically saying that banks that qualify to sell insurance under the statute can sell insurance *only* in the small communities in which their qualifying branches are located. In 1984, United States National Bank of Oregon accordingly asked that it be allowed to sell insurance from its branch in the town of Banks, Oregon[107] to customers anywhere in the country. Trade associations of insurance agents predictably argued that the statute only permitted sales of insurance within the small communities containing the relevant bank branches.

The Comptroller General agreed with the bank that Section 92 provided the necessary authorization for nationwide marketing of insurance. The insurance agents sued, arguing that the Comptroller's interpretation of Section 92 was unreasonable. The District Court held in favor of the bank and the Comptroller. The court stated the issue in the case as "whether the Comptroller reasonably concluded that Section 92 . . . authorized USBO, through a subsidiary bank insurance agency, to solicit and sell insurance to customers located throughout the country,"[108] and held that the agency's interpretation of Section 92 was reasonable under the *Chevron* doctrine.[109]

The insurance agents appealed to the D.C. Circuit. Up to that point, the lower court, the Comptroller, the insurance agents, and the National Bank of Oregon all agreed that the case was

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[106] Act of Sept. 7, 1916, 39 Stat. 753)(codified as amended at 12 U.S.C. § 92 (2000)). The statute also authorized such banks to "act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located . . . ." Whatever the objective fate of the rest of Section 92 may ultimately be, this latter provision has not survived. *See infra* note --.

[107] The 1980 census figure, which controlled the litigation involving the National Bank of Oregon, was 489. *See* Nat'l Ass'n of Life Underwriters v. Clarke, 736 F.Supp. 1162, 1164 n.6 (D.D.C. 1990). Even in the 2000 census, Banks had a population of only1,286. *See* http://banksor.htu.myareaguide.com/demographics.html.

[108] 736 F.Supp. at 1163.

[109] *Id*. at 1167-73. For background on the *Chevron* doctrine, see GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 442-573 (5th ed. 2009). On second thought, that is a whole heaping lot of reading, so don't bother.

governed by and involved the proper interpretation of Section 92 of the federal banking code. The D.C. Circuit, however, was not so sure.

In 1874, Congress adopted the Revised Statutes of the United States *en masse* in order to systematize and regularize the body of federal statutory law.[110] Section 5202 of that revision listed four exclusive ways in which national banks could incur debts or liabilities.[111] In 1913, section 13 of the Federal Reserve Act added to this list a fifth permissible form of indebtedness for "[l]iabilities incurred under the provisions of the Federal Reserve Act."[112] Section 92 showed up three years later. And thereby hangs a tale.

On September 7, 1916, Congress passed "An Act To amend certain sections of the Act entitled 'Federal Reserve Act,' approved December twenty-third, nineteen hundred and thirteen."[113] Most of the 1916 statute made specific reference to particular sections of the 1913 Federal Reserve Act, directing amendments to sections 11, 13, 14, 16, 24, and 25 of that Act. The only part of the 1916 Act that did not explicitly describe itself as an amendment to the Federal Reserve Act was the one portion containing Section 92. That portion, appearing after the amendments to sections 11 and 13 of the Federal Reserve Act, declared that "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows"[114] -- with the Act then, all within quotation marks, reproducing the previous text of section 5202, adding the provision that became codified as Section 92, and clarifying the power

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[110] The entire corpus of federal statutory law at that time contained 5602 sections.

[111] Rev. Stat. § 5202 (providing that national banks can only be indebted by notes, deposits, drafts drawn against actual deposits, and dividend liabilities to shareholders).

[112] Federal Reserve Act of 1913, § 13, 38 Stat. 264.

[113] Act of Sept. 7, 1916, ch. 461, 39 Stat. 752.

[114] *Id*. at 753.

of national banks to accept drafts or bills of exchanges from other banks. The 1916 Act then went on to specify additional targeted amendments to sections 14, 16, 24, and 25 of the Federal Reserve Act. While most of the 1916 statute was an amendment to the Federal Reserve Act of 1913, it certainly seems as though the provision adding Section 92 was instead an amendment to section 5202 of the Revised Statutes.

This extensive statutory cross-referencing is critical because in 1918, Congress enacted the War Finance Corporation Act, which provided: "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows . . . ."[115] The 1918 statute listed the five then-permissible forms of national bank indebtedness contained in the prior statute, added a sixth permissible form of indebtedness for "[l]iabilities incurred under the provisions of the War Finance Corporation Act,"[116] but *did not reproduce, reference, or otherwise include* the Section 92 authorization for national banks in small towns to sell insurance. Based on the plain language and punctuation of the relevant acts, it seems apparent that Congress, in 1918, amended Section 92 out of existence. The 1916 Act certainly seems to have made Section 92 a part of section 5202 of the Revised Statutes, and Section 92 therefore does not appear to have survived the 1918 War Finance Corporation Act's amendment of section 5202. The apparently inescapable conclusion is that, in 1986, when the Comptroller approved the National Bank of Oregon's application under Section 92, there simply was no Section 92 under which the application could have been approved.

From 1916 through the events in this case, all three departments of the national government uniformly assumed that Section 92 was in force. The Comptroller and the Federal

[115] War Finance Corporation Act, ch. 45, § 20, 40 Stat. 506 (1918).

[116] *Id*.

Reserve Board had continuously treated it as valid law since 1916.[117] Congress purported to amend Section 92 in 1982[118] and, for the period from March 6, 1987 to March 1, 1988, provided that "[a] national bank . . . may not expand its insurance agency activities pursuant to the Act of September 7, 1916 (12 U.S.C. 92), into places where it was not conducting such activities as of March 5, 1987."[119] A phalanx of courts had taken the viability of Section 92 as given for decades.[120] The sole dissenters, it seemed, were the compilers of the United States Code who, after including the provision in the first four editions of the Code, omitted it from the 1952 version and from the next six versions on the ground that it had been repealed in 1918.[121]

None of the parties, either before the Comptroller or in the District Court, disputed the relevance of Section 92 to the National Bank of Oregon's application. For all practical purposes, the parties had stipulated to the statute's validity. Indeed, when judges of the D.C. Circuit raised the apparent non-existence of Section 92 at oral argument, counsel for the insurance agents directly conceded the applicability of Section 92, finding that they "cannot advance a substantial argument that section 92 no longer exists."[122] When the D.C. Circuit asked for supplemental briefing, all of the parties again agreed that Section 92 was valid, governing law.[123]

Notwithstanding the uniform, consistent, repeated agreement of the parties that their case

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[117] *See* Independent Ins. Agents of America, Inc. v. Clarke, 995 F.2d 731, 736 (D.C. Cir. 1992).

[118] *See* Garn – St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1469, 1511 (removing the authority of national banks in small communities to broker real estate loans).

[119] Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 552, 583.

[120] *See* United States National Bank of Oregon v. Independent Ins. Agents of American, Inc., 508 U.S. 439, 443 n.2 (1993) (collecting cases).

[121] For a brief but thorough account of the intriguing story behind this action by the compilers, see *id*. at 441-42 & n.1.

[122] 955 F.2d at 741 (Silberman, J., dissenting).

[123] *Id*. at 733.

was governed by Section 92, the D.C. Circuit disagreed. After noting the general rule that courts are not bound by stipulations of law,[124] the court found this case "one of those occasions where a court may properly dispose of a case on a basis not advanced by the parties."[125] On the merits, the court held that Section 92 was in fact repealed in 1918, even in the face of the widespread assumptions to the contrary over the subsequent three quarters of a century, and that the Comptroller therefore had no authority to approve the National Bank of Oregon's activities.[126]

Judge Silberman, in dissent, would have decided the case on the parties' assumption that Section 92 was in force. He adopted the reasoning of then-Judge Scalia, who in 1983 wrote that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[127] Judge Silberman noted that "although the 'stipulation of law' cases . . . establish courts' power to reach nonjurisdictional issues not raised by the parties, they do not suggest that it is always appropriate for courts to do so,"[128] and he would therefore hold that "the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918."[129]

The battle was renewed, with significant reinforcements, on the Comptroller's petition for en banc rehearing on the merits and the bank's petition for en banc rehearing on the court's

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[124] *See id*.

[125] *Id*.

[126] A contemporaneous panel of the Second Circuit, also reaching the issue even though it had not been briefed by the parties, reached the opposite conclusion, finding that Congress did not intend in 1918 to repeal Section 92. *See* American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992).

[127] Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983).

[128] 955 F.2d at 743.

[129] *Id*. at 744.

decision to reach the validity of Section 92 in the first place. The petitions were denied 8-3. Judge Sentelle, who voted with the majority in denying rehearing, wrote a statement supporting the court's sua sponte decision to examine the pedigree of Section 92, joined by Judges Buckley and Henderson who formed the original panel majority. The heart of that statement bears reproduction at length:

> What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, *sua sponte,* raised the question of the repeal of section 92.
>
> It has long been recognized that we are "free to ignore" stipulations as to matters of law. Thus, by declining to argue that Congress repealed the section, appellants cannot stipulate into existence a repealed statute and then compel the Court to compliantly advise the parties what it would do if that statute existed . . . .
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> . . . .
>
> That parties have assumed and the Comptroller has enforced the repealed statute for over seventy years seems to me irrelevant to the question. The question is not how long the parties assumed a certain state of the law, but whether that state of the law is merely an assumption. The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. No stipulation by an executive official purporting to operate under a statute and a party affected by the official's actions can bring that statute into existence, even for purposes of a judicial decision as to its construction.
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> . . . . At bottom, I do not think it within the power of the Court to render an advisory opinion on the construction of a statute whose existence depends on the failure of the parties to assert its invalidity.[130]

Judge Silberman, joined by Judge Williams and Judge D.H. Ginsburg, fired back with an equally forceful statement in dissent:

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[130] Independent Ins. Agents of America, Inc. v. Clarke, 965 F.2d 1077, 1078 (D.C. Cir. 1992) (en banc) (Sentelle, J., concurring in the denial of rehearing *en banc*).

> As the dissenting opinion points out, the appellant trade associations, which represent insurance agents and underwriters, deliberately refused to argue (waived) any claim that Congress did repeal section 92. Even when the panel ordered supplementary briefing directed to that issue five months after argument, the appellants declined to argue that Congress repealed the section. Since the question is not jurisdictional, we do not see how it can be appropriate for a federal court, *sua sponte,* to decide it, and we fear that the implications of what might be thought a rather expansive view of federal judicial power could be profound indeed.
>
> Almost any case brought rests on certain uncontested legal assumptions that may be thought to be logical antecedents to the issues in dispute. A court is not free, however, to examine itself any of those legal assumptions (if non-jurisdictional) just by asserting that they are "essential to the determination." Concurrence at 116. That would mean that a lawsuit is framed by a court's notion of the logical way to think about a legal problem, and not by the parties' controversy . . . .
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> . . . .
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> With all due respect to our concurring colleagues, we think they have the advisory opinion point exactly backwards . . . . When a court issues an opinion on an uncontested, non-jurisdictional matter of law like the one here, it has . . . . issued an advisory opinion -- although to the world rather than the parties -- because the issue was not part of the case or controversy.[131]

In a footnote, the dissenters added that "[i]t seems to us that the phrase 'stipulates to a matter of law' is too general to be useful in consideration of this kind of problem. We would agree, for instance, that if both parties simply misread a Supreme Court decision in their briefs we would not be bound to that interpretation. But that is far removed from a party's failure to bring an analytically separate claim that we thought was available. We are not free to add such a claim to a case."[132]

The Supreme Court granted certiorari and reversed on the merits. The unanimous Court

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[131] *Id*. at 1078-79 (Silberman, J., dissenting from the denial of rehearing *en banc*).

[132] *Id*. at 1079 n.1. Judge Randolph, for his part, took issue with the entire modern practice of providing statements in connection with denials of rehearing: "In my view, denials of rehearing *en banc* are best followed by silence." *Id*. at 1080 (Randoph, J.).

– including the once-Judge Scalia who had argued for party primacy in 1983[133] – held that the D.C. Circuit had the power to decide for itself the legal validity of Section 92. "The contrary conclusion," it reasoned, "would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory."[134] As a prudential matter, the Court found no abuse of discretion in the D.C. Circuit's consideration of the validity of Section 92, though it withheld judgment on whether the lower court had an affirmative duty to examine the underling law:[135] "After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law."[136] Anticlimactically for purposes of this Article, the Court then ignored the punctuation of the 1916 Act, treated Section 92 as part of the Federal Reserve Act rather than as part of section 5202, and held that the War Finance Corporation Act (which did not purport to restate or amend the Federal Reserve Act) did not repeal Section 92.[137]

United States National Bank highlights and exemplifies several well-established

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[133] To be sure, then-Justice Scalia, in deciding a case in 1992 on the basis of an inconsistency between a regulation and a statute that no party raised, wrote: "I must acknowledge that the basis for reversing the Court of Appeals on which I rely has not been argued by the United States, here or below. 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. Even so, there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it -- particularly when the judgment will reinforce error already prevalent in the system." United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) (citations omitted).

[134] 508 U.S. at 447.

[135] *See id*. at 447-48.

[136] *Id*. at 448.

[137] *See id*. at 448-63. Given the clear language of the relevant statutes, this conclusion took some doing – which is why the Court's discussion consumed more than fifteen pages.

propositions about the ability of courts to raise legal issues, including dispositive legal issues, sua sponte: (1) American courts are universally regarded as having such power; (2) that power is not limited to matters that affect the court's jurisdiction; (3) there are, however, strong currents in the law that are hostile to the exercise of such power; (4) the power to raise issues sua sponte will not always be exercised, so that many, and perhaps even most, waivers of legal issues by parties will be honored; and (5) there is no articulated set of criteria for determining when such power should or will be exercised. In recognition of (5), Amanda Frost has recently sought to clarify and systematize the circumstances under which the exercise of claim-creating power is appropriate for courts[138]; I will have more to say about Professor Frost's welcome and intriguing suggestions later. Other scholars have strongly doubted the wisdom of courts raising legal issues on their own,[139] even to the point of suggesting that such a practice, at least when done without affording the parties an opportunity to address the courts' sua sponte arguments, might violate due process.[140]

Before wading into that thicket, it is necessary to set out the assumptions about adjudication, courts, and the law generally that underlie the various positions. Much ends up turning on a single binary choice about the nature of courts that modern law and scholarship work very hard to make seem multivalent.

III

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138 *See* Frost, *supra* note 110.

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

140 *See* Barry A. Miller,*Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253,1280-91 (2002).

a. *A Tale of Two Models*

Why do courts exist? The seemingly obvious answer is: To settle disputes. People use courts when they cannot resolve their differences without the intervention of a third party and they cannot agree on the identity of an appropriate third-party adjudicator (or for some other reason do not wish to arbitrate their dispute privately). The legal system has good reasons to establish this kind of compulsory dispute-resolution machinery that can be unilaterally invoked by a single party: it serves as a substitute for other, more socially disruptive means of dealing with disagreement, such as dueling – a rather prominent form of dispute resolution in times past[141] and future.[142] The desire to channel disputes into a peaceful, if often expensive, adjudicatory forum and away from potentially violent or disruptive forms of self help infuses many aspects of the legal system, such as its willingness to adjudicate relative (*i.e.*, better or worse) claims of property rights instead of insisting that litigants prove their claims to be good against the entire world.

If courts exist only to resolve disputes, there is no obvious reason other than lack of jurisdiction why they should do anything other than to resolve *precisely* the disputes brought to them by the parties when the parties agree on the character of those disputes. Of course, the parties will not always agree on the facts, the law, or even the fundamental nature of the underlying lawsuit, and in those circumstances courts must go their own way.[143] But to the extent that parties can agree on any features of the litigated claim, a dispute-resolving court has

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[141] Alexander Hamilton vs. Aaron Burr, New York, 1804.

[142] Malcolm Reynolds vs. Atherton Wing, Persephone, 2517.

[143] *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 95 GEO. L.J. 121, 129-30 (2005).

no clear reason to disregard that agreement.

That seems most plainly true with regard to the essential subject matter of the case. If the parties think that they are arguing about, e.g., possessory rights to a fox carcass, it would be strange for a court instead (or in addition) to decide a boundary dispute or breach of contract action between the parties that is not specifically at issue in the case. To be sure, there is nothing in the nature of things that precludes a legal system from setting up "courts" as roving commissions to seek out and resolve disputes whether or not the parties choose to bring them before courts. One can easily imagine a legal system in which any dispute, however small, immediately brings before the court *all* possible disputes among those parties and not just those disputes that arise out of the operative facts of the specific case. Indeed, one could even imagine a legal system in which courts resolve disputes involving "parties" who simply stay at home and mind their own business, with such parties playing absolutely no role other than receiving judgments imposed by self-empowered inquisitorial commissions.[144] It is enough for now to note that such a system, while conceivable, vests courts with executive and legislative powers, and American courts are typically limited only to "judicial Power."[145]

Once we take as given that disputes are initiated only by parties rather than by courts, it is no great leap to say that the "dispute" before the court is not the operative set of events giving rise to the litigation but rather the specific propositions about which the parties disagree, so that

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[144] A clever person might even construct a normative argument for such a regime on the ground that "sometimes the fact that a lawsuit has not resulted stems from ignorance, poverty, or alienation rather than from satisfaction with the status quo." GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 90 (5th ed. 2005).

[145] That is certainly true of the federal courts, which are granted *only* "[t]he judicial Power of the United States," U.S. CONST. Art. III. § 1, and no other authority other than the specifically-granted power to appoint inferior officers if Congress so directs. *See id*. art. II, § 2, cl. 2. Nothing prevents individual states from granting to their courts what the federal Constitution would regard as non-judicial power, but no state authorizes the kind of "investigatory court" described in the text.

the parties define not just the gross subject matter of the suit but also the contours of both the legal and factual claims relevant to their dispute.[146] If the parties agree on a proposition, that proposition simply is not in dispute, and it is far from obvious why a court should try to resolve it. There is nothing conceptually impossible, of course, about defining the "dispute" more broadly so that resolving the "dispute" can involve to some extent deciding constituent parts of the case about which the parties agree. As was seen in Part II, that is in fact often the American practice, especially with propositions of law. The question is why a legal system would ever answer questions that the parties do not want answered.

This is precisely the disagreement about the nature of lawsuits posed, but not carefully analyzed, by Judges Sentelle and Silberman in their statements on the denial of en banc rehearing in *Independent Ins. Agents of America, Inc. v. Clarke*.[147] Judge Silberman noted that allowing courts to reach legal issues not raised by the parties "would mean that a lawsuit is framed by a court's notion of the logical way to think about a legal problem, and not by the parties' controversy."[148] That is descriptively correct. The question, though, is whether the parties' "controversy" – the set of propositions about which the parties disagree – *ought* exclusively to define the range of matters decided by a court. Judge Silberman seemingly assumed so, but did not really argue the point. And his assumption is qualified by the concession that if the parties "misread a Supreme Court decision in their briefs we would not be bound to that

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[146] Of course, if the parties agree on too much, there might be no underlying dispute to resolve. *See* Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 548 (2006) ("There is simply no rational means of defining the terms 'case' or 'controversy' to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement"). I am addressing only circumstances in which the parties agree on certain propositions while disagreeing on enough others to generate an actual dispute.

[147] *See supra* pages xx-xx.

[148] 965 F.2d at 1079 (Silberman, J., dissenting).

interpretation."[149] On Judge Silberman's premises, why not? If the parties can invent a statute and deem it applicable to their case, why can't they invent a Supreme Court decision as well? A consistent, pure dispute-resolution model of adjudication would not accept this concession.

Judge Sentelle disagreed about the appropriate scope of the controversy to be adjudicated, essentially because he thought that allowing parties entirely to define the terms of the case could violate Article III by yielding an advisory opinion: "I do not think it within the power of the Court to render an advisory opinion on the construction of a statute whose existence depends on the failure of the parties to assert its invalidity."[150] The Supreme Court made the same suggestion, worrying that to allow the parties "to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles . . . would be difficult to characterize as anything but advisory."[151] But these conclusory observations do not hold up under scrutiny. As long as there are concrete legal consequences at stake in the case, there is nothing "advisory" about a decision based on an assumed state of affairs. In *People of the State of California v. San Pablo & T. R. Co.*,[152] the railroad owed nothing regardless of how the case was decided, so a decision by the Court would indeed be purely advisory. At stake in *Independent Ins. Agent*, by contrast, was the enforceability of an authorization from a government banking agency to sell insurance. A decision on the merits of Section 92 might have been "advisory" in the sense of giving possibly hypothetically-grounded answers about the

[149] *Id.* at 1079 n.1.

[150] *Id.* at 1078.

[151] 508 U.S. at 447.

[152] 149 U.S. 308 (1893).

reasonableness of the agency's interpretation of the statute,[153] but it would have had concrete legal consequences for the parties and thus would not have been "advisory" in the underlying constitutional sense. It mattered very much who won or lost the case.

Neither Judge Silberman nor Judge Sentelle, then, gave persuasive reasons for taking one or the other approach to defining the controversy before the court. Judge Silberman's basic approach, however, draws considerable strength from the conception of litigation as a publicly-supplied means for avoiding duels or their equivalent. If the parties hired a private arbitrator, they could specify as broad or narrow a function for that arbitrator as they wish, provided that they could agree on the scope of the case. To the extent that courts are, in essence, a form of compulsory arbitration, there would seem to be a prima facie case for giving parties the same power, subject only to whatever constraints are imposed by the possibly limited jurisdiction of the relevant tribunal. Judge Silberman's intuition about the function of courts can be grounded in the basic observation that a mechanism that exists to resolve disagreements should not be in the business of resolving agreements that do not need resolving. The logic of this position may have implications broader than Judge Silberman (or indeed anyone other than the present author) is willing to accept, but that does not affect the soundness of the position.

As for Judge Sentelle's position: because cases decided on possibly false legal (or factual) assumptions about non-jurisdictional matters are nonetheless cases, one must look elsewhere than his opinion for credible reasons why a court should ever look beyond the parties' arguments for legal materials.

One need not look far. If one views the raison d'etre for courts as dispute resolution, then

[153] Note that because *Independent Ins. Agents*, as the District Court ruled, was really a "Step 2" *Chevron* case, the decisive legal issue as the parties framed the case was not the objective meaning of Section 92 but rather whether the Comptroller's interpretation of Section 92 was within the range of interpretations permissible under *Chevron*.

party control of the issues to be decided flows naturally, if not quite ineluctably, from that function. But that is not the only viable conception of the function of courts. One might also see courts as *declarers of law* instead of or in addition to *resolvers of disputes*. The case for this vision of courts was classically stated by Owen Fiss when he argued that the job of courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and to bring reality into accord with them."[154] A court intent on law declaration is presumably interested in *correct* law declaration – anything else would be utterly perverse. Accordingly, a law declaration model of adjudication counsels strongly in favor of leaving courts free to do whatever they must to get the right answers to legal questions. If the parties fail to make the correct arguments, invoke the correct materials, or even pose the right questions, courts trying to get the law right may need to step in and guide the process themselves. As Sarah Cravens has quite elegantly put it, "[i]f developing law is to be considered the property of only the parties before the court, then judges should take a more reserved or passive approach. If instead, judges serve as trustees or custodians of the law . . . , then they should be under some kind of mandate to become more involved, and ensure that the cases before them are decided on the best grounds, using the best reasoning possible.[155]

Just as a pure system of dispute resolution might well cede the parties total control over the scope and character of the issues to be resolved, a pure system of law declaration might well dispense entirely with parties. The function of law declaration is often hampered rather than fostered by waiting for parties to bring specific disputes into court to trigger the opportunity for law declaration. Individual cases do not always pose the best vehicles for exploring legal

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[154] Owen M. Fiss, *Comment: Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

[155] *See* Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQUETTE L. REV. 251, 255-56 (2004).

questions. If law declaration is the goal, perhaps courts should be modeled more after administrative agencies. Such Declaration Courts, as we might call them, could initiate the equivalent of rulemakings, either on their own or through petitions for rulemaking, and could obtain outside input through the equivalent of notice and comment procedures.[156] Indeed, others have noted that justiciability doctrines, which constrain the ability of courts to engage in law declaration at any time they deem it appropriate, are grounded in an ideology of dispute resolution.[157] Pleading rules as well may be the product of viewing courts as mechanisms for dispute resolution.[158]

This conflict between viewing courts as dispute resolvers or seeing them as law declarers has consumed scholars for decades. The poster child for the dispute resolution model is usually Lon Fuller,[159] though it is obvious to anyone who reads Fuller that he did not push the model to anything close to its logical limits.[160] Owen Fiss comes closer to representing the opposite pole, insisting that deciding cases is actually incidental to the primary function of declaring (or perhaps establishing) law.[161] Useful surveys of the contending forces abound,[162] and we do not

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[156] Such a suggestion is not entirely farcical; some scholars have suggested the possible value of modeling at least some features of judicial decision-making after agency notice-and-comment rulemaking. *See* Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965 (2009).

[157] *See* Pushaw, *supra* note 73, at 447-450 (linking justiciability doctrines to dispute resolution and arguing that "cases" require different justiciability norms than "controversies" because in the former federal courts are meant to serve a law-declaration function).

[158] *See* Miller, *supra* note 144, at 1263.

[159] *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

[160] For an extended discussion of this point, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U.L. REV. 1273 (1995).

[161] *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) (describing dispute resolution as "one *consequence* of the judicial decision," but insisting that "the function of the judge — a statement of social purpose and a definition of role — is not to resolve disputes, but to give the proper meaning to our public values").

need another survey here.

Of course, the American legal system's choice among these models is "all of the above." Our legal system adopts neither a pure law declaration model nor a pure dispute resolution model, but instead reflects strong elements of both models fused into a sometimes muddled and unstable whole. As Amanda Frost aptly describes federal courts, in terms that have broad application to state courts as well, "judges serve a dual role: they must resolve the concrete disputes before them, and yet under the constitutional structure and in the common law tradition they are also expected to make accurate statements about the meaning of law that govern beyond the parameters of the parties and their dispute."[163] Certainly, this is an accurate description of current legal practice. To call it conventional wisdom is an understatement: "Almost everyone today would agree that adjudication is about articulating public norms as well as settling private disputes . . . ."[164]

But *why* charge courts with the task of articulating norms and announcing propositions of law divorced from the underlying task of dispute resolution, so that they are articulating norms that are not in dispute? No one thinks that arbitration is about articulating public norms; the arbitrator's job is to decide what the parties pay him or her to decide. Why are courts different? One can certainly *describe* courts as "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals,"[165] but it is much harder to think of good reasons why one would *want* them to serve such a role. And that role is in very strong tension with the

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[162] *See, e.g.*, Frost, *supra* note 110, at 496-98; Oldfather, *supra* note 148, at 139-49

[163] Frost, *supra* note 110, at 452.

[164] Bone, *supra* note 165, at 1326. *See also* Leandra Lederman, *Precedent Lost – Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999).

[165] Fiss, *supra* note 159, at 1089.

role of courts as resolvers of disputes. What induces the legal system to try to meld these roles instead of playing out the logical implications of one or the other?

b. *Legal Externalities*

One plausible reason for not letting parties govern their own affairs, in life as well as law, is externalities. It makes sense for third parties to intervene when the behavior of first and second parties adversely affects the third parties. If the manner in which a dispute between A and B is resolved affects C, one should not be surprised when C shows up at the door asking for a role in structuring that resolution.

The most direct way in which dispute resolution can affect third parties is through precedent: if the way that A and B resolve their dispute shapes the way that C and D must, in the future, resolve theirs, perhaps there are reasons not to let A and B completely control the contours of their dispute.[166] The third-party effects of precedent seem to be the overwhelming reason that scholars (or at least scholars who do not fully share Professor Fiss's jurisprudential outlook) have put forward to justify a departure from a strict party-controlled dispute resolution model. As the irrepressible Amanda Frost puts it, "In a legal system in which appellate opinions not only establish the meaning of law, but do so through precedent that binds future litigants, courts cannot cede to the parties control over legal analysis."[167]

To the contrary, I think that they can indeed cede such control without dispensing with

[166] Indeed, there may even be due process considerations if litigation between two parties effectively determines the rights of third parties who are not participants in the dispute. *See* Amy Coney Barrett, *Stare Decisis and Due Process,* 74 U. COLO. L. REV. 1011 (2003).

[167] Frost, *supra* note 110, at 453. *See also* Cravens, *supra* note 160, at 255.

the practice of precedent,[168] though it might mean re-conceiving precedent a bit. Under a relatively modest re-conceptualization, the costs of applying precedent would be somewhat higher than is characteristic of the current system. Under a more fundamental re-conceptualization, the strength and role of precedent would be substantially less than is often the case under current norms. In either case, the role of precedent turns out to depend on prior conceptions of the appropriate roles of parties and courts in determining applicable law. Put simply, the third-party effects of precedent pose a jurisprudential problem for a dispute-resolution model of adjudication only on a view of precedent that itself is grounded in a law-declaration model of adjudication. A dispute-resolution approach to precedent, by contrast, simply does not present the third-party problems that might lead one to qualify a dispute-resolution model of adjudication. A full treatment of this issue is far beyond the scope of this Article – and probably beyond the scope of any article that I am likely ever to write -- so my aim here is only to sketch out some of the relevant considerations and hope that others better versed in jurisprudence can carry the water further.

It is possible to view precedents as though they are quasi-statutes. On such a model, when a court decides a case, it announces a general principle of law, which principle is then applied deductively to a range of subsequent cases that fall within its compass. The decision that announces the legal principle is taken as having settled the meaning of the relevant law (whether

[168] In previous works, I have strongly questioned the role of precedent in federal constitutional (and statutory) decision-making, suggesting that anything beyond a very weak, qualified use of precedent as a possible source of knowledge about the law is affirmatively unconstitutional. *See* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). My arguments here, however, cover contexts far beyond federal constitutional and statutory claims, and in those contexts, such as garden-variety common law decision-making, those arguments have no force or application. Indeed, in unpublished work with Steve Calabresi, I have vigorously defended a judicious use of precedent in common-law adjudication. So none of my arguments here depends on a suspicion or criticism of precedent per se, even if I am inclined to indulge such suspicions or criticisms in limited contexts.

the law is a constitutional provision, a statute, or a common law norm does not matter for this purpose). That is largely how precedents are treated in modern law. A good percentage of contemporary legal disputes focus almost entirely on the meaning of judicial decisions, on the assumption that once that meaning is established, the decision of the case will follow as a matter of course.

Such a practice makes sense on a law-declaration model of adjudication. If the purpose of courts is to announce principles of law, the clearer and more sweeping the principles, the better, all else being equal. Indeed, settling legal meaning may be, at least for some people, the ultimate normative ground for the courts' law-declaration function.[169] And to the extent that precedents serve this legislative-like function of definitively resolving future cases, the third-party effects are quite evident. The more that precedents work like statutes, the less sensible it seems to allow parties to control the issues or materials that courts decide. Legal pronouncements contained in precedents are only as good as the foundations on which they rely. It would be possible for courts to say that their precedents are only valid on the anterior legal assumptions made by the parties, but that view seriously erodes the settlement value of precedent. If parties are free to re-litigate precedents by re-litigating the legal foundations that underlie the particular legal norms at issue, precedents will have at most a weak effect on future cases. But if the courts have independently satisfied themselves that the foundations of the primary legal pronouncement are sound before issuing them, then those foundations are, in essence, part of the precedent, and the primary legal pronouncement can have broad, binding effect.

This "settlement of the law" view of precedent thus leads directly to the rule against

[169] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-76 (1997).

accepting party stipulations about the law. If those stipulations are considered binding in future cases, the parties will effectively have settled not only their own dispute but the future disputes of non-parties as well. And if they are instead considered binding only on the parties and court in a particular case but not in future cases, it must be open to future parties to re-examine those stipulated premises, in which case the precedent is of only minimal value to the legal system (though perhaps not zero value if the stipulated premises are unlikely to be challenged). Accepting party stipulations of fact does not have the same consequences, because the legal rule can have a settlement function even if it is based on false assumptions about the case in which it is announced. At a minimum, it could settle future cases in which those false factual assumptions turn out to be true. Courts may have other reasons for not accepting factual stipulations, but promoting the societal settlement function of adjudication is not among them.

This quasi-legislative view of precedent, however, is not the only way in which one might weave precedent into a legal system. Indeed, it is an impoverished way to view precedent in many respects. First, it is far from obvious that settlement of the law is an affirmative good. The American system of separation of powers and federalism rather plainly assumes, at least to some extent, that it is not, on the theory that bad settlements can often be more harmful than leaving the law unsettled.[170] Second, if settlement of the law is the goal, it is hardly obvious that giving precedential effect to judicial decisions is the right way to accomplish it, particularly in a system with a multi-layered judiciary. Third, and most pertinent here, this view of precedent undermines the most important jurisprudential feature of precedent: its role as a source of otherwise inaccessible, socially dispersed information.

To explore this informational role for precedent, which is inspired (even if not actually

[170] *See* Gary Lawson, *Interpretative Equality As a Structural Imperative (Or "Pucker Up and Settle THIS!")*, 20 CONST. COMMENTARY 379 (2003).

endorsed) by F.A. Hayek,[171] would require a separate work. For now, it will have to suffice to say that precedents can reflect contributions to legal knowledge, just as money prices can reflect contributions to economic knowledge. But just as one would never make resource-allocation decisions based on a single price without considering the larger context of prices in which it is situated, it makes little sense to draw strong conclusions about law from a single precedent without considering how that precedent fits into a larger context of other precedents and other sources of knowledge. On this model, precedent is a *process* of considering and evaluating decisions made in concrete contexts across an entire legal system, possibly over a very long period of time. The generality and authoritativeness of a precedent may not appear until a large number of cases have accumulated reflecting and applying the norm contained in the precedent. Such a view of precedent does not provide the settlement function afforded by seeing precedents as quasi-legislative enactments. But then a system of competitive prices does not provide the settlement function afforded by a monopoly. Monopolies have the non-trivial virtue of reducing price dispersion and its associated search costs. That is not a convincing argument in favor of monopolies, and the diminished settlement value of a system of informational precedent is not a convincing argument in favor of treating court decisions as generally binding declarations of law.

Within an informational system of precedent, there is nothing wrong with accepting party stipulations on both fact and law. Any decision entered in such a case will be a "precedent" only in an incremental sense and therefore "binding" (or, more precisely, relevant and persuasive) only when those stipulated foundations are not challenged or altered in subsequent cases. That is fine on a model of precedent that is looking to individual cases not to establish sweeping norms but rather to make possibly quite modest contributions to a store of legal knowledge that is

[171] *See* FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973).

expected to accumulate and grow over time.

If that model of precedent seems too thin, it would be possible to have a stronger doctrine of precedent melded to a party-oriented theory of litigation that accepts stipulations of law, but at some non-trivial cost to the legal system. One could treat prior decisions as controlling *unless* the legal conclusions of the precedent court were shaped in some important respect by party stipulations of law. If stipulations lay behind the precedent, then either the precedent must be discounted to some degree or those stipulations would need to be examined to determine if the precedent court's legal conclusions would likely have been different had the correct background law been applied. Whether one is attempting to uncover the legal foundations of precedents or attempting to formulate an appropriate discount rate for precedents that might rest on incorrect stipulations of law, the obvious effect is to increase the costs of invoking precedent. Whether those costs are worth the benefits of party control of litigation is a question that may be impossible to answer without a metric for comparing the relevant costs and benefits, which I do not have.

One should not overstate the differences between law-declaration and dispute-resolution models of litigation. A dispute-resolution model of law leaves plenty of room for law declaration by courts. Anytime that parties disagree on a legal proposition, the court will have to make a decision about that proposition, and that decision may well have system-wide effects. The question is not whether courts should abandon the enterprise of independent law-declaration; the question is whether they should do so in the limited class of cases in which parties explicitly agree on certain legal propositions essential to their cases. My limited point here is that one cannot say "no" based on the external effects of precedent without begging vital questions about the proper role of precedent in adjudication. And by the same token, one cannot say "yes"

without giving some thought to the likely implications of that answer for the role of precedent in adjudication.

c. Other Grounds

While the third-party effect of precedent seems to the be the leading reason offered for not ceding parties full control of the legal contours of their disputes, it is not the only reason conceivable or that has been advanced. Indeed, Amanda Frost has recently assembled a variety of reasons why, at least under certain circumstances, she thinks it appropriate for courts to conduct independent legal analysis in the face of party agreement. To be sure, she was not focusing specifically on situations where the parties have expressly stipulated to the law, so some of her arguments are not a perfect fit with the issues raised here. But she has done an impressive job of mustering a wide range of arguments that potentially bear on these issues, and it is worthwhile to examine them.

Professor Frost's arguments fall into four main categories, one of which can easily be expanded to encompass some other important concerns as well. In her view (and that of others), courts need to maintain control over the law applicable to their cases to preserve their power and duty to say what the law is, to keep control over their interpretative processes, to maintain their decisional independence, and to safeguard both their own judicial powers and the legislative powers of lawmaking bodies. Alone or in combination, these arguments are not decisive against a party-centered approach to adjudication and its accompanying sympathy for legal stipulations.

1. *Law Declaration*

One of the most famous lines in American law is the statement in *Marbury v. Madison* that courts have "the power and duty to say what the law is."[172] In the context of the case, the statement makes perfect sense. Congress and the President had previously determined, at least implicitly, that it was constitutional to vest the Supreme Court with original jurisdiction in mandamus cases such as William Marbury's claim for his commission.[173] The question for the Court was whether those prior determinations were conclusively binding on courts or whether the Court could make its own judgment, independently of the other national departments, on the meaning of the applicable law. *Marbury* said, quite sensibly, that federal courts are not so bound because their "judicial Power" to decide cases includes, as a necessary component, the power and duty to determine the applicable law. Accordingly, the Court was free to decide for itself whether the statute or the Constitution, assuming a conflict between the two, was the paramount governing law.

Nothing in this discussion speaks to legal stipulations when jurisdiction is not at stake. If the only parties to the case were Congress and the President, and they all agreed on relevant legal propositions, then it would raise the question whether the courts could or should interject a different view of the law. But that is not what happened in *Marbury*. Moreover, the issue addressed by the Court in *Marbury* was jurisdictional: if the Court truly had no power to hear the case, then it needed simply to establish that fact and say no more. Even if all of the parties wanted the Court to decide the case on the merits, if the Court truly believed that it had no

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[172] 5 U.S. (1 Cranch) 137, 177 (1803).

[173] In fact, it is questionable whether any such determination was made, even implicitly, as it is doubtful whether the Judiciary Act of 1789 actually purported to create such original jurisdiction in the Supreme Court. For a brief account of the scholarly debate over Chief Justice Marshall's interpretation of Section 13 of the Judiciary Act in *Marbury*, see Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENTARY 283, 286-90 (2003). I take the Court's decision at face value here.

jurisdiction, then that is the one context in which party stipulations of law should not be accepted even under a party-centered adjudicative model.

Marbury today is often taken to stand for very different claims, including at the extreme the claim that legal pronouncement by federal courts are hierarchically superior to, rather than (as *Marbury* actually decided) coordinate with, the legal views of other federal officials, state officials, or private citizens.[174] This vision of judicial supremacy has no foundation in the Constitution or the decision in *Marbury* (though some have tried, unsuccessfully in my view, to ground it in foundational principles of jurisprudence[175]). *Marbury* grounded the judicial power and obligation to state the law – a power nowhere expressly granted by the Constitution – in the more basic power to decide cases.[176]

Once one takes a sweepingly broad view of judicial power, it is not difficult to find in that "power" an active role for judges in determining law even in the face of party agreement. Professor Frost takes that leap, moving from (1) *Marbury* to (2) the claim that "[l]ocating the answer to disputed questions of law is one of the federal judiciary's essential functions"[177] to (3) the conclusion that "[w]hen the parties fail to fully and accurately describe applicable legal standards, the norm against judicial issue creation comes into conflict with the judiciary's law pronouncement power."[178] But all of this begs the question whether the federal judiciary in fact

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[174] The poster child for this position is *Cooper v. Aaron*, 358 U.S. 1 (1958), with its bald declaration that "the federal judiciary is supreme in the exposition of the law of the Constitution," *id*. at 18, and that Supreme Court decisions are therefore "the supreme law of the land." *Id*. Professor Frost appears to accept that judicial supremacist position. *See* Frost, *supra* note 109, at 472 (saying that, until they are overridden by statutes or constitutional amendments, "judicial pronouncements are the law for all the citizens to follow".

[175] *See* Alexander & Schauer, *supra* note 174.

[176] For a correct account of *Marbury*, see Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2703 (2003).

[177] Frost, *supra* note 110, at 471.

[178] *Id.* at 472.

has a "law pronouncement power," separate and apart from its case-deciding power, as an "essential function[]." It is certainly possible to hold and defend that view; I daresay it is by far the majority view among members of the American legal community. Such a view, however, requires independent support from some other argument besides itself.[179]

Professor Frost writes that "[i]f litigants could constrain courts through their own truncated or inaccurate depictions of the meaning of statutes, constitutional provisions, and the like, they could effectively wrest this task away from the courts, putting federal judges in the impoverished role of picking and choosing from among the litigants' interpretations of the law, rather than their own."[180] Take away the word "impoverished," and I would say "right on!" If one believes that litigation is about courts choosing among arguments and proofs presented by parties rather than objectively determining right answers, then that is precisely what courts should do. Professor Frost has elegantly described the (widely held) view that courts should control the law-finding process in litigation, but she has not actually argued for it in anything other than a question-begging fashion.

2. *Interpretative Method*

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[179] Professor Pushaw has argued that law declaration was an expected function of federal courts, especially in federal question, admiralty, and foreign dignitary cases. *See* Pushaw, *supra* note 73, at 476=83. But while this may establish that there should be different justiciability requirements for different classes of disputes in federal courts, it does not speak to whether courts may or should disregard party agreement on questions of law. Law declaration is absolutely a crucial aspect of the judicial function whenever the parties disagree about the applicable law. That does not make courts law declarers first and dispute resolvers second, nor does it say to prefer the first role over the second in the event of conflict. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 149 n.278.

[180] Frost, *supra* note 110, at 474 (deciding cases based on the parties' arguments and proofs "would transform the federal courts from the third branch of government responsible for declaring the meaning of law into a private arbitration service working for the parties and no one else").

One of the most important legal questions at issue in every case is how legal questions should be decided. In order to defend a proposition of law, one must have some interpretative methodology that prescribes how legal propositions are properly defended. Oftentimes, choosing the appropriate methodology is the decisive legal issue in a case. Accordingly, the power and duty to select and apply interpretative methodologies when needed for the disposition of a case is as much an implied component of the judicial power as is the power and duty to establish the law.

What if the parties stipulate to the appropriate interpretative methodology in a case? Can the parties agree, for instance, that their statutory dispute will be resolved solely on the basis of plain meaning (perhaps to avoid the mutual costs of exhaustively canvassing the legislative history, just as parties can sometimes stipulate to facts to avoid the mutual costs of determining the truth)? Would a court in such a case be bound to accept the parties' agreed-upon methodology?

On a party-centered view of adjudication, it is hard to see why not. Agreeing on legal methodology is no different in principle from agreeing on the meaning of a statute or the bindingness of a precedent. And indeed, Professor Frost's principal argument against letting parties control methodology through stipulation is the same as her argument against letting parties directly determine substantive law: it would "let litigants control an essential aspect of the judicial function."[181] Again, this argument simply begs the question. It is entirely persuasive for anyone who already believes in a law-declaration model of courts, but it provides only self-referential reasons for holding that belief in the first place.

Professor Frost does, however, add a twist that can easily be extended into a broader

[181] *Id.* at 479.

argument against party control of legal methodology. She points out that certain methodological principles are employed by courts to protect system-wide values, and specific parties may have no interest in promoting those values in any particular case. As an example, she invokes the avoidance doctrine, which counsels courts to (mis?)construe ambiguous statutes to render them, as much as possible, in accordance with rather than contrary to the Constitution.[182] In *Free Enterprise Fund*, Justice Breyer pointed out that by assuming that SEC commissioners are removable only for cause without examining the statutory basis for that claim, the Court traded what could have been a decision on statutory grounds for a decision on constitutional grounds, in apparent disregard of at least one variant of the avoidance canon.[183] Numerous other canons of construction also have substantive aims, such as preserving federalism or protecting the public fisc.[184] Litigants may have no interest in serving those values if they get in the way of a decision that both litigants want. As Professor Frost correctly points out,[185] deciding cases as the parties want them decided can often result in broader assertions of judicial power than courts would prefer to exercise if they could choose the terms of decision for themselves.

Framed in this way, the argument is an extension of the previous argument from externalities. Precedent is the most obvious third-party effect of judicial decisions, but perhaps substantive canons reflect other potential system-wide effects that are supposed to affect individual cases but which will not necessarily enter into the calculus of litigating (and stipulating) parties. And once one focuses on those effects, others can readily come to mind.

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[182] *Id*.

[183] 561 U.S. at – (Breyer, J., dissenting). Avoidance can involve construing statutes to avoid constitutional issues, and it can also involve choosing to decide statutory questions before addressing constitutional issues.

[184] For an enlightening discussion of substantive canons, and the difficulties of defending many of them, see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L.REV. 109 (2010).

[185] *See* Frost, *supra* note 110 at 481-82.

The parties will not always choose to focus on issues that are easiest for courts to decide. Stipulations, either of law or fact, can make the courts' work more difficult rather than easier if it trades agreement on relatively straightforward issues for disagreement on relatively complex ones. Because courts are publicly funded, litigants do not bear the full costs of their use of the court system, so perhaps there are institutional reasons for refusing to yield complete control over the legal process to parties.

This is, to my mind, the strongest argument against full party control of litigation through legal stipulations. Note that, unlike the argument from precedent, it is also an argument against full party control of litigation through factual stipulations, which have the same potential to increase costs to courts and to direct decisions in ways that benefit the parties but not the system as a whole. But the appropriate solution to the undoubted problem of externalities is not necessarily to take away party control, just as the appropriate solution to economic externalities is not necessarily to abolish property. Even if one thinks that the costs (however measured) of those externalities exceed the benefits (however measured) of party control of litigation, perhaps those externalities could instead be internalized. For example, if party stipulations increase rather than decrease the costs to the court system, why not simply make parties pay those costs by allowing courts to charge the parties for such stipulations? The parties can then decide whether the stipulations are worth the candle.[186] With respect to system-wide values embodied in substantive canons: under a party-centered view of litigation, the precedential effect of any decision that implicates those values is limited by the underlying agreement of the parties. Of course, in a system that treats precedents as quasi-legislative enactments, it is important to make

[186] Coming up with an appropriate fee schedule is not a simple or costless task. But figuring out under existing law whether to accept party agreement on a legal question, such as the continuing vitality of existing precedent, is no picnic either. Decisions are never costless.

sure that those precedents protect values that the parties may not care about very deeply. But any such system has already abandoned party-centrism as a guiding norm.

If the question is whether to make marginal moves towards or away from party control in a system that tries to accommodate both a dispute-resolution and a law-declaration model of courts, Professor Frost has raised critical considerations that bear on that question. But if one is looking more broadly at the two models, there is no general "argument from externalities" that counsels strongly against (or for) a focus on dispute resolution.

3. *Judicial Independence*

Professor Frost suggests that restricting courts only to those legal matters actually in dispute would undermine the independence of the judiciary.[187] This claim is hard to fathom. It is true that giving full effect to legal stipulations allows the parties to manipulate the issues decided by courts. But why is that a problem, much less a threat to judicial independence? Professor Frost suggests that it could, in some sense, conscript courts into endorsing legal and policy positions not reflective of either the actual law or the judges' own views.[188] It is difficult to see how that can be the case if the decision is based on a stipulation. Acceptance of a stipulation is acceptance of party agreement, not an endorsement of the substance of the stipulation. Of course, if one somehow equates judicial independence with the very idea of courts as law-declarers, then accepting legal stipulations plainly undermines judicial "independence" so defined. But that is an odd conception of independence.

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[187] *See* Frost, *supra* note 110, at 483.

[188] *See id*.

In the end, the argument seems to rest on a notion that judicial independence, *from all possible controlling influences*, is a good thing. That is a hard position to maintain. To be sure, judicial independence from *other governmental actors* is a good thing for a wide range of reasons, and certainly one would want judicial independence from the influence of *one party* to a dispute. But when *all of the parties* agree on the appropriate "influence," it is hard to see how that is any threat either to courts or to the legal system as a whole.

4. *Safeguarding Power*

Suppose that Congress enacts a flagrantly unconstitutional law, but all of the parties choose to accept that law as valid for purposes of their case. If courts accept the parties' stipulation of constitutionality, haven't the courts let Congress exceed its constitutional jurisdiction? Isn't that just as serious a problem as the courts exceeding their own jurisdiction?[189]

On a dispute-resolution model, no, it is not serious at all. Courts do not exist to police the actions of other governmental actors. Courts exist to decide cases. In the course of deciding cases, courts must determine the applicable law. If one of the parties – be it the government or a private citizen – thinks that a governmental act, such as a statute, bolsters its case, the party is free to raise that act as a relevant source of law. If the other party argues that the statute is in fact unconstitutional and the court agrees, the statute is given no effect in the particular adjudication. That is it. The court's decision that the statute is unconstitutional does not delete the statute from the United States Code or state statute books. The President would not commit an impeachable

[189] *See id*. at 487.

offense by attempting to enforce the "invalidated" law if the President genuinely believed that the court was clearly wrong.[190] The statute simply fails to operate if challenged in a particular case. If the statute is *not* challenged, so that all parties are willing to accept the law as valid, there is no deep jurisprudential problem with deciding the case on that assumption.

To be sure, that may mean that Congress (or the President, or a State, or a prior court) may, at least for the moment, get away with acting unconstitutionally. So what? It is not the job of courts "to check overstepping by the political branches . . . ."[191] That is the job of voters (or armed revolutionaries). The job of courts is to decide cases and, where necessary, to determine the applicable law. Where the applicable law is settled by agreement, it is not necessary to determine it.

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The dispute resolution and law declaration models of adjudication are both coherent models. Each model can spin out implications for the design of legal institutions and the appropriate rules for litigation. A reasonable person, and a reasonable judge, could choose either model with a considerable measure of intellectual integrity. The underlying choice is largely normative, which makes it time for this author, who is no philosopher, to stop talking about it.

Of course, to spin out coherent polar models of adjudication is not to say that one must

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[190] To be sure, Professor Frost is correct that "[s]cholars generally agree that the executive has to obey Supreme Court pronouncements about the meaning of the Constitution, even when the executive disagrees with the Court." *Id*. at 489. I respectfully dissent. *See* Gary Lawson, & Christopher D. Moore, *The Executive Power of Constitutional Interpretation,* 81 IOWA L. REV. 1267 (1996) (arguing that the President has no obligation to afford even modest deference to Supreme Court opinions,and that he may, and indeed must, defy even specific judgments which the President believes are clearly mistaken). For an even more extreme dissent than mine, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

[191] Frost, *supra* note 110, at 489.

necessarily choose only at the poles. The American legal system obviously pays homage at different points to both models. And there is no doubt that on a dispute resolution model courts will decide issues of law and on a law declaration model (at least one that is not a pure rulemaking system) courts will decide cases. The problem, however, is that those models point in very different directions on a wide range of issues crucial to the structure of adjudication. It matters where one puts the emphasis. One can view courts as deciding matters of law as an incident to their case-deciding function or one can view them as deciding cases as an incident to their law-declaring function. If one puts both functions on an equal footing, then there must be some means for determining when the one function or the other will serve as the foundation for a particular practice. Again, my goal here is not to tell anyone which choice to make, though I have made no secret of my preference. My goal is to identify the implications and consequences of those approaches. One of the most important consequences is the extent to which courts should consider themselves bound by legal stipulations made by parties. The majority opinion in *Free Enterprise Fund* chose to accept those stipulations, and it thereby chose to accept a role as essentially a publicly-paid arbitrator. That is a perfectly noble role to serve, to which anyone spared a duel by the existence of the court system can attest. It is no less noble even though the Court is not remotely going to accept the full range of consequences that flow from that role. But it might be nice to see some of those consequences at least acknowledged.

IV

The choice between a dispute-resolution and a law-declaration role for courts has many collateral consequences. The dispute resolution model calls for an incremental view of precedent

and a broad role for party control of both the factual and legal issues decided. The law declaration model calls for a much more definitive role for precedent and broader power for courts to control the terms of their decisions. Framed in this way, the dispute resolution model appears more (for lack of a better word) modest in its conception of the judicial role than does the law declaration model. Seen through this light, the majority opinion in *Free Enterprise Fund*, which accepted the parties' framing of the legal issues with respect both to the removability of SEC commissioners and to the viability of the Court's prior precedents on removal of federal officers, was a more (again for lack of a better word) restrained opinion than was the dissent. Similarly, the dissenting judges in the D.C. Circuit in *American Ins*. took a more (again for lack of a better word) restrained view of the judicial role than did the majority.[192] That by itself is neither good nor bad; judicial modesty and restraint are not necessarily good things, much less constitutionally appropriate things.[193] But it is (once more for lack of a better word) interesting.

It also has implications for the common practice of non-parties filing amicus briefs to raise issues not addressed by the parties.[194] In *Free Enterprise Fund*, for example, one brief filed by some legal scholars (including the present author) asked the Court to overturn *Morrison v. Olson* and hold that the President has constitutionally unlimited power to remove executive officials.[195] The same brief urged the Court to hold that members of the PCAOB were constitutional "Heads of Departments" under the Appointments Clause and therefore principal

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[192] The majority included, by the way, such conservative stalwarts as David Sentelle, Jim Buckley, and Karen Henderson.

[193] *See* Gary Lawson, *Conservative or Constitutionalist?*, 1 GEO. J.L. & PUB. POL'Y 81 (2002).

[194] For a much more detailed and thoughtful account than I provide here of this practice and its implications, see Cravens, *supra* note 160, at 274-82.

[195] *See* Brief of Law Professors, *supra* note 54.

officers who must be appointed by the President and Senate. The Court specifically declined to reconsider *Morrison*, and it did not even mention the possibility that the PCAOB might be a constitutional "Department[]" whose heads are principal officers.

On a dispute resolution model of adjudication, it is unclear how to handle such situations. At one level, it seems like the majority took the right approach. If the parties did not want those issues raised, there is no reason why the Court should raise them. But it is not obvious that all of the parties did not want those issues raised. In *Free Enterprise Fund*, the petitioners were delighted to have arguments on the table calling for the overruling of *Morrison* and for holding the PCAOB to be a constitutional "Department[]" – even though the latter argument actually contradicted a position in the petitioners' principal brief. That will often be the case – parties will sometimes deliberately choose not to advance issues only because they know that amici will do the work for them. In that respect, amicus briefs can be essentially end runs around length limits on briefs imposed by courts. So understood, they pose a problem of judicial management but no problem of jurisprudence. If, however, there is good reason to think that all of the parties want certain issues raised by amici to be off the table, a party-centered view of litigation would counsel strongly against giving any credence to amicus briefs that go beyond the limits set by the parties. On a law-declaration model, amicus briefs should always be welcome, subject only to administrative control by the courts to avoid getting swamped by an avalanche of briefs.

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The Court in *Free Enterprise Fund* let the parties stipulate the law. Good for them. Other courts should take note.